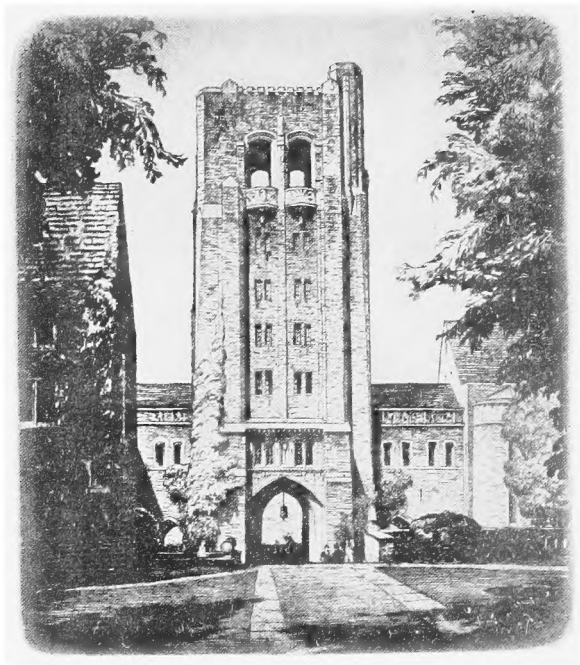


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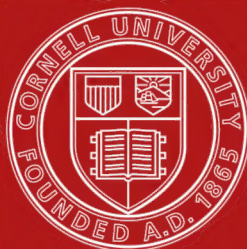
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BRIEFS
ON THE
LAW OF INSURANCE

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TABLE OF CONTENTS

VOLUME 7

[The references in the right-hand column are to the black letter paging in the text.]

XVI. ESTOPPEL AND WAIVER AS TO MATTERS AVOIDING OR FORFEIT- ING THE CONTRACT.	Page
1. Application of doctrines of estoppel and waiver to insurance contracts	2459
2. Powers of officers and agents in general.	2475
3. Powers of agents and officers as limited by the policy or ap- plication	2497
4. What constitutes knowledge or notice as essential to estoppel or waiver.	2516
5. Estoppel by fraud, mistake, or negligence of agent.	2555
6. Form, requisites, and construction of waiver in general.	2595
7. Estoppel and waiver by issuance and delivery of policy and acts prior thereto.	2619
8. Estoppel and waiver by acts and conduct subsequent to de- livery	2658
9. Estoppel and waiver by acceptance and retention of premi- ums or assessments in general.	2683
10. Estoppel and waiver as to nonpayment of premiums and as- sessments	2699
11. Estoppel and waiver by requiring proofs, participating in adjustment and payment of loss.	2738
12. Effect of provisions declaring policy incontestable or nonfor- feitable	2755
13. Estoppel and waiver in guaranty and indemnity insurance. .	2764
14. Pleading and practice with reference to estoppel and waiver	2768
XVII. CANCELLATION, SURRENDER, AND RESCISSION OF CONTRACT.	
1. Cancellation by insurer—Insurance of property.	2789
2. Cancellation and rescission of contract of property insurance by the insured or by mutual consent.	2815
3. Cancellation and rescission of life and accident policies and actions therefor.	2830
4. Surrender of life or accident policy by the insured under the terms of the contract.	2863
XVIII. RISK AND CAUSE OF LOSS—MARINE INSURANCE.	
1. Place and cause of loss in general.	2877
2. Excepted risks and proximate cause of loss.	2896
XIX. EXTENT OF LOSS AND LIABILITY OF INSURER—MARINE INSUR- ANCE.	
1. Extent of loss in general.	2920
2. Constructive total loss and right to abandon therefor.	2928
3. Abandonment and effect thereof.	2950
4. Limitation of liability by memorandum clause and exception of particular average.	2968
5. Amount of liability and determination thereof.	2982
XX. RISK AND CAUSE OF LOSS—FIRE AND CASUALTY INSURANCE.	
1. Place and cause of loss and excepted risks.	3006
2. Pleading and practice in relation to risk and cause of loss. .	3035

XXI.	EXTENT OF LOSS AND LIABILITY OF INSURER—FIRE AND CAS- UALTY INSURANCE..	Page
1.	Extent of loss.....	3046
2.	Limitation of liability by charter or by policy.....	3053
3.	Extent of liability in general.....	3061
4.	Value of property or interest.....	3078
5.	Effect of other insurance and apportionment of loss.....	3098
6.	Pleading and practice with reference to extent of liability in general.....	3117
XXII.	RISK AND CAUSE OF LOSS—LIFE AND ACCIDENT INSURANCE.	
1.	Cause of death and excepted risks in life insurance.....	3129
2.	Cause of death or injury in accident insurance.....	3156
3.	Excepted risks in accident insurance.....	3175
4.	Suicide as an excepted risk in life and accident insurance...	3224
XXIII.	EXTENT OF LOSS AND LIABILITY OF INSURER—LIFE AND ACCI- DENT INSURANCE.	
1.	Extent of liability in life insurance.....	3270
2.	Extent of liability in accident and health insurance.....	3287
XXIV.	CAUSE OF LOSS AND EXTENT OF LIABILITY—GUARANTY AND INDEMNITY INSURANCE.	
1.	Risk and cause of loss.....	3313
2.	Extent of liability.....	3330
XXV.	NOTICE AND PROOFS OF LOSS.	
1.	Necessity of notice and proof of loss.....	3347
2.	Time and manner of service of notice and proofs of loss..	3356
3.	Persons by whom and to whom notice may be given and proofs furnished.....	3372
4.	Form and sufficiency of notice and proofs of loss.....	3380
5.	Pleading and practice relating to necessity and sufficiency of notice and proofs of loss.....	3402
6.	Fraud and false swearing in proofs of loss.....	3412
7.	Effect of proofs of loss.....	3433
8.	Necessity and sufficiency of notice and proofs of death or in- jury	3440
9.	Time within which notice and proofs of death or injury must be furnished.....	3456
10.	Effect of notice and proofs of death or injury.....	3466
11.	Waiver of notice and proof of loss, death, or injury—Gen- eral rules.....	3477
12.	Powers of officers and agents to waive notice and proofs of loss, death, or injury.....	3486
13.	Acts and conduct constituting waiver and estoppel as to no- tice and proofs—In general.....	3510
14.	Waiver of notice and proofs of loss, death, or injury by de- nial of liability.....	3531
15.	Waiver of defects in notice or proofs by failure to object..	3544
16.	Questions of practice relating to waiver of notice and proofs of loss, death, or injury.....	3556
17.	Notice and proofs of marine losses.....	3563
18.	Notice and proofs of loss in guaranty and indemnity insur- ance	3570
XXVI.	ADJUSTMENT OF LOSS.	
1.	Adjustment in general.....	3584
2.	Necessity of arbitration or appraisal.....	3595
3.	Validity and effect of arbitration.....	3629
4.	Waiver of arbitration or appraisal.....	3658
5.	Arbitration in life and accident insurance and submission to tribunals of fraternal orders.....	3675

XXVII.	RIGHT TO PROCEEDS.	Page
1.	Persons entitled to proceeds—Insurance of property.....	3689
2.	Right to proceeds in life and accident insurance.....	3720
3.	Rights of creditors and assignees.....	3787
4.	Actions to determine rights.....	3812
XXVIII.	PAYMENT, DISCHARGE, AND SUBROGATION.	
1.	Insurer's right to repair or rebuild.....	3823
2.	Payment and discharge—Insurance other than life.....	3836
3.	Payment and discharge of life and accident policies.....	3863
4.	Penalties for refusal of, or delay in making, payment—Attorney's fees.....	3884
5.	Subrogation	3893
XXIX.	REINSURANCE.	
1.	Special matters relating to reinsurance contracts.....	3932
XXX.	SPECIAL MATTERS RELATING TO THE REMEDY.	
1.	Jurisdiction and venue.....	3944
2.	Limitation of actions.....	3954
3.	Process	4000

TABLE OF CASES CITED

(Page 1703)

INDEX

(Page 1865)

SUPPLEMENT
TO
BRIEFS ON THE LAW OF
INSURANCE
VOLUME 7

7 SUPP.B.B.INS.

(905)*

XVI. ESTOPPEL AND WAIVER AS TO MATTERS AVOIDING OR FORFEITING THE CONTRACT

1. APPLICATION OF DOCTRINES OF ESTOPPEL AND WAIVER TO INSURANCE CONTRACTS

2459-2462. (a) In general

2460 (a). A waiver of the right to enforce a forfeiture may be express, or may be implied from conduct of the insurer.

Majestic Life Assur. Co. v. Tuttle, 58 Ind. App. 98, 107 N. E. 22; *Appel v. People's Surety Co. of New York*, 148 App. Div. 70, 132 N. Y. Supp. 200; *State Life Ins. Co. v. Murray*, 159 Fed. 408, 86 C. C. A. 344, affirming (C. C.) 151 Fed. 539. The doctrine of waiver and estoppel as a defense by insured to alleged breaches by him of the insurance contract obtains in the courts of South Carolina. *Plunkett v. Piedmont Mut. Ins. Co.*, 61 S. E. 893, 80 S. C. 407.

There is a difference between a "waiver" and an "estoppel." A "waiver" is the intentional relinquishment of a known right (*Lee v. Casualty Co. of America*, 96 Atl. 952, 90 Conn. 202). A waiver of a breach of a condition in an insurance policy does not require the company to do anything to the disadvantage of the insured (*Cox v. American Ins. Co.*, 184 Ill. App. 419). In the case of a waiver too, the question does not depend on anything the insured does or on whether he was misled; a waiver not being necessarily based on a new agreement or estoppel (*Equitable Life Assur. Society of United States v. Ellis*, 105 Tex. 526, 147 S. W. 1152, affirming [Tex. Civ. App.] 137 S. W. 184). To constitute a waiver of forfeiture of a policy, it must appear that the company expressed an intention to relinquish the defense, or that its transactions after knowledge recognized the validity of the policy (*Seaback v. Metropolitan Life Ins. Co.*, 113 N. E. 862, 274 Ill. 516, affirming judgment *Sulski v. Same*, 196 Ill. App. 76). Whether a waiver of forfeiture of a certificate of insurance will be found in any particular case depends not so much on the intention of the insurer against whom it is asserted, as on the effect which its conduct or course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake (*Trotter v. Grand Lodge of Iowa Legion of Honor*, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A. [N. S.] 569, 11 Ann. Cas. 533). Where insurer has notice of forfeiture before loss, silence will fur-

nish basis of waiver, but, when notice is not obtained until after loss, some affirmative act is necessary to furnish basis for claim of waiver (*Southern States Fire Ins. Co. of Birmingham v. Kronenberg* [Ala.] 74 South. 63).

The doctrine of implied waiver is only another name for the doctrine of estoppel, and must rest on misleading conduct.

German American Ins. Co. v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; *Beggs v. Supreme Council Catholic Knights and Ladies of America*, 146 Ill. App. 168; *Gardner v. Inter-Ocean Life & Casualty Co.*, 93 Kan. 810, 145 Pac. 844; *Appel v. People's Surety Co. of New York*, 132 N. Y. Supp. 200, 148 App. Div. 70.

Thus in *Humes Const. Co. v. Philadelphia Casualty Co.*, 32 R. I. 246, 79 Atl. 1, Ann. Cas. 1912D, 906, it was said that where the plaintiff, in an action on an employer's liability policy, alleged that defendant "waived" the right of objection that a claim was not covered by the policy, this did not restrict it to a recovery in accordance with the doctrine of waiver, if the facts showed an estoppel; the terms "waiver" and "estoppel" being sometimes loosely used interchangeably, especially with reference to situations arising under insurance policies.

2462 (a). The doctrine and rules as to waiver and estoppel apply to mutual insurance companies (*Plunkett v. Piedmont Mut. Ins. Co.*, 80 S. C. 407, 61 S. E. 893); and they are also applicable to mutual benefit associations.

Trotter v. Grand Lodge of Iowa Legion of Honor, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533; *Johnson v. Modern Brotherhood of America*, 114 Minn. 411, 131 N. W. 471; *Edmonds v. Modern Woodmen of America*, 102 S. W. 601, 125 Mo. App. 214; *Zahm v. Royal Fraternal Union of St. Louis*, 154 Mo. App. 70, 133 S. W. 374.

2462-2467. (b) What conditions may be waived

2462 (b). The insurer may waive conditions inserted in the policy for its benefit, or forfeitures resulting from violations of such conditions.

Washburn v. Union Cent. Life Ins. Co., 38 South. 1011, 143 Ala. 485; *J. Frank & Co. v. New Amsterdam Casualty Co. (Cal.)* 165 Pac. 927; *Cox v. American Ins. Co.*, 184 Ill. App. 419; *Graham v. Security Mut. Life Ins. Co.*, 62 Atl. 681, 72 N. J. Law, 298.

2463 (b). Since fraud in procuring the contract only renders it voidable, the insurer may waive the fraud and treat the contract as valid.

Indiana Nat. Life Ins. Co. v. McGinnis (Ind. App.) 99 N. E. 751, judgment reversed 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192;

Id. (Ind. App.) 99 N. E. 756, judgment reversed 180 Ind. 701, 101 N. E. 295. But see *American Cent. Ins. Co. v. Antram*, 38 South. 626, 86 Miss. 224, holding that in case of fraud the contract is non-existent, and that consequently there can be no waiver.

Though the contract provides that it shall be void in case the applicant misrepresents a fact material to the risk, or in case of misrepresentations in the application which are made warranties, it is nevertheless voidable only at the election of the insurer, the insurer being entitled to waive or take advantage of the breach at its election (*American Cent. Life Ins. Co. v. Rosenstein*, 46 Ind. App. 537, 92 N. E. 380, affirming judgment 88 N. E. 97, on rehearing).

An insurance company cannot, however, be held liable on a policy on the theory of waiver, if insured had no insurable interest.

Wisecup v. American Ins. Co. of Newark, N. J., 186 Mo. App. 310, 172 S. W. 73; *Bush v. Hartford Fire Ins. Co.*, 71 Atl. 916, 222 Pa. 419.

2464 (b). The general rule that conditions inserted for the benefit of the insurer may be waived has been applied in numerous instances.

Reference may be made to the following cases:

- (1) Other insurance: *Eagle Fire Co. v. Lewallen*, 47 South. 947, 56 Fla. 246; *Southern States Fire Ins. Co. v. Vann*, 69 Fla. 549, 68 South. 647, L. R. A. 1916B, 1189; *Henderson v. Standard Fire Ins. Co.*, 143 Iowa, 572, 121 N. W. 714; *Rogers v. Home Ins. Co. of New York*, 155 Mo. App. 276, 136 S. W. 743; *Workman v. Royal Exchange Assurance*, 96 Wash. 559, 165 Pac. 488.
- (2) Title or ownership: *Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman*, 73 N. E. 730, 35 Ind. App. 1; *Westchester Fire Ins. Co. v. Smith*, 128 Ark. 92, 193 S. W. 275.
- (3) Increase of risk: *Progress Spinning & Knitting Mills Co. v. Southern Nat. Ins. Co.*, 42 Utah, 263, 130 Pac. 63, 45 L. R. A. (N. S.) 122.
- (4) Vacancy clause: *Dolliver v. Granite State Fire Ins. Co.*, 89 Atl. 8, 111 Me. 275, 50 L. R. A. (N. S.) 1106, Ann. Cas. 1916C, 765; *Patterson v. American Ins. Co. of Newark*, N. J., 174 Mo. App. 37, 160 S. W. 59.
- (5) Iron-safe clause: *Queen of Arkansas Ins. Co. v. Forlines*, 94 Ark. 227, 126 S. W. 719; *Pace v. American Cent. Ins. Co.*, 158 S. W. 892, 173 Mo. App. 485.
- (6) Keeping prohibited articles: *German-American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77.
- (7) Removal clause: *Delaware Ins. Co. v. Wallace* (Tex. Civ. App.) 160 S. W. 1130; *Kesler v. Farmers' Mut. Fire & Lightning Ins. Ass'n*, 160 Iowa, 374, 141 N. W. 954; *E. C. Winson & Son v. Mutual Fire & Tornado Ass'n*, 170 Iowa, 521, 153 N. W. 97.
- (8) Payment of premiums or premium notes: *Grigsby v. Russell*, 32

- Sup. Ct. 58, 222 U. S. 149, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863, reversing decree *Russell v. Grigsby*, 168 Fed. 577, 94 C. C. A. 61; *Occidental Life Ins. Co. v. Jacobson*, 15 Ariz. 242, 137 Pac. 869; *Williams v. Empire Mut. Annuity & Life Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082; *Monahan v. Fidelity Mut. Life Ins. Co.*, 148 Ill. App. 171, judgment affirmed 242 Ill. 488, 90 N. E. 213, 134 Am. St. Rep. 337; *Majestic Life Assur. Co. v. Tuttle*, 58 Ind. App. 98, 107 N. E. 22; *New York Life Ins. Co. v. Evans*, 136 Ky. 391, 124 S. W. 376; *Johnson v. Retail Merchants' Mut. Fire Ins. Co.*, 112 Minn. 418, 128 N. W. 462; *Shawnee Mut. Fire Ins. Co. v. Cannedy*, 36 Okl. 733, 129 Pac. 865, 44 L. R. A. (N. S.) 376; *Equitable Life Assur. Society of United States v. Ellis*, 105 Tex. 526, 147 S. W. 1152, affirming judgment (Tex. Civ. App.) 137 S. W. 184; *Security Life & Annuity Co. of America v. Underwood* (Tex. Civ. App.) 150 S. W. 293; *Underwood v. Security Life & Annuity Co. of America* (Tex.) 194 S. W. 585; *Loftis v. Pacific Mut. Life Ins. Co. of California*, 38 Utah, 532, 114 Pac. 134; *Ramsey v. Travelers' Protective Ass'n of America*, 133 N. W. 634, 147 Wis. 405.
- (9) Payment of benefit assessments and dues: *Griffith v. Supreme Council of Royal Arcanum*, 182 Mo. App. 644, 166 S. W. 324; *Jones v. Supreme Lodge Knights of Honor*, 140 Ill. App. 227; *La Branche v. St. Jean Baptiste Society*, 76 N. H. 237, 81 Atl. 698.

2465 (b). The conditions enumerated are not the only ones that may be waived. Thus the insurer may waive a condition that all payments must be made to the company, and not to its local agents (*Courtney v. Fidelity Mut. Aid Ass'n*, 94 S. W. 768, 101 S. W. 1098, 120 Mo. App. 110). So, too, a mutual benefit society is estopped to deny the validity of an extension of the time of payment of a premium upon the ground that such extension was in violation of the original contract of insurance (*Farmers' & Mechanics' Life Ass'n v. Caine*, 123 Ill. App. 419, judgment affirmed 79 N. E. 956, 224 Ill. 599). Stipulations in a fire policy as to the conditions on which it shall have its inception and become operative as a contract may be waived (*Gazzam v. German Union Fire Ins. Co.*, 71 S. E. 434, 155 N. C. 330, Ann. Cas. 1912C, 362). And the insurer of a vessel may waive a condition restricting navigation for its benefit (*Norris v. China Traders' Ins. Co.*, 100 P. 1025, 52 Wash. 554). On the other hand, a condition providing that insurer should not be liable for any loss resulting from fire built within 50 feet of insured building was not subject to waiver after the destruction of the building by fire built within the prohibited distance, since the loss of the insured building resulting from such fire ended ipso facto the liability on the policy (*Draper v. Oswego County Fire Relief Ass'n*, 101 N. Y. Supp. 168, 115 App. Div. 807).

The parties cannot as a rule waive provisions of the statute (*Moore v. Prudential Casualty Co.*, 156 N. Y. Supp. 892, 170 App. Div. 849), or of the charter and by-laws of a mutual insurance company (*Leonard v. Farmers' Mut. Fire Ins. Co. of Monroe & Wayne Counties*, 192 Mich. 230, 158 N. W. 1041).

Gen. St. Conn. 1902, § 3497, does not prohibit Connecticut insurance company, which contracted to insure many motor cars from providing for a waiver of cancellation clauses. *Automobile Ins. Co. of Hartford, Conn., v. Guaranty Securities Corp.* [D. C.] 240 Fed. 222.

In some cases the question has been raised whether the conditions of the standard policy, being prescribed by law, can be waived. The better opinion seems to be that the usual rules as to waiver and estoppel apply to the conditions of the standard policy, in the same manner and with the same force and effect as to other forms of policy.

Farley v. Spring Garden Ins. Co., 134 N. W. 1054, 148 Wis. 622; *Leisen v. St. Paul Fire & Marine Ins. Co.*, 20 N. D. 316, 127 N. W. 837, 30 L. R. A. (N. S.) 539. See, also, *Queen Ins. Co. v. Hartwell Ice & Laundry Co.*, 7 Ga. App. 787, 68 S. E. 310. But see *Oatman v. Bankers' Fire Relief Ass'n*, 66 Or. 388, 134 Pac. 1033, denying rehearing of 66 Or. 388, 133 Pac. 1183, where the court seems to hold that the rules relevant to questions of waiver prior to the enactment of the standard policy law do not apply to policies written in conformity with that law.

In *Queen Ins. Co. of America v. Hartwell Ice & Laundry Co.*, 7 Ga. App. 787, 68 S. E. 310, it appeared that the agent of a fire insurance company, not knowing the rate upon property sought to be insured, executed a temporary contract of insurance or binder to be effective until the regular standard policy should be issued by the company, the insured to pay the premium upon receipt of such regular policy. It was held that the property was insured during the term specified in the temporary contract upon the terms and conditions of the regular standard policy, so that a breach of any of such terms that would render void the regular policy would also invalidate the temporary contract, and any waiver of such breaches would apply to the temporary contract.

2467-2470. (c) Estoppel and waiver as dependent on knowledge or notice of facts

2467 (c). In order to show a waiver or an estoppel, it must appear that the insurer had knowledge or notice of the facts avoiding or forfeiting the insurance.

Traders' Ins. Co. v. Letcher, 39 South. 271, 143 Ala. 400; Security Ins. Co. v. Laird, 182 Ala. 121, 62 South. 182; Southern States Fire Ins. Co. of Birmingham v. Kronenberg (Ala.) 74 South. 63; Wiley v. Rome Ins. Co., 12 Ga. App. 186, 76 S. E. 1067; Harvick v. Modern Woodmen of America, 158 Ill. App. 570; Hermann v. Court of Honor, 193 Ill. App. 366; Hexom v. Knights of Maccabees of the World, 140 Iowa, 41, 117 N. W. 19; Germania Life Ins. Co. v. Lauer, 123 Ky. 727, 97 S. W. 363, 30 Ky. Law Rep. 3; Swaine v. Teutonia Fire Ins. Co., 109 N. E. 825, 222 Mass. 108; Murphy v. Metropolitan Life Ins. Co., 118 N. W. 355, 106 Minn. 112; Rudd v. American Guarantee Fund Mut. Fire Ins. Co., 120 Mo. App. 1, 96 S. W. 237; Brittenham v. Sovereign Camp Woodmen of the World, 180 Mo. App. 523, 167 S. W. 587; Frick v. Millers' Nat. Ins. Co. (Mo.) 184 S. W. 1161; Kennedy v. The Grand Fraternity, 36 Mont. 325, 92 Pac. 971, 25 L. R. A. (N. S.) 78; Platauer v. American Bonding Co. of Baltimore (Sup.) 92 N. Y. Supp. 238; Schoeller v. Grand Lodge, A. O. U. W. of State of New York, 110 App. Div. 456, 96 N. Y. Supp. 1088; Gienty v. Knights of Columbus, 126 App. Div. 934, 110 N. Y. Supp. 1129, affirming 55 Misc. Rep. 98, 105 N. Y. Supp. 244; Klein v. Supreme Council of Loyal Ass'n, 155 N. Y. Supp. 580, 92 Misc. Rep. 216; Gardner v. North State Mut. Life Ins. Co., 79 S. E. 806, 163 N. C. 367, 48 L. R. A. (N. S.) 714, Ann. Cas. 1915B, 652; Van Woert v. Modern Woodmen of America, 29 N. D. 441, 151 N. W. 224; American Steam Laundry Co. v. Hamburg Bremen Fire Ins. Co., 121 Tenn. 13, 113 S. W. 394, 21 L. R. A. (N. S.) 442. A ground of forfeiture of a fire policy which has not yet occurred cannot be waived. Patterson v. American Ins. Co. of Newark, 148 S. W. 448, 164 Mo. App. 157.

Thus, where it was claimed that an agent had adjusted the loss and agreed to pay it, and the agent testified that at the time he agreed on a settlement he did not know that the iron-safe clause of the policy had not been complied with, and that the books of insured had been lost, it was held to be error to instruct that the agent's agreement to settle estopped the company from asserting a forfeiture for noncompliance with the iron-safe clause, without requiring a finding that at the time the agreement was made the adjuster had knowledge of the destruction of the books (Rudd v. American Guarantee Fund Mut. Fire Ins. Co., 96 S. W. 237, 120 Mo. App. 1).

2469 (c): The rule stated that knowledge of the cause of forfeiture must be shown in order to predicate waiver or estoppel is, however, complied with if it appears that the insurer should have known the facts, if it had given proper attention to its business (*Keys v. National Council, Knights and Ladies of Security*, 174 Mo. App. 671, 161 S. W. 345). Hence it is not essential that insurer should have full knowledge of the conditions creating a forfeiture if he has such knowledge as puts him on inquiry (*Eagleton v. Prudential Ins. Co. of America*, 193 Ill. App. 306).

But since an estoppel cannot be predicated on an innocent mistake as to legal rights, the erroneous opinion of an attorney, regarded as an agent for the collection of a premium note, that a stay of judgment thereon was as good as a payment, would not estop the insurer from asserting a suspension of the policy by reason of non-payment of premiums (*Davis v. Home Ins. Co.*, 127 Tenn. 330, 155 S. W. 131, 44 L. R. A. [N. S.] 626). In spite of knowledge of the insurer of defect in property insured, no estoppel can arise against him to plead the defect when the insured in the contract of insurance agrees to repair the defect (*Mendenhall v. Farmers' Ins. Co. of Kokomo*, 110 N. E. 60, 183 Ind. 694).

2470-2472. (d) Consideration

2470 (d). No new consideration is necessary to support a waiver of a forfeiture.

Washburn v. Union Cent. Life Ins. Co., 38 South. 1011, 143 Ala. 485;
Majestic Life Assur. Co. v. Tuttle, 58 Ind. App. 98, 107 N. E. 22;
Mettner v. Northwestern Nat. Life Ins. Co., 103 N. W. 112, 127 Iowa, 205; *Draper v. Oswego County Fire Relief Ass'n*, 82 N. E. 755, 190 N. Y. 12, affirming 115 App. Div. 807, 101 N. Y. Supp. 168.

A waiver is merely a continuance of the old contract, and not the making of a new one (*O'Connor v. Knights & Ladies of Security [Iowa]* 158 N. W. 761, L. R. A. 1917B, 897).

2472. (e) Revival of conditions after waiver

2472 (e). When an insurer has once expressly or impliedly waived a condition in a policy, or a forfeiture, such waiver cannot be revoked without the consent of the insured.

Union Cent. Life Ins. Co. v. Washburn, 158 Ala. 169, 48 South. 475;
Queen of Arkansas Ins. Co. v. Forlines, 94 Ark. 227, 126 S. W. 719;
Keys v. National Council, Knights & Ladies of Security, 174 Mo. App. 671, 161 S. W. 345; *Thompson v. Modern Brotherhood of America*, 189 Mo. App. 15, 176 S. W. 506; *Mutual Life Ins. Co. of New York v. Davis* (Tex. Civ. App.) 154 S. W. 1184.

2472-2473. (f) Who may take advantage of waiver

2473 (f). The insured may be estopped to set up a waiver. Thus in *Security Ins. Co. v. Laird*, 182 Ala. 121, 62 South. 182, it was held that where the insurer denied liability on a policy for breach of a condition against incumbrance, and the insured denied having made the mortgage, he was estopped to claim that even if it had been made the forfeiture was waived.

2. POWERS OF OFFICERS AND AGENTS IN GENERAL**2475-2477. (b) Powers of officers and agents in general**

2476 (b). An agent who is intrusted with the business of the company for his locality has power, in the absence of provisions to the contrary, to modify or waive a condition in a policy issued through his agency.

Home Ins. Co. of New York v. Ballew, 96 S. W. 878, 29 Ky. Law Rep. 1059; *Caledonian Fire Ins. Co. v. Shepherd*, 111 Miss. 175, 71 South. 314; *Gorton v. Milwaukee Mechanics' Ins. Co.*, 115 Mo. App. 69, 90 S. W. 747; *Shook v. Retail Hardware Mut. Fire Ins. Co.*, 154 Mo. App. 394, 134 S. W. 589; *Schultz v. Des Moines Mut. Hail & Cyclone Ins. Ass'n*, 153 N. W. 884, 35 S. D. 627, Ann. Cas. 1917D, 78; *North American Acc. Ins. Co. v. Bowen* (Tex. Civ. App.) 102 S. W. 163. And see *Loftis v. Pacific Mut. Life Ins. Co. of California*, 38 Utah, 532, 114 Pac. 134.

In *Finleyson v. Liverpool & London & Globe Ins. Co.*, 16 Ga. App. 51, 84 S. E. 311, it was held that a forfeiture cannot be waived by an agent without express authority from the governing officials of the insurance company. While this seems to be in accord with the trend of judicial opinion in Georgia, it is doubtful if it was necessary to the decision of the case.

But where the authority of an agent does not extend to making a new contract of insurance, he cannot waive a forfeiture; and the act of such agent is not binding on insurer unless it knew, or could have known, what was done, and adopted or ratified the act, or by its act or conduct estopped itself to insist on the forfeiture (*Crook v. New York Life Ins. Co.*, 75 Atl. 388, 112 Md. 268).

The power of the agent to bind the company will of course be affected if there is a conflict of interest. Thus, an agent who issued a policy on a stock of goods and afterward took a chattel mortgage on the stock in favor of a bank of which he was cashier and part owner, could not as such agent consent to such mortgage on behalf of the company (*Mulrooney v. Royal Ins. Co. of Liverpool, England*, 163 Fed. 833, 90 C. C. A. 317). So, too, in order to constitute

a waiver binding on the insurer, the acts must be done or the statements made by the agent in the course of his employment as an agent (*Johnson v. Continental Ins. Co. of New York*, 119 Tenn. 598, 107 S. W. 688). But where the insurance company's agent promised to indorse a policy to prevent forfeiture on account of a chattel mortgage, the fact that he was the cashier of the bank executing the mortgage did not prevent his waiver from binding the insurance company (*Royal Ins. Co. of Liverpool v. Morgan*, 122 Ark. 243, 183 S. W. 198).

The rule that waiver by an agent binds the insurer applies to mutual companies existing under Ky. St. § 702 et seq. (*Kentucky Growers' Ins. Co. v. Logan*, 149 S. W. 922, 149 Ky. 453).

2478-2479. (d) Powers of general agents

2478 (d). The power of a general agent to waive conditions and forfeitures is, according to the weight of authority, coextensive with that of the insurance company.

Security Mut. Life Ins. Co. v. Riley, 157 Ala. 553, 47 South. 735; *Pacific Mut. Life Ins. Co. v. Carter*, 123 S. W. 384, 92 Ark. 378, Id., 92 Ark. 378, 124 S. W. 764; *Germania Life Ins. Co. of New York v. Lauer*, 123 Ky. 727, 97 S. W. 363, 30 Ky. Law Rep. 3, 7 L. R. A. (N. S.) 1053; *Pelican Assur. Co. of New York v. Schildknecht*, 128 Ky. 351, 108 S. W. 312, 32 Ky. Law Rep. 1257; *Richard v. Springfield Fire & Marine Ins. Co.*, 38 South. 563, 114 La. 794, 69 L. R. A. 278, 108 Am. St. Rep. 359; *Peck v. Washington Life Ins. Co.*, 74 N. E. 1122, 181 N. Y. 585, affirming 91 App. Div. 597, 87 N. Y. Supp. 210; *Godfrey v. Atlantic Horse Ins. Co.*, 169 N. C. 238, 84 S. E. 339; *Talbott v. Metropolitan Life Ins. Co.*, 142 Fed. 694, 74 C. C. A. 26. But see *Weston v. State Mut. Life Assur. Soc.*, 84 N. E. 1073, 234 Ill. 492, affirming judgment 137 Ill. App. 319.

2479 (d). So it has been held that an agent of an insurance company in charge of its loan and extension department at its headquarters in New York has general authority to waive a forfeiture for nonpayment of premiums (*Equitable Life Assur. Society of United States v. Ellis*, 105 Tex. 526, 152 S. W. 625, overruling motion for rehearing 105 Tex. 526, 147 S. W. 1152).

2479-2481. (e) Powers of agents authorized to countersign and issue policies, receive premiums, and consent to changes

2479 (e). The power to waive conditions and forfeitures is also conceded to agents authorized to issue and deliver policies.

Ætna Fire Ins. Co. v. Kennedy, 161 Ala. 600, 50 South. 73, 135 Am. St. Rep. 160; *Cohen v. Home Ins. Co.* (Del. Super.) 97 Atl. 1014; *Price*

v. North American Accident Ins. Co., 152 Pac. 805, 28 Idaho, 136; Continental Ins. Co. v. Bair (Ind. App.) 114 N. E. 763; West v. National Casualty Co., 61 Ind. App. 479, 112 N. E. 115; Despain v. Pacific Mut. Life Ins. Co. of California, 106 Pac. 1027, 81 Kan. 722; Northwestern Nat. Ins. Co. of Milwaukee v. Avant, 132 Ky. 106, 116 S. W. 274; Kentucky Growers' Ins. Co. v. Logan, 149 S. W. 922, 149 Ky. 453; Richard v. Springfield Fire & Marine Ins. Co., 38 South. 563, 114 La. 794, 69 L. R. A. 278, 108 Am. St. Rep. 359; Crowder v. Continental Casualty Co., 91 S. W. 1016, 115 Mo. App. 535; Riley v. American Cent. Ins. Co., 92 S. W. 1147, 117 Mo. App. 229; United Zinc Cos. v. General Accident Assur. Corp., 144 Mo. App. 380, 128 S. W. 836; Manning v. Connecticut Fire Ins. Co., 176 Mo. App. 678, 159 S. W. 750; Madsen v. Prudential Ins. Co. of America (Mo. App.) 185 S. W. 1168. But see Harris v. North American Ins. Co., 77 N. E. 493, 190 Mass. 361, 4 L. R. A. (N. S.) 1137.

But it has been held in Kansas that forfeiture for nonpayment of premium could not be waived by statement to the insured or beneficiary concerning the insurer's obligations or insured's rights made by an agent having nothing to do with issuing the policy or receiving premiums (*Lightner v. Prudential Ins. Co. of America*, 154 Pac. 227, 97 Kan. 97).

2480 (e). An agent having power to issue policies may also construe provisions of the policy. Thus where insurer's agent, knowing that insured already had \$4,000 other insurance, told insured that a rider on the policy permitting \$2,000 other concurrent insurance meant \$2,000 in addition to what insured already had, such interpretation bound insurer (*Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185).

The rule that agents having power to issue policies may by a waiver bind the insurer is broad in its application, and embraces practically all persons empowered to conclude insurance contracts without first referring the negotiations to their principals.

Bank of Anderson v. Home Ins. Co. of New York, 14 Cal. App. 208, 111 Pac. 507; *Powell v. Continental Ins. Co.*, 81 S. E. 654, 97 S. C. 375.

2481 (e). So, where an agent of a fire insurance company had authority to issue regular and builder's risk policies, and issued a regular policy on a building nearly completed, he thereby waived the incompleteness of the building, and bound the company by the policy (*New Hampshire Fire Ins. Co. v. Blakely*, 97 Ark. 564, 134 S. W. 926). And an agent authorized to issue policies may change the conditions of the policy after its execution (*Shook v. Retail Hardware Mut. Fire Ins. Co.*, 154 Mo. App. 394, 134 S. W. 589).

2481-2484. (f) Powers of local agents

2481 (f). The local agent of an insurance company, who is the sole representative of the company and intrusted with its business in his locality, has power to waive conditions and forfeitures, unless his authority is specifically limited to the knowledge of the insured.

National Mut. Fire Ins. Co. v. Sprague, 92 Pac. 227, 40 Colo. 344; Eagle Fire Co. v. Lewallen, 56 Fla. 246, 47 South. 947; Continental Ins. Co. v. Bair (Ind. App.) 116 N. E. 752; Continental Ins. Co. v. Thomson, 84 S. W. 546, 27 Ky. Law Rep. 158; Kentucky Live Stock Ins. Co. v. Stout, 175 Ky. 343, 194 S. W. 318; Western Nat. Ins. Co. v. Marsh, 34 Okl. 414, 125 Pac. 1094, 42 L. R. A. (N. S.) 991; Merchants' & Planters' Ins. Co. v. Marsh, 34 Okl. 453, 125 Pac. 1100, 42 L. R. A. (N. S.) 996; Modern Woodmen v. Weekley, 42 Okl. 25, 139 Pac. 1138; Ætna Ins. Co. of Hartford, Conn. v. Brannon (Tex. Civ. App.) 91 S. W. 614.

2483 (f). Some recent authorities place limitations on the powers of local agents. Thus in Ohio it is held that where an insurance company has given authority to its agent to execute and deliver a policy, but has not given him authority to make a later verbal contract waiving any provision of such policy, a verbal contract undertaking to waive such a provision will not bind the company unless with knowledge of the facts it ratifies such act of the agent, which may be done by direct acts of the company which show such ratification, or indirectly by conduct (*Farmers' Nat. Bank v. Delaware Ins. Co.*, 94 N. E. 834, 83 Ohio St. 309).

2484-2486. (g) Powers of soliciting agents

2484 (g). An agent authorized only to solicit insurance, though he delivers the policy and collects the premium, cannot after the execution of the policy waive any of its conditions.

Prine v. American Central Ins. Co., 171 Ala. 343, 54 South. 547; *Southern States Fire Ins. Co. of Birmingham v. Kronenberg* (Ala.) 74 South. 63; *Madsen v. Maryland Casualty Co. of Baltimore*, 163 Cal. 204, 142 Pac. 51; *House v. Security Fire Ins. Co.*, 145 Iowa, 462, 121 N. W. 509; *Madsen v. Prudential Ins. Co. of America* (Mo. App.) 185 S. W. 1168; *Merchants' & Planters' Ins. Co. v. Marsh*, 34 Okl. 453, 125 Pac. 1100, 42 L. R. A. (N. S.) 996; *Modern Woodmen v. Weekley*, 42 Okl. 25, 139 Pac. 1138; *Phipps v. Union Mut. Ins. Co. (Okl.)* 150 Pac. 1083; *Kansas City Life Ins. Co. v. Blackstone* (Tex. Civ. App.) 143 S. W. 702.

2485 (g). In jurisdictions where the insurer is chargeable with notice of facts known to the solicitor, the rule does not apply to a

waiver of conditions precedent. In such jurisdictions it is held that a soliciting agent may waive conditions precedent, on the theory that an agency to solicit carries with it implied authority to do everything necessary to discharge the business in hand.

London Guaranty & Accident Co. v. Hartman, 122 Ill. App. 315; *Metropolitan Life Ins. Co. v. Willis*, 37 Ind. App. 48, 76 N. E. 560.

Though generally a soliciting agent cannot waive conditions subsequent, yet, if he has been held out as having general powers, the insurer will be bound by his waivers, unless the insured has knowledge of the limitations on his authority.

Queen of Arkansas Ins. Co. v. Malone, 111 Ark. 229, 163 S. W. 771; *Connecticut Fire Ins. Co. v. Moore*, 156 S. W. 867, 154 Ky. 18, Ann. Cas. 1914B, 1106; *Jones v. Prudential Ins. Co. of America*, 173 Mo. App. 1, 155 S. W. 1106.

2486-2487. (h) Powers of collectors and clerks

2486 (h). An agent of an insurer, with mere authority to collect premiums, has no authority to waive a forfeiture (*Cayford v. Metropolitan Life Ins. Co.*, 5 Cal. App. 715, 91 Pac. 266).

2487 (h). A clerk in the medical department of an insurance company has no authority to make a parole agreement changing the policy as to time of payments (*Nicoud v. New York Life Ins. Co.*, 134 N. Y. Supp. 119, 149 App. Div. 784).

2487-2488. (i) Powers of adjusters

2487 (i). An adjuster of an insurance company, authorized to adjust a loss, has power to waive forfeitures.

Queen of Arkansas Ins. Co. v. Forlines, 94 Ark. 227, 126 S. W. 719; *Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 161 Iowa, 5, 141 N. W. 447; *Wilms v. New Hampshire Fire Ins. Co.*, 194 Mich. 656, 161 N. W. 940; *Western Reciprocal Underwriters' Exchange v. Coon*, 38 Okl. 453, 134 Pac. 22. But see *Emanuel v. Maryland Casualty Co.*, 94 N. Y. Supp. 36, 47 Misc. Rep. 378; *Berger v. Aetna Life Ins. Co.*, 95 N. Y. Supp. 541, 48 Misc. Rep. 385. An assistant adjuster performing the duties of a chief adjuster may waive forfeitures in a fire insurance policy, unless his authority is limited to the knowledge of insured. *Western Reciprocal Underwriters' Exchange v. Coon*, 38 Okl. 453, 134 Pac. 22.

2490. (k) Powers of agents whose commissions have been revoked

2490 (k). As respects a fire policy issued by agents of an insurance company, they remain its agents, with power to bind it as to a vacancy permit, notwithstanding revocation of their agency, un-

known to insured. Insured must have actual knowledge of the revocation of the authority of the agents who issued his policy, that their promise to him to renew a vacancy permit shall not bind him; constructive notice, from the permit delivered by them being signed by another as agent, not being enough (*Sutherland v. Federal Ins. Co.*, 97 Miss. 345, 52 South. 689). So, too, where defendant's agent issued a policy to plaintiff, the insurer could not repudiate a permit to remove the property, issued by such agent after his discharge, in the absence of notice to plaintiff (*Goldstein v. Pacific Home Mut. Fire Ins. Co.*, 74 Or. 247, 145 Pac. 267). And in *Northwestern Nat. Ins. Co. of Milwaukee v. Avant*, 132 Ky. 106, 116 S. W. 274, it was held that, where the agent of insurer with whom a contract of insurance was made was informed by insured that the latter desired additional insurance, and then stated that he would like to have the opportunity to write the additional insurance, but before insured was ready to take the additional insurance insurer withdrew its agency from the agent, a finding that there was an assent by insurer to insured taking out additional insurance was warranted. Where one who was a general agent of a fire insurance company, with authority to issue and transfer policies, after the revocation of his agency, consented to and signed the transfer of a policy to plaintiff, and plaintiff in good faith believed that he was dealing with the company's agent, and the company had not given the public such notice of the revocation as was reasonably necessary to give persons of ordinary prudence notice that the agency had terminated, and plaintiff at the time of the transfer had no notice sufficient to put a reasonably prudent man on inquiry as to the revocation, plaintiff can hold the company liable on the policy (*Gragg v. Home Ins. Co. of New York*, 107 S. W. 321, 32 Ky. Law Rep. 988).

2490-2491. (l) Powers of brokers and temporary agents

2490 (l). An insurance broker, who acts as agent for the insured in procuring the policy, has no power to bind the insurer by a waiver of conditions or forfeitures.

Romano v. Concordia Fire Ins. Co., 106 N. Y. Supp. 63, 121 App. Div. 489; *Seitz v. Scottish Union & National Ins. Co.*, 37 Pa. Super. Ct. 261.

2493-2494. (n) Statutory provisions

2493 (n). Under the South Carolina statute (Civ. Code 1902, § 1810), which provides that one shall be held to be the agent of a foreign insurance company in soliciting insurance, delivering policies,

adjusting losses, etc., it can be found that local agents, through whom a policy was issued, and who countersigned it and consented to its assignment for the insurance company, were authorized to waive proof of loss (*Bank of Brunson v. Ætna Ins. Co. of Hartford, Conn.*, 203 Fed. 810, 122 C. C. A. 128). Under the Texas statute (Rev. St. 1911, art. 4847) declaring that a local branch of a fraternal association cannot waive any provisions of the laws and constitution of the association, the association cannot be estopped by the conduct of a local body (*Grayson v. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of the International Order of Twelve* [Tex. Civ. App.] 171 S. W. 489).

2494-2497. (o) Mutual benefit societies—Powers of general officers, local lodges, and officers of local lodges

2494 (o). A mutual benefit association may, of course, waive compliance with its by-laws (*Cline v. Sovereign Camp, Woodmen of the World*, 111 Mo. App. 601, 86 S. W. 501).

But the by-laws may provide that no local lodge or officer thereof shall waive any provision of such by-laws.

Woodmen of the World v. Hall, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517; *Coughlin v. Knights of Columbus*, 79 Conn. 218, 64 Atl. 223; *Collver v. Modern Woodmen of America*, 154 Iowa, 615, 135 N. W. 67; *Lathrop v. Modern Woodmen of America*, 56 Or. 440, 106 Pac. 328, rehearing denied 56 Or. 440, 109 Pac. 81.

A waiver of the provisions contained in the contract of a mutual benefit society, exempting it from liability for death in a prohibited occupation, must be made by the home office where the contract was made (*Showalter v. Modern Woodmen of America*, 156 Mich. 390, 120 N. W. 994).

2495 (o). The relation of subordinate lodges of a mutual benefit society to the grand or supreme lodge is that of agency. Consequently, in the absence of limitation, a subordinate lodge has power to waive a forfeiture arising from a violation of the society's by-laws.

United Order of Golden Cross v. Hooser, 160 Ala. 334, 49 South. 354; *Jones v. Supreme Lodge Knights of Honor*, 86 N. E. 191, 236 Ill. 113, 127 Am. St. Rep. 277; *Beggs v. Supreme Council Catholic Knights and Ladies of America*, 146 Ill. App. 168; *Taylor v. American Patriots*, 152 Ill. App. 578; *Walker v. American Order of Foresters*, 162 Ill. App. 30; *Blais v. United Brotherhood of Carpenters and Joiners of America*, 169 Ill. App. 596; *Klauss v. National Council, Knights and Ladies of Security*, 170 Ill. App. 196; *O'Brien v.*

Catholic Order of Foresters, 172 Ill. App. 638; Sauerwein v. Grand Lodge of Order of Sons of Hermann, 121 Minn. 229, 141 N. W. 174; Dougherty v. Supreme Court of Independent Order of Foresters, 125 Minn. 142, 145 N. W. 813; Galvin v. Knights of Father Mathew, 169 Mo. App. 496, 155 S. W. 45; Johnson v. Grand Lodge, A. O. U. W. of Utah, Wyoming, and Idaho, 31 Utah, 45, 86 Pac. 494.

Of course, if the subordinate lodge, in performing the acts relied on as showing a waiver, is actually acting as agent for the member, the supreme lodge is not bound thereby (*Knights of Columbus v. Burrough's Beneficiary*, 107 Va. 671, 60 S. E. 40, 17 L. R. A. [N. S.] 246). And if the by-laws of a fraternal benefit society prohibit the local organizations from waiving any provision thereof, no waiver or estoppel may be invoked against the society based upon the acts of the local organizations or their officers, unless it has, through its general officers, authorized or recognized such waiver (*Griffith v. Supreme Council of Royal Arcanum*, 182 Mo. App. 644, 166 S. W. 324).

Deputy executives of a mutual benefit society, with all the power and authority, within their territory, of the chief executive officer, have power to waive provisions of the by-laws (*Independent Order of Foresters v. Cunningham*, 127 Tenn. 521, 156 S. W. 192).

2496 (o). Officers of subordinate lodges have no authority by reason merely of such office to waive provisions of the rules of the society which enter into and form part of the contract of insurance.

Woodmen of the World v. Hall, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517; *Pate v. Modern Woodmen of America* (Ark.) 195 S. W. 1070; *Glaspy v. United Brotherhood*, 163 Ill. App. 78; *Crowley v. A. O. H. Widows' and Orphans' Fund*, 110 N. E. 276, 222 Mass. 228; *Larkin v. Modern Woodmen of America*, 163 Mich. 670, 127 N. W. 786; *Brittenham v. Sovereign Camp Woodmen of the World*, 180 Mo. App. 523, 167 S. W. 587; *Daffron v. Modern Woodmen of America*, 190 Mo. App. 303, 176 S. W. 498; *Morgan v. Royal Ben. Society*, 167 N. C. 262, 83 S. E. 479; *Sterling v. Head Camp, Pacific Jurisdiction*, 80 Pac. 375, 28 Utah, 505, rehearing denied 80 Pac. 1110, 28 Utah, 526.

But, if the officer of the local lodge may fairly be regarded as an agent of the supreme lodge in respect of the transactions with which he is concerned, he may waive forfeitures.

United Order of the Golden Cross v. Hooser, 160 Ala. 334, 49 South. 354; *Peebles v. Eminent Household of Columbian Woodmen*, 111 Ark. 435, 164 S. W. 296; *Saucerman v. Court of Honor*, 150 Ill. App. 550; *Shultice v. Modern Woodmen of America*, 67 Wash. 65, 120 Pac. 531.

While camp officers in the Woodmen of the World are agents of the Sovereign Camp for certain purposes, they cannot bind the camp in dealing with local members by acting merely within the apparent scope of their authority; that rule having no application where the member knows, or is presumed to know, the extent of the agent's powers (*Bennett v. Sovereign Camp, Woodmen of the World* [Tex. Civ. App.] 168 S. W. 1023). Where a waiver on the part of a mutual benefit society is relied on by a beneficiary in a mutual benefit certificate, the beneficiary must show that the society, with knowledge of the facts occasioning a forfeiture, dispensed with the observance of the condition; and where waiver is relied on as an act of an agent, it must be shown that the agent had express authority, or that his acts were, with knowledge of the facts, ratified (*Kennedy v. The Grand Fraternity*, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. [N. S.] 78).

3. POWERS OF AGENTS AND OFFICERS AS LIMITED BY THE POLICY OR APPLICATION

2497-2502. (a) Provisions of policy or application limiting authority of officers or agents

2498 (a). Limitations on the powers of agents with respect to waivers are valid and binding on the insured if he has knowledge thereof.

Modern Woodmen of America v. International Trust Co., 25 Colo. App. 26, 136 Pac. 806; *Coughlin v. Knights of Columbus*, 79 Conn. 218, 64 Atl. 223; *People's Bank of Donaldsonville v. National Fire Ins. Co. of Hartford, Conn.*, 58 South. 826, 130 La. 951; *New York Life Ins. Co. v. O'Dom*, 100 Miss. 219, 56 South. 379, Ann. Cas. 1914A, 583; *Gish v. Insurance Co. of North America*, 16 Okl. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826; *Modern Brotherhood of America v. Beshara*, 142 Pac. 1014, 42 Okl. 684; *Wyss-Thalman v. Maryland Casualty Co. of Baltimore* (O. C.) 193 Fed. 55, writ of error dismissed 193 Fed. 53, 113 C. C. A. 383; *Stillman v. Aetna Life Ins. Co.* (D. C.) 240 Fed. 462.

So an insured is presumed to have contracted with reference to conditions of the policy, imposing limitations on the authority of the insurer's secretary to consent to additional insurance (*Tilton v. Farmers' Ins. Co. of Town of Palatine*, 143 N. Y. Supp. 107, 82 Misc. Rep. 79).

2499 (a). As a general proposition, it may be said that an insured cannot rely on a waiver by an agent, when authority to waive is expressly withheld from such agent.

Porter v. General Acc. Fire & Life Assur. Corp., 157 Pac. 825, 30 Cal. App. 198; Coughlin v. Knights of Columbus, 79 Conn. 218, 64 Atl. 223; Rome Industrial Ins. Co. v. Eidson, 75 S. E. 657, 138 Ga. 592; Sowiczki v. Modern Woodmen of America, 192 Mich. 265, 158 N. W. 891; New York Life Ins. Co. v. O'Dom, 100 Miss. 219, 56 South. 379, 39 L. R. A. (N. S.) 649; Scheeler v. Casualty Co. of America (Sup.) 137 N. Y. Supp. 811; Deming Inv. Co. v. Shawnee Fire Ins. Co., 83 Pac. 918, 16 Okl. 1, 4 L. R. A. (N. S.) 607; Morgan v. American Cent. Ins. Co. (W. Va.) 92 S. E. 84, L. R. A. 1917D, 1049.

2500 (a). Thus, where the suspension of a member has taken place ipso facto for nonpayment of dues, an officer has no authority to waive such suspension where the constitution and by-laws specifically exclude such authority (Glaspy v. United Brotherhood, 163 Ill. App. 78). In Coughlin v. Knights of Columbus, 79 Conn. 218, 64 Atl. 223, the by-laws of the society provided that no subordinate council had the authority to waive the stipulations requiring a member of a subordinate council to pay his monthly assessment for the death benefit fund of the council within 30 days from the 1st day of each month under penalty of ipso facto suspension for the failure to so pay. It was held that a subordinate council could not waive the conditions on which a member's benefit certificate was issued or to change the provisions of the laws of the order with respect to the time of payment of monthly assessments. So, too, where a policy contains a stipulation of warranty and provides that no officer of the company shall have power to waive any provision of the policy unless in writing, such limited grant of authority is the measure of his power (Gish v. Insurance Co. of North America, 87 Pac. 869, 16 Okl. 59, 13 L. R. A. [N. S.] 826).

In Joplin v. National Live Stock Ins. Co., 61 Or. 544, 122 Pac. 897, 44 L. R. A. (N. S.) 569, a policy on a horse provided that the insurer would not be liable if the animal was lost "by order of any civil authority," and that any agreement by an agent altering the policy should not be binding, unless authorized by the home office. It was held that the insurer was not liable where the horse was killed on the advice of a veterinarian, because it had an incurable contagious disease, though the agent of the insurer consented to the killing of the horse; it not appearing that he had authority from the home office to give such consent.

2501 (a). Though an agent's power to waive conditions may be restricted he may nevertheless construe the conditions, and his construction will be binding on the insurer. In *Plunkett v. Piedmont Mut. Ins. Co.*, 80 S. C. 407, 61 S. E. 893, it appeared that the by-laws of defendant company provided that agents of the company had no power to alter or modify what is known as the iron-safe clause of the policy, or the requirement that books be kept in a safe place outside the insured building, or requiring insured to keep an iron safe, but the agent, who was not simply a soliciting agent, but had authority to receive and transmit premiums, and transmit the policy, when issued, with the indorsement that it was approved by him, represented to plaintiff, in soliciting the policy, that such provisions did not apply in case of a small business, and plaintiff would not be bound by them. It was held that defendant, by its agent, waived the requirements as to the iron safe and the manner of keeping the books.

2502-2504. (b) Persons affected by limitations on authority of officers

2502 (b). A provision in an insurance policy that no officer or agent of the company shall have power to waive stipulation of warranty unless indorsed thereon or added thereto is valid (*Gish v. Insurance Co. of North America*, 87 Pac. 869, 16 Okl. 59, 13 L. R. A. [N. S.] 826). So, too, where a policy provided that any forfeiture for nonpayment of premium could be waived only by a writing signed by an officer of the insurer, an agreement between assured and insurer's local agent that quarterly premiums due on the 6th of certain months could be paid as late as the 22d of such months was not within the apparent scope of his authority, and therefore not binding on the insurer (*Collins v. Metropolitan Life Ins. Co.*, 80 Pac. 609, 32 Mont. 329, 108 Am. St. Rep. 578, rehearing denied 80 Pac. 1092, 32 Mont. 329, 108 Am. St. Rep. 578).

2503 (b). Where past-due premiums on an industrial policy were received by the insurer's local agent, and forwarded by him to the superintendent of agencies, whose duty it was to adjust and settle claims, and he undertook to settle plaintiff's claim for less than the amount due, and took her receipt "in full settlement of all claims and demands against" the company "arising under or by reason of the policy," such superintendent had power to waive a forfeiture, or a default in payment of premiums, though the policy provided that this could be done only by writing, signed either by

the president, vice president, or secretary of the company (*Industrial Mut. Indemnity Co. v. Thompson*, 83 Ark. 574, 104 S. W. 200, 10 L. R. A. (N. S.) 1064, 119 Am. St. Rep. 149).

Though a mutual benefit association may limit the authority of its officers to waive regulations or forfeitures, the association itself may waive compliance with its by-laws, and provisions therein attempting to disable the organization from doing so are nugatory (*Cline v. Sovereign Camp, Woodmen of the World*, 86 S. W. 501, 111 Mo. App. 601). So a provision of the by-laws of a benefit society that no act of any subordinate council while a member is under suspension shall reinstate such member, nor waive nonpayment of assessments, except as expressly authorized, is invalid as an attempt on the part of the imperial council to disable itself from future action with reference to delinquent members even by mutual consent (*Leland v. Modern Samaritans*, 111 Minn. 207, 126 N. W. 728).

2504-2506. (c) Same—Limitations on authority of agents

2504 (c). A stipulation that no agent shall have power to waive conditions or forfeitures does not apply to a general agent or general manager.

Belden v. Union Central Life Ins. Co., 141 Pac. 370, 167 Cal. 740; *Id.*, 141 Pac. 373, 167 Cal. 798; *German American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; *Continental Casualty Co. v. Johnson*, 119 Ill. App. 93; *United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760; *Hardy v. Aetna Life Ins. Co.*, 70 S. E. 828, 154 N. C. 430; *Loftis v. Pacific Mut. Life Ins. Co.*, 38 Utah, 532, 114 Pac. 134. But see *Hutson v. Prudential Ins. Co.*, 122 Ga. 847, 50 S. E. 1000 holding that a stipulation that no condition can be waived, except by the indorsement of certain of the officers named, and no agent can modify the contract or waive any forfeiture, is notice to the policy holder and his beneficiary that a general agent is without authority to waive any provision, condition, or forfeiture prescribed in the policy.

A clause in a policy that no condition or provision therein shall be waived or altered, except by written indorsement attached thereto, and signed by the officers of insurer, does not prevent a general agent from making a contract of insurance outside of the matters written and printed on the face of the policy itself, since the clause is directed against a waiver of provisions, or alterations, of a contract in existence, and which has become a binding obligation between the parties (*Gloss-Sheffield Steel & Iron Co. v. Aetna Life*

Ins. Co., 74 N. J. Eq. 635, 70 Atl. 380). So, too, the superintendent of a foreign life insurance company doing business in the state may waive the forfeiture of a policy for nonpayment of a premium, though the policy states that no waiver shall be valid unless in writing signed by an officer (*Nicholas v. Prudential Ins. Co.*, 155 S. W. 478, 170 Mo. App. 437).

Local agents of insurance companies, vested with authority to make contracts to insure and to countersign and deliver policies and receive premiums, have power to waive stipulations in the policy, although it contains a restriction declaring that its provisions can only be waived by an agreement in writing signed by the president or secretary (*Rudd v. American Guarantee Fund Mut. Fire Ins. Co.*, 96 S. W. 237, 120 Mo. App. 1).

If, however, an agent is a special agent of limited authority the limitation on his powers will be effective. Thus, in *Coughlin v. Knights of Columbus*, 79 Conn. 218, 64 Atl. 223, the laws of a fraternal benefit society required a member of a subordinate council to pay the monthly assessments within 30 days from the 1st day of each month, under penalty of ipso facto suspension for failure so to pay, and provided that no officer or council of the society had the power to waive the provisions of the laws of the society. It was held that the officers of the society in dealing with the members thereof were acting as special agents under a special authority, the limits of which were known to the members, and their acts in allowing members to pay assessments after the time fixed did not operate either by way of waiver or estoppel to prevent the society from maintaining a defense to an action on a benefit certificate based on the failure of the member to pay a monthly assessment within the time fixed. So a provision in a policy that no condition or warranty contained therein can be waived or altered by any soliciting agent is a valid limitation (*Madsen v. Maryland Casualty Co. of Baltimore*, 168 Cal. 204, 142 Pac. 51). And it has also been held that an owner of property, in obtaining insurance from an insurance company's local agent, was bound to take notice that such agent had no authority orally to change the clause in the policy relating to vacancy (*Harris v. North American Ins. Co.*, 77 N. E. 493, 190 Mass. 361, 4 L. R. A. [N. S.] 1137).

2506-2509. (d) Waiver of limitations—Effect of usage or custom

2506 (d). Stipulations in policies limiting the powers of agents in respect to waivers of conditions and forfeitures are not to be re-

garded as limitations on the power of the company to contract, but merely as reservations for its benefit, which may be waived.

Eagle Fire Co. v. Lewallen, 56 Fla. 246, 47 South. 947; *Hartford Fire Ins. Co. v. Brown*, 60 Fla. 83, 53 South. 838; *Southern States Fire Ins. Co. v. Vann*, 69 Fla. 549, 68 South. 647, L. R. A. 1916B, 1189; *Queen Ins. Co. v. Patterson Drug Co. (Fla.)* 74 South. 807, L. R. A. 1917D, 1091; *Dromgold v. Royal Neighbors*, 261 Ill. 60, 103 N. E. 584, reversing 177 Ill. App. 1; *Jakes v. North American Union*, 186 Ill. App. 1; *Public Savings Ins. Co. of America v. Manning*, 61 Ind. App. 239, 111 N. E. 945; *West v. National Casualty Co.*, 61 Ind. App. 479, 112 N. E. 115; *Continental Ins. Co. v. Bair (Ind. App.)* 114 N. E. 763; *Henderson v. Standard Fire Ins. Co. of Iowa*, 143 Iowa, 572, 121 N. W. 714; *New England Mut. Life Ins. Co. v. Springgate*, 129 Ky. 627, 112 S. W. 681, 19 L. R. A. (N. S.) 227, rehearing denied, 129 Ky. 627, 113 S. W. 824, 19 L. R. A. (N. S.) 227; *McMillan v. Insurance Co. of North America*, 58 S. E. 1020, 1135, 78 S. C. 433.

A waiver of a stipulation limiting the agent's authority need not be in express terms, but it may be implied by law from the conduct of an agent acting within the apparent scope of his authority (*Southern States Fire Ins. Co. v. Vann*, 69 Fla. 549, 68 South. 647, L. R. A. 1916B, 1189).

2508 (d). The waiver of the limitation need not in fact be by the company, but may be by an agent, who has authority to act for the company, in his locality, for all purposes connected with the contract.

Eagle Fire Co. v. Lewallen, 56 Fla. 246, 47 South. 947; *Southern States Fire Ins. Co. v. Vann*, 69 Fla. 549, 68 South. 647, L. R. A. 1916B, 1189; *New England Mut. Life Ins. Co. v. Springgate*, 129 Ky. 627, 112 S. W. 681, 19 L. R. A. (N. S.) 227, rehearing denied 129 Ky. 627, 113 S. W. 824, 19 L. R. A. (N. S.) 227; *British America Assur. Co. v. Francisco*, 58 Tex. Civ. App. 75, 123 S. W. 1144.

The rule is based on the principle that the company cannot make its local agent the medium through which all the benefits of the policy flow from the insured to it, and then deny his authority to represent it when the benefits of the insured are involved (*Hartford Fire Ins. Co. v. Brown*, 60 Fla. 83, 53 South. 838). So, too, it has been said that a provision that stipulations in an insurance policy cannot be waived by any agent, officer, or other representative cannot be sustained on the theory it does not seek to prevent the corporation itself, but only its agents, from waiving stipulations, since the corporation can act only through its agents and officers

(London Guarantee & Accident Co. v. Mississippi Cent. R. Co., 97 Miss. 165, 52 South. 787).

Though in some cases it is not squarely held that an agent can waive limitations on his authority, the result is reached by adopting the principle that a stipulation limiting the authority of agents has no application when the law declares a waiver by estoppel arising from the acts of the company through its agents.

Fidelity Mut. Life Ins. Co. v. Bussell, 86 S. W. 814, 75 Ark. 25; *People's Fire Ins. Co. v. Goyne*, 79 Ark. 315, 96 S. W. 365, 16 L. R. A. (N. S.) 1180, 9 Ann. Cas. 373; *Bank of Anderson v. Home Ins. Co. of New York*, 14 Cal. App. 208, 111 Pac. 507; *Eagle Fire Co. v. Lewallen*, 47 South. 947, 56 Fla. 246; *Wisotzkey v. Niagara Falls Fire Ins. Co.*, 189 N. Y. 532, 82 N. E. 1134, affirming 112 App. Div. 599, 98 N. Y. Supp. 760. A nonwaiver agreement executed by insured merely prevented a waiver of breaches of the "iron-safe clause" from examination of books, and did not prevent a waiver by positive declarations or acts indicating a purpose to waive. *Pennsylvania Fire Ins. Co. v. Draper*, 187 Ala. 103, 65 South. 923.

2509-2510. (e) Knowledge or notice of limitations

2509 (e). An insurer will be bound by statements and acts of its agents within the apparent scope of their employment, unless notice of limitations on their authority are brought home to the insured.

Security Mut. Life Ins. Co. v. Riley, 157 Ala. 553, 47 South. 735; *Continental Fire Ins. Co. v. Wilford Stunston & Co.*, 100 S. W. 338, 30 Ky. Law Rep. 1176; *Essington Enamel Co. v. Granite State Fire Ins. Co.*, 45 Pa. Super. Ct. 550; *Old Colony Ins. Co. v. Starr-Mayfield Co.* (Tex. Civ. App.) 135 S. W. 252; *New Jersey Fire Ins. Co. v. Baird* (Tex. Civ. App.) 187 S. W. 356.

Notice to the insured may be predicated on his acceptance of a policy containing the limitation (*Rome Industrial Ins. Co. v. Eidson*, 138 Ga. 592, 75 S. E. 657). So, too, it has been held that one joining a mutual benefit association with knowledge of its character is chargeable with knowledge that no officer may waive the age limit for new members (*Daffron v. Modern Woodmen*, 190 Mo. App. 303, 176 S. W. 498).

Where insured accepted health and accident policy stipulating that the provisions thereof could not be waived by an agent, he could not rely on any waiver or agreement to waive, made by the agent. *Great Eastern Casualty Co. of New York v. Reed*, 17 Ga. App. 613, 87 S. E. 904.

2510 (e). A clause in an application for insurance printed in very small type, and containing a limitation of the authority of the

agent, is insufficient to impart to the applicant notice of such limitation (*Foster v. Pioneer Mut. Ins. Ass'n*, 79 Pac. 798, 37 Wash. 288).

2510-2514. (f) Construction of restrictions as applied to conditions precedent or subsequent

2510 (f). The prevailing doctrine is that restrictions in the policy on the power of agents with respect to waiver do not apply to those conditions which relate to the inception of the contract.

Johnson v. Aetna Ins. Co., 51 S. E. 339, 123 Ga. 404, 107 Am. St. Rep. 92; *Dulany v. Fidelity & Casualty Co. of New York*, 106 Md. 17, 66 Atl. 614; *Forwood v. Prudential Ins. Co. of America*, 83 Atl. 169, 117 Md. 254; *Shook v. Retail Hardware Mut. Fire Ins. Co.*, 154 Mo. App. 394, 134 S. W. 589; *Johnson & Stroud v. Rhode Island Ins. Co.*, 172 N. C. 142, 90 S. E. 124; *Leisen v. St. Paul Fire & Marine Ins. Co.*, 20 N. D. 316, 127 N. W. 837, 30 L. R. A. (N. S.) 539.

Contra: The courts of Oklahoma Territory necessarily followed the doctrine laid down in *Northern Assurance Co. v. Grand View Building Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. See *State Mut. Ins. Co. v. Craig*, 27 Okl. 90, 111 Pac. 325, and *Sullivan v. Mercantile Town Mut. Ins. Co.*, 20 Okl. 460, 94 Pac. 676, 129 Am. St. Rep. 761. But, on attaining statehood, the courts of the state repudiated the doctrine and adopted the majority rule.

Compare *Maryland Casualty Co. v. Eddy*, 239 Fed. 477, 152 C. C. A. 355, holding that the provision in an insurance policy against waiver by agents applies to a provision, read into the policy by law, that a material intentional misrepresentation avoids the policy.

But, of course, mere soliciting agents have no power to waive even as to conditions relating to the inception of the contract.

Powell v. Prudential Ins. Co., 153 Ala. 611, 45 South. 208; *Iverson v. Metropolitan Life Ins. Co.*, 91 Pac. 609, 151 Cal. 746, 13 L. R. A. (N. S.) 866.

2514 (f). Provisions in a fire policy limiting the power of agents to waive conditions and provisions of the policy do not refer to matters to be performed after a loss has occurred.

McCollough v. Home Ins. Co. of New York, 102 Pac. 814, 155 Cal. 659, 18 Ann. Cas. 862; *Bakhaus v. Caledonian Ins. Co.*, 112 Md. 676, 77 Atl. 310.

2514-2515. (g) Statutory provisions

2514 (g). The statute of Maine (Rev. St. c. 49, § 93) permitting the service of notices on agents of insurance companies, renders

void a stipulation that no one, except one of the executive officers shall alter contracts or waive forfeitures (*Frye v. Equitable Life Assur. Society of the United States*, 89 Atl. 57, 111 Me. 287).

Statutory provisions in Alabama (Gen. Acts 1911, p. 713, § 20), Missouri (Laws 1911, p. 292, § 22), New York (Insurance Law, [Consol. Laws, c. 28] § 239, as amended by Laws 1911, c. 198, § 2), and Tennessee (Acts 1905, c. 480) declare that the constitution and by-laws of mutual benefit associations may provide that no subordinate lodge or officer thereof may waive their provisions. Such statutes have been upheld in several cases.

Beiser v. Sovereign Camp of Woodmen of the World (Ala.) 74 South. 235; *Davis v. National Council of Knights and Ladies of Security*, 196 Mo. App. 485, 196 S. W. 97; *Hubbard v. Modern Brotherhood of America* (Mo. App.) 193 S. W. 911; *Klein v. Supreme Council of Loyal Ass'n*, 163 N. Y. Supp. 5, 98 Misc. Rep. 218; *Simmons v. Sovereign Camp, Woodmen of the World*, 188 S. W. 941, 136 Tenn. 233.

It has been held in Missouri that the statute of that state above referred to governs in actions in the state against foreign corporations, although state of such corporation's creation may recognize waivers by subordinate officials, etc. (*Davis v. National Council of Knights and Ladies of Security*, 196 Mo. App. 485, 196 S. W. 97).

A clause in a fire policy, as authorized by Code W. Va., 1913, c. 34, § 68 (sec. 1430), forbidding agent's waiver of its provisions except by written indorsement, relates to provisions the performance of which is essential to validity and continuance of contract, and not to stipulations to be performed after loss (*Lusk v. American Cent. Ins. Co.* [W. Va.] 91 S. E. 1078).

4. WHAT CONSTITUTES KNOWLEDGE OR NOTICE AS ESSENTIAL TO ESTOPPEL OR WAIVER

2516-2519. (a) What constitutes notice in general

2516 (a). Where an agent of the insurer examines the premises, the insurer is bound to have notice of all an expert should know from such inspection, and is bound by knowledge to that extent.

This general rule was applied in *Bailey v. Liverpool & London & Globe Ins. Co.*, 166 Mo. App. 593, 149 S. W. 1169, as to use of building, and in *Helm v. Anchor Fire Ins. Co.*, 132 Iowa, 177, 109 N. W. 605, and *Home Ins. Co. of New York v. Crowder*, 164 Ky. 792, 176 S. W. 344, as to value of property.

The doctrine of waiver and estoppel arising out of knowledge of agents applies to mutual assessment companies, as well as ordinary or old

line companies. *Hankinson v. Piedmont Mut. Ins. Co.*, 80 S. C. 392, 61 S. E. 905; *McCarty v. Same*, 81 S. C. 152, 62 S. E. 1, 18 L. R. A. (N. S.) 729.

In *British & Foreign Marine Ins. Co. v. Cummings*, 113 Md. 350, 76 Atl. 571, the plaintiff, in applying for a policy on a secondhand automobile, gave correctly the character and make, horse power, and manufacturer's number, stating that it was built in 1907, believing that fact to be true. From the information so given, by comparison of the number with the manufacturer's catalogue, defendant's expert, before issuing the policy, could have ascertained the year in which the machine was built, and after loss it was ascertained that it was of "1906 model," whereupon defendant denied liability. It was held that, since defendant had in its possession evidence from which it could have ascertained before issuing the policy that the machine was of 1906 model, it was charged with notice thereof, and was estopped to assert such alleged misrepresentation in defense.

2517 (a). But a mere opportunity on the part of the insurer to make an examination or ascertain certain facts will not charge the insurer with knowledge of what the examination would have disclosed. Thus the mere fact that the insurer's agent examined the stock when the policy was written, and might have discovered that the insured did not keep a fireproof safe, was not a waiver of insured's obligation to comply with the fireproof safe clause of the policy (*Hammond v. Niagara Fire Ins. Co.*, 142 Pac. 936, 92 Kan. 851, L. R. A. 1915F, 759). So in the case of a policy on an automobile it was held that the mere fact that the agent saw the car did not put the insurer on notice as to the age of the car (*Smith v. American Automobile Ins. Co.*, 188 Mo. App. 297, 175 S. W. 113). On the other hand, in *De Noyelles v. Delaware Ins. Co.*, 78 Misc. Rep. 649, 138 N. Y. Supp. 855, it was held that evidence that there were maps in the office of the resident agents of an insurer showing the occupancy of the building insured, and kept to guide them in determining whether offered risks should be accepted, was competent to show waiver of insured's warranty that the building was occupied exclusively for dwelling purposes. If the insurer has knowledge of facts when policy is issued which, on inquiry, would lead to a discovery of facts upon which forfeiture or defense is based, it is estopped to assert such forfeiture or defense (*Life & Casualty Ins. Co. v. King*, 137 Tenn. 685, 195 S. W. 585).

"Constructive notice," as defined by Civ. Code Ga. 1910, § 4530,

is not the equivalent of "actual notice" to an insurer or its representatives of material misrepresentations by the insured as affecting the question of waiver of forfeiture (*Wiley v. Rome Ins. Co.*, 12 Ga. App. 186, 76 S. E. 1067). And in order to establish waiver by insurer of condition avoiding policy in case of concurrent insurance, constructive notice to insurer is not sufficient (*Liverpool & London & Globe Ins. Co. v. Hughes*, 89 S. E. 817, 145 Ga. 716).

2518 (a). In *Conley v. Northwestern Fire & Marine Ins. Co.*, 34 Okl. 749, 127 Pac. 424, it was held that a petition alleging that the defendant knew that the fee simple to the land on which the insured building was situated was in the Choctaw and Chickasaw Tribes of Indians, and that the condition of the policy as to sole and unconditional ownership was waived, states a cause of action.

2519-2520. (b) Knowledge of or notice to officers and directors

2520 (b). Knowledge of the president of the insurer is, of course, knowledge of the company (*Metcalf v. Mutual Fire Ins. Co.*, 132 Wis. 67, 112 N. W. 22). And it cannot be objected that there was no waiver of forfeiture under a fire policy, because under the rules of the insurance company its policies were issued and forfeitures waived only on recommendation of a board, and such board had no notice; notice having been given the vice president of the company, and this being notice to the company, on which it should have required the board to act (*Arkansas Mut. Fire Ins. Co. v. Claiborne*, 82 Ark. 150, 100 S. W. 751).

Though knowledge of the secretary is imputable to the company, yet it was held in *Weiler v. Lancaster County Mut. Ins. Co.*, 50 Pa. Super. Ct. 249, that the fact that the secretary of the company knew that plaintiff contemplated taking out additional insurance is not inconsistent with the covenant of the policy that such additional insurance, when taken out, should be indorsed upon the policy. Under the Iowa statute (Code 1897, § 1750), providing that any officer of an insurance company shall be its agent with authority to transact business, a county mutual fire insurance company is bound by notice to its secretary of the removal from the county of property insured within the county, and by a parol consent to the removal (*Kesler v. Farmers' Mut. Fire & Lightning Ins. Ass'n*, 160 Iowa, 374, 141 N. W. 954).

2520-2524. (c) Agents in general

2520 (c). It is a general rule that knowledge of an agent of an insurance company as to matters within the general scope of his au-

thority is the knowledge of the company, and it is bound thereby, in the absence of fraud. An exception to the general rule that notice to an agent is notice to his principal arises where an agent and plaintiff conspired to obtain insurance from the principal for the plaintiff by stating his age in the application to be five years less than it really was, since plaintiff, knowing the agent was acting in his own interest, had no right to assume he would communicate plaintiff's true age to the principal (*Elliott v. Knights of The Modern Maccabees*, 46 Wash. 320, 89 Pac. 929, 13 L. R. A. [N. S.] 856).

Mere knowledge on the part of the insured that the insurer's agent is acting adversely to the insurer, without participation in such action by the insured with fraudulent intent, does not prevent the agent's knowledge from being imputed to the insurer (*Huestess v. South Atlantic Life Ins. Co.*, 70 S. E. 403, 88 S. C. 31). On the other hand, it was held in *Gardner v. North State Mut. Life Ins. Co.*, 163 N. C. 367, 79 S. E. 806, 48 L. R. A. (N. S.) 714, Ann. Cas. 1915B, 652, that where an insurance agent delivers a policy with knowledge of a materially false representation on the part of the applicant, he acts for himself and not for the company, and participates in a fraud which avoids the policy. But it was held, in *Queen of Arkansas Ins. Co. v. Laster*, 108 Ark. 261, 156 S. W. 848, that the existence of friendly relations between insured and insurance agent and the payment of the premium by the agent did not show such collusion or fraud as prevented notice to the agent of an incumbrance on the property, constituting notice to the company.

2521 (c). The general rule that the knowledge of the agent is imputable to the company is supported by numerous cases.

Reference may be made to the following cases: *Fidelity-Phoenix Fire Ins. Co. v. Ray*, 196 Ala. 425, 72 South. 98; *United States Health & Accident Ins. Co. v. Goin*, 197 Ala. 584, 73 South. 117; *Capital Fire Ins. Co. v. Montgomery*, 81 Ark. 508, 99 S. W. 687; *Queen of Arkansas Ins. Co. v. Taylor*, 100 Ark. 9, 138 S. W. 990; *Westchester Fire Ins. Co. v. Smith*, 128 Ark. 92, 193 S. W. 275; *United Assur. Ass'n v. Frederick (Ark.)* 195 S. W. 691; *Mutual Aid Union v. Blacknall (Ark.)* 196 S. W. 792; *Sowell v. London Assur. Corp.*, 32 Cal. App. 443, 163 Pac. 242; *Wiley v. Rome Ins. Co.*, 12 Ga. App. 186, 76 S. E. 1067; *Atlas Assur. Co., Limited, of London, v. Kettles*, 87 S. E. 1, 144 Ga. 306; *Downs v. Michigan Commercial Ins. Co.*, 157 Ill. App. 32; *Abrahamson v. Hartford Fire Ins. Co.*, 181 Ill. App. 254; *Deming v. Prudential Ins. Co. of America*, 190 Ill. App. 604; *Scarlett v. National Live Stock Ins. Co.*, 193 Ill. App. 488; *Humboldt Fire Ins. Co. v. Ashby*, 57 Ind. App. 682, 108 N. E. 150; *Globe & Rutgers Fire Ins. Co. v. Indiana Reduction*

Co., 62 Ind. App. 528, 113 N. E. 425; *Johnson v. Farmers' Ins. Co.*, 126 Iowa, 565, 102 N. W. 502; *Salzman v. Machinery Mut. Ins. Ass'n*, 142 Iowa, 99, 120 N. W. 697; *Eckert v. Century Fire Ins. Co.*, 147 Iowa, 507, 124 N. W. 170; *Walrod v. Des Moines Fire Ins. Co.*, 159 Iowa, 121, 140 N. W. 218; *Funk v. Anchor Fire Ins. Co.*, 171 Iowa, 331, 153 N. W. 1048; *Crawford's Adm'r v. Travelers' Ins. Co.*, 99 S. W. 963, 124 Ky. 733, 30 Ky. Law Rep. 943, 124 Am. St. Rep. 425; *Ætna Life Ins. Co. v. Howell* (Ky.) 107 S. W. 294; *Continental Ins. Co. v. Buchanan*, 108 S. W. 355, 32 Ky. Law Rep. 1298; *Wilson v. Germania Fire Ins. Co.*, 140 Ky. 642, 131 S. W. 785; *Goebel v. German-American Ins. Co. of Pennsylvania*, 96 Atl. 627, 127 Md. 419; *Perry v. John Hancock Mut. Life Ins. Co.*, 147 Mich. 645, 111 N. W. 195; *Blake v. Farmers' Mut. Lightning Protected Fire Ins. Co. of Michigan*, 194 Mich. 589, 161 N. W. 890; *Gordon v. St. Paul Fire & Marine Ins. Co. (Mich.)* 163 N. W. 956; *Big Creek Drug Co. v. Stuyvesant Ins. Co.*, 115 Miss. 333, 75 South. 768; *Hilburn v. Phoenix Ins. Co.*, 140 Mo. App. 355, 124 S. W. 63; *Dubinsky v. Hartford Fire Ins. Co., of Hartford, Conn. (Mo. App.)* 196 S. W. 1045; *Schuler v. Metropolitan Life Ins. Co.*, 191 Mo. App. 52, 176 S. W. 274; *Hudson v. Glens Falls Ins. Co.*, 112 N. E. 728, 218 N. Y. 133, L. R. A. 1917A, 482, reversing judgment 147 N. Y. Supp. 1117, 162 App. Div. 934; *Johnson & Stroud v. Rhode Island Ins. Co.*, 172 N. C. 142, 90 S. E. 124; *Michigan Idaho Lumber Co. v. Northern Fire & Marine Ins. Co.*, 35 N. D. 244, 160 N. W. 130; *McKelvey v. Eureka Fire & Marine Ins. Co.*, 1 Ohio App. 184, 34 Ohio Cir. Ct. R. 443; *North River Ins. Co. of New York v. O'Conner* (Okl.) 164 Pac. 982; *State Mut. Ins. Co. v. Green* (Okl.) 166 Pac. 105, L. R. A. 1917F, 663; *Plunkett v. Piedmont Mut. Ins. Co.*, 80 S. C. 407, 61 S. E. 893; *Thomas v. Modern Brotherhood*, 25 S. D. 632, 127 N. W. 572; *Security Mut. Life Ins. Co. v. Calvert* (Tex. Civ. App.) 100 S. W. 1033, judgment reversed 101 Tex. 128, 105 S. W. 320; *Workman v. Royal Exchange Assurance*, 96 Wash. 559, 165 Pac. 488.

The agent was described as a general agent in *German-American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; *Crystal Ice Co. v. United Surety Co.*, 123 N. W. 619, 159 Mich. 102; *Ward's Adm'r v. Preferred Acc. Ins. Co.*, 67 Atl. 821, 80 Vt. 321.

He was described as a local agent, or as an agent with power to make contracts of insurance in *Continental Ins. Co. v. Rosenberg*, 7 Pennewill (Del.) 174, 74 Atl. 1073; *Eagle Fire Co. v. Lewallen*, 47 South. 947, 56 Fla. 246; *Springfield Fire & Marine Ins. Co. v. Price*, 132 Ga. 687, 64 S. E. 1074; *Jacobs v. Queen Ins. Co.*, 183 Mich. 512, 150 N. W. 147; *Manning v. Connecticut Fire Ins. Co.*, 176 Mo. App. 678, 159 S. W. 750; *Schmidt v. Williamsburgh City Fire Ins. Co.*, 95 Neb. 43, 144 N. W. 1044, 51 L. R. A. (N. S.) 261; *De Noyelles v. Delaware Ins. Co.*, 138 N. Y. Supp. 855, 78 Misc. Rep. 649; *Powell v. Continental Ins. Co.*, 81 S. E. 654, 97 S. C. 375; *Mecca Fire Ins. Co. v. Smith* (Tex. Civ. App.) 135 S. W. 688;

National Union Fire Ins. Co. v. Burkholder, 116 Va. 942, 83 S. E. 404; Gaskill v. Northern Assur. Co., 73 Wash. 668, 132 Pac. 643.

The Maine statute (Rev. St. c. 49, § 93), providing that insurance agents shall be regarded as in place of the company, and that the company shall be bound by their knowledge of the risk and of all matters connected therewith, applies to a health policy. Strickland v. Peerless Casualty Co., 90 Atl. 974, 112 Me. 100.

Where insurance company reinstates canceled policy after knowledge of breach prior to reinstatement has been brought home to local issuing agent, forfeitures are waived (*Home Ins. Co. of New York v. Mobley* [Okl.] 157 Pac. 324). Although a building partially completed was boarded up and vacant for several months before and after being insured so as not to be considered a "builder's risk" by the officials at the home office of an insurance company, yet, if the insurance company's local agents in another state insured it as a "builder's risk," the company, when sued upon the policy, cannot claim it was not correctly described (*Dodge v. Grain Shippers' Mut. Fire Ins. Ass'n*, 176 Iowa, 316, 157 N. W. 955).

2523 (c). It has also been held that knowledge upon the part of inspectors of an insurance company is the knowledge of such company (*Fitzsimmons-Kreider Milling Co. v. Ohio Millers' Mut. Fire Ins. Co.*, 158 Ill. App. 174). And knowledge of the field superintendent and local cashier of a life insurance company is imputable to the company (*McCormack v. Security Mut. Life Ins. Co.*, 161 App. Div. 33, 146 N. Y. Supp. 613).

2524 (c). Where a member of a firm engaged in the insurance business and agent of the insurer acquired knowledge of an incumbrance on property insured in the course of the business of the firm, such knowledge was chargeable to the insurer, though the partner acquiring the knowledge was not the one who subsequently wrote the policy (*St. Paul Fire & Marine Ins. Co. v. Stogner*, 44 Tex. Civ. App. 60, 98 S. W. 218). To the same effect is *Lewis v. Guardian Fire & Life Assur. Co.*, 181 N. Y. 392, 74 N. E. 224, 106 Am. St. Rep. 557, affirming 93 App. Div. 157, 87 N. Y. Supp. 525, where it was held that one obtaining a policy after notifying a member of the firm who are the agents of the insurance company that there is other insurance upon the property, without that fact being indorsed on the policy when issued, as required by one of its conditions, can assume that the agents waive such condition by authority, and that the omission to make such indorsement will not affect the policy, though it is obtained from the insurance company

by another member of the firm who was not informed as to such other insurance.

2524-2527. (d) Solicitors, collectors, and surveyors

2524 (d). The rule that knowledge of the agent is imputable to the insurer is in many jurisdictions regarded as applying also to a soliciting agent with reference to matters made known to him prior to the execution of the policy and within the scope of his employment.

Reference may be made to *Merchants' Mut. Fire Ins. Co. of Colorado v. Harris*, 51 Colo. 95, 116 Pac. 143; *Northwestern Mut. Life Ins. Co. v. Farnsworth*, 60 Colo. 324, 153 Pac. 699; *Springfield Fire & Marine Ins. Co. v. Price*, 132 Ga. 687, 64 S. E. 1074; *Johnson v. Royal Neighbors*, 253 Ill. 570, 97 N. E. 1084, affirming 159 Ill. App. 269; *Commercial Life Ins. Co. v. McGinnis*, 50 Ind. App. 630, 97 N. E. 1018; *Supreme Tribe of Ben Hur v. Lennert*, 178 Ind. 122, 98 N. E. 115, overruling judgment (Ind. App.) 94 N. E. 889, which affirmed on rehearing (Ind. App.) 93 N. E. 869; *Biermann v. Guaranty Mut. Life Ins. Co.*, 142 Iowa, 341, 120 N. W. 963; *Wilson v. Anchor Fire Ins. Co.*, 143 Iowa, 458, 122 N. W. 157; *Pfister v. Missouri State Life Ins. Co.*, 116 Pac. 245, 85 Kan. 97; *Rearden v. State Mut. Life Ins. Co.*, 60 S. E. 1106, 79 S. C. 526; *Life & Casualty Ins. Co. v. King*, 137 Tenn. 685, 195 S. W. 585.

The solicitor was in the employ of the local or general agent in *Cue v. Connecticut Fire Ins. Co.*, 89 Kan. 90, 130 Pac. 664, 44 L. R. A. (N. S.) 1218, and *Springfield Fire & Marine Ins. Co. v. Price*, 132 Ga. 687, 64 S. E. 1074. The solicitor had authority to deliver the policy in *Athens Mut. Ins. Co. v. R. H. Ledford & Son*, 134 Ga. 500, 68 S. E. 91; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Connecticut Fire Ins. Co. v. Moore*, 154 Ky. 18, 156 S. W. 867, Ann. Cas. 1914B, 1106; *Kelly v. Citizens' Mut. Fire Ass'n*, 96 Minn. 477, 105 N. W. 675; *Lawyer v. Globe Mut. Ins. Co.*, 25 S. D. 549, 127 N. W. 615; *Security Mut. Life Ins. Co. v. Calvert* (Tex. Civ. App.) 100 S. W. 1033, judgment reversed 101 Tex. 128, 105 S. W. 320.

2525 (d). On the other hand, in some jurisdictions it is held that the knowledge of a solicitor, who has authority only to take and forward applications, cannot be imputed to the insurer.

Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N. S.) 866; *Sharman v. Continental Ins. Co.*, 167 Cal. 117, 138 Pac. 708, 52 L. R. A. (N. S.) 670; *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, 142 Pac. 51; *Elliott v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 172 Cal. 261, 156 Pac. 481, L. R. A. 1916F, 1026; *Pettijohn v. St. Paul Fire & Marine Ins. Co.*, 100 Kan. 482, 164 Pac. 1096; *Bonewell v. North American Accident Ins. Co.*, 132 N. W. 1067, 167 Mich. 274, Ann. Cas. 1913A, 847, affirming judg-

ment on rehearing 125 N. W. 59, 160 Mich. 137; Merchants' & Planters' Ins. Co. v. Marsh, 34 Okl. 453, 125 Pac. 1100, 42 L. R. A. (N. S.) 996.

Since knowledge by a solicitor, to be imputable to the insurer, must be as to matters within the scope of his authority, it has been held in some cases that as the solicitor has nothing to do with the physical examination of the insured, knowledge of the solicitor, as to the health of the insured is not imputable to the company.

Haapa v. Metropolitan Life Ins. Co., 114 N. W. 380, 150 Mich. 467, 16 L. R. A. (N. S.) 1165, 121 Am. St. Rep. 627; Gorman v. Metropolitan Life Ins. Co., 143 N. Y. Supp. 1063, 158 App. Div. 682; Butler v. Michigan Mut. Life Ins. Co., 77 N. E. 398, 184 N. Y. 337, reversing 93 App. Div. 619, 87 N. Y. Supp. 1129.

2526 (d). The rule that the insurer is charged with the knowledge of a soliciting agent does not generally apply to matters which come to the solicitor's knowledge after the policy is issued (*Ætna Ins. Co. v. Kennedy*, 161 Ala. 600, 50 South. 73, 135 Am. St. Rep. 160).

2527-2528. (e) Subagents or clerks

2527 (e). Where a foreign insurance company transacted business through a domestic corporation, which had power to issue policies, knowledge of an agent of such domestic corporation was imputable to the foreign insurer (*Thorne v. Casualty Co.*, 106 Me. 274, 76 Atl. 1106). And under the Florida statute (Gen. St. 1906, §§ 2765, 2777), where insurer's authorized agent places insurance through agent employed to act generally for him, to whom insured pays premium, etc., insurer cannot escape responsibility for his acts, though he is not designated as its regular agent, or as an agent (*Queen Ins. Co. v. Patterson Drug Co.* (Fla.) 74 South. 807, L. R. A. 1917D, 1091). It has been held in Vermont that knowledge of the husband of insurer's agent, soliciting insurance for her, as to incumbrance upon the property insured, is the knowledge of the insurer (*Wilson v. Commercial Union Assur. Co.*, 90 Vt. 105, 96 Atl. 540).

2528-2529. (f) Medical examiners

2528 (f). As a general rule an insurer is chargeable with knowledge of facts of which its medical examiner acquires knowledge during the performance of his duties.

McRory v. Independent Order of Puritans, 60 Colo. 456, 154 Pac. 92;
Fair v. Metropolitan Life Ins. Co., 63 S. E. 812, 5 Ga. App. 708;

South Atlantic Life Ins. Co. v. Hurt's Adm'x, 115 Va. 398, 79 S. E. 401; Eagleton v. Prudential Ins. Co. of America, 193 Ill. App. 306; Weisguth v. Supreme Tribe of Ben Hur, 194 Ill. App. 17, judgment affirmed 112 N. E. 350, 272 Ill. 541. But see Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734, 151 Pac. 159.

But, as already noted in the case of soliciting agents, it is held in some cases that it must appear that the knowledge of the medical examiner was acquired in transacting the business of the company, and must be as to facts within the scope of his employment. So, in Whigham v. Supreme Court I. O. F., 51 Or. 489, 94 Pac. 968, it was held that a mutual benefit order was not estopped to declare a forfeiture for breach of warranty consisting of false statements made in a member's application, because the lodge physician before whom the answers were made, while subsequently treating the applicant professionally and not in connection with his lodge duties, acquired information amounting to notice that answers in the application were false. And in Sovereign Camp, Woodmen of the World, v. Hall, 104 Ark. 538, 148 S. W. 526, it was said that an insurer is not chargeable with knowledge of facts known to the medical examiner as to the occupation of the insured.

2529 (f). In Mutual Life Ins. Co. v. Powell, 133 C. C. A. 417, 217 Fed. 565, it was held that the knowledge of the medical examiner that certain statements of the applicant as to his health were untrue was not imputable to the insurer. The holding is based, apparently, on the fact that the applicant was guilty of bad faith, in that she knew she was making false statements and discussed the matter with the examiner, thus showing collusion between the examiner and the applicant.

A private physician who, in the absence of the regular examiner, examined the applicant for a policy to be issued by a fraternal insurer, is not the agent of the insurer, where he was procured by a friend of the applicant (Sovereign Camp Woodmen of the World v. Lillard [Tex. Civ. App.] 174 S. W. 619).

2529. (g) Agents who are themselves interested or whose commissions have been revoked

2529 (g). If the agent is himself interested in the property insured, his knowledge of matters affecting the risk will not, ordinarily, be imputable to the company (Dull v. Royal Ins. Co., 159 Mich. 671, 124 N. W. 533). Thus, where a firm of insurance agents were largely interested as officers and stockholders of plaintiff corporation, and as agents for defendant insurance company insured

the corporation's plant, machinery, etc., their knowledge that the plant was not being operated at the time the insurance was issued was not chargeable to their principal, the insurer (*Home Ins. Co. v. North Little Rock Ice & Electric Co.*, 111 S. W. 994, 86 Ark. 538, 23 L. R. A. [N. S.] 1201). So, too, knowledge of an agent of the existence of an assignment for benefit of creditors is not imputable to the company, where the agent was one of the creditors (*Roper v. National Fire Ins. Co.*, 161 N. C. 151, 76 S. E. 869). In *Bank of Anderson v. Home Ins. Co.*, 14 Cal. App. 208, 111 Pac. 507, the facts were these: A fire policy stipulating that it should be void if insured procured other insurance without consent indorsed on the policy covered the property of insured, and neither the agent of insurer nor a bank to whom the loss was made payable as collateral for a loan amply secured by a mortgage had any interest in the property, and insurer knew that the agent was an officer of the bank. Insurer through its general agent had full knowledge of the transaction, and ratified it. Insured procured additional insurance with the knowledge of the agent, who promised to make the proper indorsement, but failed to do so. There was no fraud on the part of insured and the bank. It was held that the insurer was bound by the acts of its agent, and could not defeat a recovery for a loss on the ground that the agent's and insurer's interests conflicted.

2529-2531. (h) Agent of one company procuring insurance through agent of another company

2530 (h). In *Atlanta Home Ins. Co. v. Smith*, 136 Ga. 592, 71 S. E. 902, the facts were as follows: The plaintiff applied to an insurance agent for insurance, stating that the premises were on leased ground, owned by a third person. The agent procured a policy from an agent of defendant company, who countersigned and issued it, and delivered it to the first agent who in turn delivered it to the insured. The first agent did not communicate to the defendant's agent the information with respect to the title of the land. The commissions were divided between the agents of the two companies in accordance with a practice followed by them, but not by other agents in the city. No agent of the defendant company inspected the property. The policy contained a stipulation that it should be void if the interest of the insured were other than unconditional and sole ownership, or if the subject of insurance were a building on ground not owned by the insured in fee simple. It was held that the agent receiving the application and delivering the policy was

an agent of the insurer, and that his knowledge was imputable to the insurer, and estopped it from claiming a forfeiture of the policy on account of a breach of its conditions respecting the ownership.

On the other hand, a contrary doctrine seems to have been applied in *Wisotzkey v. Hartford Fire Ins. Co.*, 112 App. Div. 596, 98 N. Y. Supp. 763, affirmed in 189 N. Y. 532, 82 N. E. 1134. In that case it appeared that plaintiff applied to M. & J. for a line of insurance on lumber belonging to another, to secure plaintiff's interest therein as a creditor of the owner. M. & J., being unable or unwilling to place all the insurance, according to a custom among insurance agents, applied to defendant's agent for a policy, which was issued, in which plaintiff's interest in the lumber was improperly stated. The policy, which provided that no person unless duly authorized in writing should be deemed the agent of the insurer, was delivered to M. & J. Plaintiff paid the premium for the entire insurance to them, and they paid the premium on the policy in question to defendant's agent. It was held that M. & J. were mere insurance brokers, and not defendant's agents, and hence defendant was not estopped by their knowledge of plaintiff's interest to insist on a forfeiture.

Under the South Carolina statute (Civ. Code 1902, § 1810; Civ. Code 1912, § 2712), an insurance agent who, because he could not write a policy in his own company, "brokered" it to the agent of another company was the agent of such other company, and his knowledge was imputable to it (*Maryland Casualty Co. v. Gaffney Mfg. Co.*, 76 S. E. 1089, 93 S. C. 406).

2531-2534. (i) Agency for insurer or insured

2531 (i). It is generally held that soliciting agents are to be regarded as agents of the insurer, and not of the insured, so as to charge the insurer with knowledge of facts known to such solicitor, if his knowledge was acquired in the negotiations leading up to the issuance of the policy.

Stillman v. Aetna Life Ins. Co. (D. C.) 240 Fed. 462; *Merchants' Mut. Fire Ins. Co. v. Harris*, 51 Colo. 95, 116 Pac. 143; *Allen v. Phoenix Assur. Co.*, 95 Pac. 829, 14 Idaho, 728; *Fosmark v. Equitable Fire Ass'n*, 23 S. D. 102, 120 N. W. 777 (holding that solicitor is agent of insurer both independent of statute and under the provisions of Laws 1905, c. 126, § 2); *Camden Fire Ins. Ass'n v. Wandell* (Tex. Civ. App.) 195 S. W. 289. But see *Salzano v. Marine Ins. Co.*, 159 N. Y. Supp. 277, 173 App. Div. 275.

Though it has been held that, where an application is intrusted to a person who is not in fact the agent of the insurer, the presumption arises that such person is the agent of the insured, the mere fact that the insurance was not solicited by the insurer's agent, but the application came first from the insured, does not constitute the agent a mere broker, and therefore agent of the insured. So it was held in *Salzman v. Machinery Mut. Ins. Ass'n*, 142 Iowa, 99, 120 N. W. 697, that the fact that insured applied orally to a particular person for fire insurance, and insurer issued a policy, sufficiently shows such person's agency for insurer both at common law and under Code Iowa, § 1750, making one who solicits insurance, etc., for a company, an agent. In *Dull v. Royal Ins. Co.*, 159 Mich. 671, 124 N. W. 533, it appeared that an owner of land and B. and others formed a corporation, of which B. became a stockholder and officer. The owner contracted to convey the property to the corporation. Subsequently he insured the property in his own name on the solicitation of B. Thereafter the owner conveyed the property to a trustee for the corporation. The capacity of B. and his connection with insurer was not shown, except that the premium passed through his hands on the way to an agency of insurer. It was not shown that insurer knew of B.'s connection with the corporation or the owner. It was held that B.'s knowledge as to the condition of the title at the issuance of the policy, and the subsequent transfer of the property was not binding on insurer.

The designation as agents of insurance company by Gen. Stat. Fla. § 2765, of any person making contract of insurance for such insurance company, does not apply to agent and local medical examiner, agents of the company, so as to make their knowledge of the fraudulent character of material representations the knowledge of the company (*Mutual Life Ins. Co. of New York v. Hilton-Green*, 36 Sup. Ct. 676, 241 U. S. 613, 60 L. Ed. 1202, reversing judgment 211 Fed. 31, 127 C. C. A. 467).

2532 (i). A broker who merely solicits applications, and afterwards places the insurance with such companies as he can induce to take the risk, is regarded as agent of the insured, and his knowledge is not imputable to the company.

Bonewell v. North American Accident Ins. Co., 167 Mich. 274, 132 N. W. 1067, Ann. Cas. 1913A, 847, affirming on rehearing 160 Mich. 137, 125 N. W. 59; *Smith v. American Automobile Ins. Co.*, 188 Mo. App. 297, 175 S. W. 113; *Clymer Opera Co. v. Rural Valley*

Mut. Fire Ins. Co., 50 Pa. Super. Ct. 645; Fire Ass'n of Philadelphia v. American Cement Plaster Co., 84 S. W. 1115, 37 Tex. Civ. App. 629.

And, even though the broker receives a commission upon the premium secured for such risks as the insurer chooses to accept, he is not an agent of the insurer so that notice to him would bind the insurer (*American Steam Laundry Co. v. Hamburg Bremen Fire Ins. Co.*, 121 Tenn. 13, 113 S. W. 394, 21 L. R. A. [N. S.] 442).

On the other hand, it seems to be the rule in Indiana that the knowledge of a broker is imputable to the company.

German Fire Ins. Co. of Indiana v. Greenwald, 51 Ind. App. 469, 99 N. E. 1011; *Western Ins. Co. v. Ashby*, 53 Ind. App. 518, 102 N. E. 45; *Globe & Rutgers Fire Ins. Co. v. Hamilton* (Ind. App.) 116 N. E. 597.

2534-2537. (j) Same—Effect of provisions in policy or application

2535 (j). An insurance company cannot, by stipulations in its policy or otherwise, transform their agents into agents for the insured, so as to avoid being chargeable with knowledge of matters known to such agents (*Capital Fire Ins. Co. v. Montgomery*, 81 Ark. 508, 99 S. W. 687). And to the same effect is *Turner v. Modern Woodmen of America*, 186 Ill. App. 404. So, where insurer's medical examiner had full knowledge concerning the mental condition of insured's family, the insurer was bound by the physician's knowledge, though the contract provided that he should be the agent of the insured (*South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 115 Va. 398, 79 S. E. 401). And a medical examiner of a life insurance company must be deemed the agent of the company, although he is paid by the insured for the examination, and the policy contains a provision making him the agent of the insured (*Weisguth v. Supreme Tribe of Ben Hur*, 194 Ill. App. 17, judgment affirmed 112 N. E. 350, 272 Ill. 541).

2537-2539. (k) Effect of limitations as to waiver

2537 (k). Notwithstanding limitations in the policy as to the power of an agent to waive the conditions, the insurer will be charged with the knowledge of its agent, especially when the insured is ignorant of such restrictions.

Despain v. Pacific Mut. Life Ins. Co., 81 Kan. 722, 106 Pac. 1027; *Ætna Life Ins. Co. v. Howell* (Ky.) 107 S. W. 294; *Fosmark v. Equitable Fire Ass'n*, 23 S. D. 102, 120 N. W. 777.

So, too, it has been held that for an insurance company, with its president in a foreign land, establishing a general office in the

United States, to provide that notice to any of its general agents in the United States, or any knowledge that they shall obtain relating to any business of the company in the United States, shall not be notice or knowledge to the company, is unreasonable, and will not be upheld by the courts (*United Zinc Cos. v. General Accident Assur. Corporation*, 144 Mo. App. 380, 128 S. W. 836). And in Georgia it has been held that an insurer is bound by knowledge of its local agent that before issuance of the policy there had been a change of ownership of the automobile insured against fire, and estopped to set up such change of ownership as a defense, though the policy limited the right of waiver by an agent (*Commercial Union Assur. Co., Limited, of London, v. Lyon & Kelly*, 17 Ga. App. 441, 87 S. E. 761).

On the other hand, the federal courts, following the general doctrine laid down in *Northern Assurance Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, have held that, where there are limitations on the power of the agent to waive conditions, knowledge of the agent is not imputable to the company.

Ætna Life Ins. Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356; *Prudential Ins. Co. of America v. Moore*, 231 U. S. 560, 34 Sup. Ct. 191, 58 L. Ed. 367; *St. Paul Fire & Marine Ins. Co. v. Penman*, 81 C. C. A. 151, 151 Fed. 961.

And the same rule is followed in Oklahoma as to policies issued before statehood (*Home Ins. Co. of New York v. Ballard*, 32 Okl. 723, 124 Pac. 316). And in California it has been held that where a soliciting agent of an insurer has neither actual nor ostensible authority to waive the falsity of statements in an application for a life policy, his knowledge of the falsity of statements therein if not communicated to the insurer, is not imputable to it (*Iverson v. Metropolitan Life Ins. Co.*, 91 Pac. 609, 151 Cal. 746, 13 L. R. A. [N. S.] 866).

2539-2540. (1) Statutory provisions

2539 (1). In some instances the decisions holding that the insurer is chargeable with knowledge of facts known to the agent are based on statutory provisions. Thus the Maine statute (Rev. St. 1903, c. 49, § 93), providing that agents of insurance companies shall be regarded as in the place of the companies in all respects, regarding any insurance effected by them, has been applied in several

cases to uphold the rule that knowledge of the agent is imputable to the company.

Thorne v. Casualty Co. of America, 106 Me. 274, 76 Atl. 1106; *Guptill v. Pine Tree State Mut. Fire Ins. Co.*, 109 Me. 323, 84 Atl. 529.

So the decision in *Mutual Life Ins. Co. of New York v. Hilton-Green*, 127 C. C. A. 467, 211 Fed. 31, holding the company chargeable with knowledge of facts known to the agent was apparently based on *Gen. St. Fla.* 1906, § 2765.

2540-2542. (m) Knowledge acquired in transacting business of company

2540 (m). In some states knowledge of the agent is imputable to the company only in so far as the agent's information was acquired as such agent, and the general rule does not apply as to information acquired by the agent in his individual capacity.

Traders' Ins. Co. v. Letcher, 143 Ala. 400, 39 South. 271; *First Nat. Bank of Nome v. German American Ins. Co.*, 23 N. D. 139, 134 N. W. 873, 38 L. R. A. (N. S.) 213. And see *Mutual Aid Union v. Blacknall* (Ark.) 196 S. W. 792.

Thus, information as to the ownership of insured property, obtained by an agent from insured several years before the issuance of the policy in suit, and at the time of the issuance of other policies, is not imputable to defendant company in the absence of evidence that the agent was at the time defendant's agent, or that the prior insurance was obtained from defendant (*Continental Ins. Co. v. Cummings* [Tex. Civ. App.] 95 S. W. 48). So, too, where notice to the insurer of a bill of sale by insured to a bank was attempted to be shown from the knowledge thereof possessed by the agent of the company who at the time was assistant cashier of the bank, it was held that the rule that notice to the agent will be imputed to the principal does not apply (*Exchange Bank of Wilcox v. Nebraska Underwriters' Ins. Co.*, 120 N. W. 1010, 84 Neb. 110, 133 Am. St. Rep. 614). And where M. & Co. were both the agents of defendant insurance company and of a building and loan association, for whose benefit certain property was insured by them, knowledge of the vacancy of the property acquired by M. & Co. as agents of the loan association, and not while attending to the affairs of the insurance company, and not shown to have been present in the minds of M. & Co. at the time they did any act with reference to the insurance as agents of the defendant, was not notice to defendant sufficient to constitute a waiver of a forfeiture by reason of such vacan-

cy (*Foreman v. German Alliance Ins. Ass'n*, 52 S. E. 337, 104 Va. 694, 3 L. R. A. [N. S.] 444, 113 Am. St. Rep. 1071). In *Scrivner v. Anchor Fire Ins. Co.*, 144 Iowa, 328, 122 N. W. 942, the facts were these: The soliciting agent of an insurance company attempted to secure additional insurance from an insured, but was advised that the insured would take his additional insurance in another company, but the agent was requested to forward the insured's policy to the company to procure an indorsement more fully covering his goods insured. The agent had no authority to act for the company, save as a solicitor, and attempted to exercise no other authority in returning the policy for reformation. It was held that defendant was not charged with any notice as to insured's intentions to take additional insurance, nor as to his actual application to another company therefor, though such application was made before the policy with the corrected description of the goods insured was returned, and was not estopped from setting up as a defense the breach of condition in its policy against the taking of additional insurance in another company; and Code, § 1750, providing that the term "agent" as applied to insurance shall include any person who shall, directly or indirectly, transact any insurance business for an insurance company, and that any agent representing such company who may solicit insurance or transact the business generally of such company shall be held to be the agent of the company with authority to transact all business within the scope of his employment, is immaterial on the question.

Where reinstatement of insurance policy was procured by false representations, made on the company's blank, that insured was in sound health, that the truth was known to agents of insurer, who had no duties respecting issuance or reinstatement of policies or waiver of conditions, held not constructive notice to insurer, so as to constitute a waiver of forfeiture (*McCormack v. Security Mut. Life Ins. Co.*, 116 N. E. 74, 220 N. Y. 447).

2541 (m). On the other hand in other states it is held that it is immaterial in what capacity the agent acquires information if he has the information in mind when he acts for the company.

New York Mut. Savings & Loan Ass'n v. Westchester Fire Ins. Co., 110 App. Div. 760, 97 N. Y. Supp. 436, affirmed in 189 N. Y. 525. 82 N. E. 1129; *Fire Ass'n of Philadelphia v. La Grange & Lockhart Compress Co.*, 50 Tex. Civ. App. 172, 109 S. W. 1134.

So an insurance company is estopped to claim a forfeiture of a fire policy under its provision that it shall be void if the building be

or become unoccupied and so remain for 10 days, the general local agent who issued it knowing when he did so that the tenant and his family had gone away, and would be absent beyond the end of the 10 days; and it is immaterial that the agent was also the renting agent of insured, and as such acquired his knowledge (*New York Mut. Savings & Loan Ass'n v. Westchester Fire Ins. Co.*, 110 App. Div. 760, 97 N. Y. Supp. 436, affirmed in 82 N. E. 1129, 189 N. Y. 525).

2542-2543. (n) Knowledge acquired as agent of other company

2542 (n). An insurance company is charged with notice of other insurance, if its agent is also the agent for other companies, and as such procures the policies for the other insurance (*Henderson v. Standard Fire Ins. Co.*, 143 Iowa, 572, 121 N. W. 714). So, where two insurance companies represented by the same general agents are in reality one and the same company, permission by the general agents acting for one company to a tenant to keep articles on the premises forbidden by his policy on goods in the building amounts to notice to the other company and waiver by it of a condition in a policy issued on the building to the landlord forfeiting the policy if those articles are kept on the premises (*German American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. [N. S.] 77). And in *Mutual Life Ins. Co. of New York v. Hilton-Green*, 127 C. C. A. 467, 211 Fed. 31, it was held that under the Florida statute relating to agents (Gen. St. Fla. 1906, § 2765), knowledge of managing and soliciting agents and medical examiners as to falsity of representations by insured is chargeable to the company, in the absence of collusion, though acquired in connection with the soliciting and examining of the insured for another company.

In *Traders' Ins. Co. v. Letcher*, 143 Ala. 400, 39 South. 271, it was held that where an agent of a company, after procuring a fire policy stipulating that it should be void on procuring additional insurance, procured additional insurance in another company, either as its agent or as the agent of the insured, the knowledge of the additional insurance acquired by the agent was not knowledge of the company issuing the first policy, since it was not acquired by him while transacting its business as its agent. Moreover, the agent of a company, issuing a fire policy with a stipulation against incumbances, is not required to exercise diligence in examining the registers of insurance in other companies, kept by his predecessor, in order to ascertain whether mortgage permits had been granted by

any of the other companies represented by such agent (Hartford Fire Ins. Co. v. Wright, 58 Tex. Civ. App. 237, 125 S. W. 363).

2543-2546. (o) Knowledge from prior policies and applications

2543 (o). Where the insured falsely stated in her application she had not before applied for beneficial membership, the insurer is estopped to plead the misrepresentation; the application being on file in the insurer's main office (Supreme Tribe of Ben Hur v. Owens [Okl.] 151 Pac. 198, L. R. A. 1916A, 979).

2544 (o). Where a permit is issued to tenants by insurance agents to do that which is forbidden in policies issued by the same agents to the landlord, it will be presumed, in spite of the testimony to the contrary of the agent actually granting the permit, that they had in mind at the time the policies issued to the landlord (German American Ins. Co. v. Hyman, 42 Colo. 156, 94 P. 27, 16 L. R. A. [N. S.] 77). But, where a policy contained a stipulation that insured would use no explosives, the fact that prior policies issued at a higher rate of premium permitted the use of explosives was not notice to the insurer that insured intended to use explosives in violation of the present policy (Columbian Exposition Salvage Co. v. Union Casualty & Surety Co., 220 Ill. 172, 77 N. E. 128, affirming 123 Ill. App. 245). And the fact that prior fire policies issued by same insurer's agent had attached thereto, insurer's agreement to existing incumbrance which agent knew had been paid off was not notice of subsequent incumbrance so as to estop insurer from relying on breach of warranty against incumbrances (Riley v. Ætna Ins. Co. [W. Va.] 92 S. E. 417, L. R. A. 1917E, 983).

2545 (o). If the insurer, either at the time of issuing a policy or during the life thereof, acquires knowledge of matters affecting the contract, it will be charged with such knowledge on subsequent renewals of the original insurance.

Fire Ass'n of Philadelphia v. Yeagley, 72 N. E. 1035, 34 Ind. App. 387;
Farley v. Spring Garden Ins. Co., 148 Wis. 622, 134 N. W. 1054
(referring to the Wisconsin statute relating to standard policies).

2546-2547. (p) Notice of certain facts as notice of other facts

2546 (p). Knowledge or notice of certain matters affecting the contract will not constitute notice of other matters, unless the latter are a necessary incident of the former, or their evidence may be inferred necessarily from the matters known. Thus a provision in a policy making loss, if any, payable to third party as its inter-

est might appear, does not charge insurer with notice that its interest was that of a chattel mortgagee so as to prevent a forfeiture of the policy (*Woods v. Insurance Co. of State of Pennsylvania*, 82 Wash. 563, 144 Pac. 650). So the fact that, at the time of its contract, an insurance company has knowledge of other insurance upon the property, does not justify the inference that it assented to additional insurance subsequently taken out by the insured (*Kelly v. Liverpool & London & Globe Ins. Co.*, 102 Minn. 178, 111 N. W. 395, judgment affirmed on reargument 102 Minn. 178, 112 N. W. 870, 1019). Moreover, notice given to a mutual company of the death of the insured, with directions to send the notices of assessment thereafter to a designated person, does not charge the insurer with notice that the insured property had been sold to such person (*Towle v. Dirigo Mut. Fire Ins. Co.*, 107 Me. 317, 78 Atl. 374). The Texas statute (Rev. St. 1895, art. 3251) gives lessors of buildings a preference lien for one year on the property of the tenant in the building for the payment of rent, and provides that the article shall not be construed as in any manner affecting any act exempting property from forced sale. It was held, in *Hartford Fire Ins. Co. v. Wright*, 58 Tex. Civ. App. 237, 125 S. W. 363, that though insurer's agent knew that insured occupied leased premises, and that his property was subject to the statutory lien, there was no waiver of a clause rendering the policy void if the property "be or become incumbered by a chattel mortgage," where the lease contained a clause of which the agent was ignorant, giving the landlord a lien for the full term, expressly waiving all exemption laws, and providing that the lien should be cumulative of all statutory liens and remedies.

Knowledge that insured was in hospital for an operation does not charge the insurer with notice that insured had heart disease (*Benson v. Metropolitan Life Ins. Co.*, 161 Mo. App. 480, 144 S. W. 122). And where a life policy and an application therefor provided that it should not take effect unless on its date and delivery the applicant was in sound health, the fact that the insurance company's agent was told prior to and at the time the application was made that the applicant was subject to fits did not charge the company with knowledge that the fits were epileptic (*Thompson v. Metropolitan Life Ins. Co.* [Sup.] 99 N. Y. Supp. 1006, reversed 113 N. Y. Supp. 225, 128 App. Div. 420).

2547-2548. (q) Record of title or incumbrance

2547 (q). The filing of a chattel mortgage is not constructive notice to the insurer under Rev. Laws 1910, § 4032, that the insured property was incumbered (*North British & Mercantile Ins. Co. v. Wright* [Okl.] 154 Pac. 654).

2548-2549. (s) Knowledge by custom or usage

2548 (s). Insurers are bound to know the customs of the place where they transact business, and are assumed to have made their contracts in reference thereto (*Todd v. German-American Ins. Co. of New York*, 59 S. E. 94, 2 Ga. App. 789). And an insurer is chargeable with knowledge of the usual and customary methods of conducting the business which it insures (*Yost v. Anchor Fire Ins. Co.*, 38 Pa. Super. Ct. 594).

2549-2551. (t) Sufficiency of notice or knowledge

2549 (t). Information to an insurance company that the buildings to be insured were on "leased ground" was sufficient to apprise the company of the nature of the interest of insured under a verbal agreement with his landlord that, in consideration of an annual rental, insured might occupy the premises and erect thereon a building to be his property and removable by him, and effectual to estop the company from setting up as a defense that insured did not own the ground on which the building was situated as required by the policy (*Springfield Fire & Marine Ins. Co. v. Price*, 64 S. E. 1074, 132 Ga. 687). Where a person not having a legal right to redeem from a tax sale redeemed the property and obtained a sheriff's deed, which was recorded, and an agent soliciting insurance was shown a receipt for a tax paid on the property, and could have had the deed examined and thereby discovered such person's want of title, and such person, in good faith, believed that he had title to the property, and represented that he owned the property without making any false statement to the agent as to the character of the title, the policy issued covered such person's interest in the property resulting from his lien for the amount of the tax claim paid to redeem, though it stipulated that it should be void if the interest of insured was not truly stated (*Wilson v. Germania Fire Ins. Co.*, 140 Ky. 642, 131 S. W. 785).

Mere rumor as to insured's habits, communicated to representative of subordinate lodge, was not such knowledge of insured's habits as could be made basis of estoppel (*Cameron v. Royal Neighbors of America* [Mich.] 163 N. W. 902). The knowledge by the

local agent of such a company of a mere remark by insured after the policy had been issued that she had taken out additional insurance in another company, not communicated by him to the company, is not sufficient to afford a basis for a waiver of breach of policy condition not to take out subsequent insurance (*Kring v. Globe Farmers' Town Mut. Fire, Tornado, Cyclone, and Wind-storm Ins. Co., of Rockport*, 195 Mo. App. 133, 189 S. W. 628).

Where an applicant for a policy of life insurance told agent that he was afflicted with some ailment, the nature of which was not disclosed, and that he had been treated by a physician, this was not sufficient knowledge of agent based on plaintiff's statements, to estop company from avoiding policy. *Quinn v. Mutual Life Ins. Co. of New York*, 158 Pac. 82, 91 Wash. 543.

2550 (t). Notice to insurer's agent that insured had other insurance on his "furniture" was notice of other insurance on a piano (*Utz v. Insurance Co. of North America*, 122 S. W. 318, 139 Mo. App. 153). In *O'Neill v. Northern Assur. Co. of London*, 155 Mich. 564, 119 N. W. 911, it appeared that prior to issuing a fire insurance policy, a third person purchased the personal property described therein, and the contract of purchase gave plaintiffs a lien thereon, and provided that the purchaser should keep it insured, and the policy truthfully described the property as purchased on contracts. It was held that defendant was thereby notified that something remained to be done by the purchaser to complete his purchase and that both his interest and plaintiffs' were insured, and the policy was not void because plaintiffs were not the sole and unconditional owners. Where the policy contained a provision that insurer should not be liable beyond the actual cash value of the property, and defendant alleged fraudulent representation by plaintiff in his application as to its value, and it appeared that defendant's agent solicited the insurance, "looked around at the building some," and was not called as a witness for defendant, though present at the trial, it was not error to instruct that defendant was bound by the agent's knowledge gained in soliciting the insurance, though he failed to communicate it, and, if he received the application, defendant must be deemed to have known the value when it issued the policy, and could not be held to have been deceived by, or have relied on, plaintiff's representations (*Helm v. Anchor Fire Ins. Co.*, 132 Iowa, 177, 109 N. W. 605).

The defense, to an action on a benefit certificate, that insured made false statements in his application as to his age and as to

whether he had previously been a member of the order, cannot be held to have been waived because the insurer had notice of facts which would cause a person of ordinary prudence to make inquiry, and that such inquiry, if prosecuted with reasonable diligence, would have resulted in actual knowledge of the falsity of the statements, since the doctrine of waiver or ratification is founded upon actual and not constructive knowledge (*Brotherhood of Railroad Trainmen v. Roberts*, 48 Tex. Civ. App. 325, 107 S. W. 626). So, where the applicant stated that there was a doubt as to his age, detailing the facts, and the agent of the insurer stated that, if applicant was telling the truth, he was acceptable as a member of defendant benefit society, there was no estoppel against the defendant (*Daffron v. Modern Woodmen*, 190 Mo. App. 303, 176 S. W. 498). But, generally, information sufficient to put a reasonably prudent man on inquiry which would have discovered the facts is equivalent to actual notice (*Huestess v. South Atlantic Life Ins. Co.*, 70 S. E. 403, 88 S. C. 31).

2552-2554. (v) Mutual benefit societies

2552 (v). Where a subordinate lodge is the agent of the supreme or grand lodge of the order, knowledge of its officers and members is imputable to the supreme or grand lodge.

Kidder v. Supreme Assembly of A. S. of E., 154 Ill. App. 489 (knowledge as to physical condition of applicant); *Johnson v. Royal Neighbors of America*, 97 N. E. 1084, 253 Ill. 570, affirming judgment 159 Ill. App. 269; *Turner v. Modern Woodmen of America*, 186 Ill. App. 404; *Green v. National Annuity Ass'n*, 135 Pac. 586, 90 Kan. 523 (knowledge of physical condition of applicant); *Hendrickson v. Grand Lodge A. O. U. W.*, 120 Minn. 36, 138 N. W. 946; *Thomas v. Modern Brotherhood of America*, 25 S. D. 632, 127 N. W. 572; *Shultice v. Modern Woodmen of America*, 67 Wash. 65, 120 Pac. 531. And see *Sovereign Camp Woodmen of the World v. Latham*, 59 Ind. App. 290, 107 N. E. 749; *Krecek v. Supreme Lodge of Fraternal Union of America*, 95 Neb. 428, 145 N. W. 859. In *Keys v. National Council, Knights and Ladies of Security*, 174 Mo. App. 671, 161 S. W. 345, it was held that knowledge of the financial officer of a local lodge that insured was over 60 days in arrears in the payment of assessments charged the association with such knowledge. But see *Modern Woodmen v. International Trust Co.*, 25 Colo. App. 26, 136 Pac. 806, holding that, where statements made to one authorized by a fraternal benefit society to organize a local camp as to insured's habits are mere opinions, they do not charge the agent with the duty of investigating the extent of insured's indulgence in intoxicants.

Thus knowledge of the officers and members of the subordinate lodge as to the occupation of a member is generally imputable to the association.

O'Brien v. Catholic Order of Foresters, 172 Ill. App. 638; Zeman v. North American Union, 263 Ill. 304, 105 N. E. 22, affirming 181 Ill. App. 551; Simmons v. Modern Woodmen of America, 185 Mo. App. 483, 172 S. W. 492. But see Hartmann v. National Council of Knights and Ladies of Security, 190 Mo. App. 92, 175 S. W. 212, and Thompson v. Modern Brotherhood of America, 189 Mo. App. 15, 176 S. W. 506, in both of which it is held that under Act March 30, 1911 (Laws 1911, p. 292, § 22), the knowledge of the subordinate lodge is not sufficient, but the knowledge must be brought home to the supreme lodge.

In the O'Brien Case, cited above, the facts as to the member's occupation were known to the recording secretary of the local lodge, and it appeared that he was obliged to keep a description roll of members' occupations. On the other hand, in Grand Lodge A. O. U. W. of Connecticut v. Burns, 84 Conn. 356, 80 Atl. 157, where it appeared that the only person connected with insurer who had knowledge of the member's change of occupation was the recorder of the local lodge, and that it was no part of his duty to investigate the fact, make a record, or report to the grand lodge, it was held that his knowledge was not imputable to the grand lodge.

The Iowa statute (Code, c. 8, § 1811) provides that in an action on a life policy, where defendant seeks to avoid liability on the ground of the intemperate habits of assured, it shall be a sufficient defense to show that the habits of assured were generally known in the community where defendant's agent resided, if thereafter defendant continued to receive the premiums. It was held, in Knapp v. Brotherhood of American Yeomen, 128 Iowa, 566, 105 N. W. 63, that this statute has no application to an action on a certificate issued by a fraternal beneficiary association, as chapter 9, § 1825, exempts such associations from the statutes relating to life insurance companies.

A fraternal organization on the camp plan issuing death benefit certificates to members could provide that notice to the local clerk of matters not necessarily involved in or part of his duty of collection and remittance would not be notice to the supreme camp. Haycock v. Sovereign Camp, Woodmen of the World, 162 Wis. 116, 155 N. W. 923.

5. ESTOPPEL BY FRAUD, MISTAKE, OR NEGLIGENCE OF AGENT**2555-2559. (a) Inserting false answers in application by mistake, negligence, or design of agent**

2555 (a). Where the insured has truthfully stated the facts relating to the risk, but his statements as written by the agent, through the mistake, negligence, or fraud of such agent, do not correspond to insured's statements, the insurer is estopped to predicate misrepresentation or breach of warranty as ground of avoidance.

Farmers' Mut. Ins. Ass'n of Alabama v. Tankersley, 13 Ala. App. 524, 69 South. 410; *Security Mut. Ins. Co. v. Woodson*, 95 S. W. 481, 79 Ark. 266, 116 Am. St. Rep. 75; *Capital Fire Ins. Co. v. Montgomery*, 81 Ark. 508, 99 S. W. 687; *Liverpool & London & Globe Ins. Co. v. Payton*, 128 Ark. 528, 194 S. W. 503; *Merchants' Mut. Fire Ins. Co. v. Harris*, 51 Colo. 95, 116 Pac. 143; *Allen v. Phoenix Assur. Co.*, 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903, 10 Ann. Cas. 328; *Allen v. Phoenix Assur. Co.*, 14 Idaho, 728, 95 Pac. 829; *Carroll v. Hartford Fire Ins. Co.*, 154 P. 985, 28 Idaho, 466; *Iowa Life Ins. Co. v. Haughton*, 46 Ind. App. 467, 87 N. E. 702, reversing on rehearing 85 N. E. 127; *Broadly v. Patrons' Fire & Tornado Ass'n*, 94 Kan. 245, 146 Pac. 343; *Continental Ins. Co. v. Ford*, 131 S. W. 189, 140 Ky. 406; *Scottish Union & National Ins. Co. v. Wylie*, 110 Miss. 681, 70 South. 835; *Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co.*, 133 Mo. App. 57, 113 S. W. 217; *Shockey v. Fidelity-Phoenix Fire Ins. Co. of New York* (Mo. App.) 191 S. W. 1049; *Leisen v. St. Paul Fire & Marine Ins. Co.*, 20 N. D. 316, 127 N. W. 837, 30 L. R. A. (N. S.) 539; *French v. State Farmers' Mut. Hail Ins. Co.*, 29 N. D. 426, 151 N. W. 7, L. R. A. 1915D, 766; *Ætna Ins. Co. of Hartford, Conn., v. Brannon* (Tex. Civ. App.) 91 S. W. 614; *Camden Fire Ins. Ass'n v. Wandell* (Tex. Civ. App.) 195 S. W. 289; *Foster v. Pioneer Mut. Ins. Ass'n*, 79 P. 798, 37 Wash. 288; *Gaskill v. Northern Assur. Co.*, 73 Wash. 668, 132 Pac. 643.

Where misrepresentations in application for policy of burglary insurance were made by insurer's agent with knowledge of the truth, such knowledge estopped the insurer from claiming that policy was void because of false warranties. *New Amsterdam Casualty Co. v. New Palestine Bank*, 59 Ind. App. 69, 107 N. E. 554.

So an insurer was not released because a paster attached to the policy when the property was moved stated that it was located in a building used as a dwelling, whereas it was a mercantile building, where the insured stated the true facts to the agent from whom he

procured the policy when the paster was attached, provided such agent was the agent of the insurer (*Lehmann v. Hartford Fire Ins. Co.*, 167 S. W. 1047, 183 Mo. App. 696).

2558 (a). When the application is filled out by the agent from his own knowledge, no information being sought from the insured, who signs the application in blank or without reading it, relying on the agent's good faith and assumption of knowledge, any false statements are the fault of the company through its agents, and insured cannot be called on to bear the consequences.

Eckert v. Century Fire Ins. Co., 147 Iowa, 507, 124 N. W. 170; *Gardner v. Continental Ins. Co.*, 125 Ky. 464, 101 S. W. 908, 31 Ky. Law Rep. 89; *Maxwell v. York Mut. Fire Ins. Co.*, 95 Atl. 877, 114 Me. 170; *Baumler v. Farmers' Northern Mut. Fire Ins. Co.*, 148 Mich. 430, 111 N. W. 1069; *Bushnell v. Farmers' Mut. Ins. Co.*, 85 S. W. 103, 110 Mo. App. 223; *Coleman v. Caldwell County Mut. Fire Ins. Co.*, 103 S. W. 150, 125 Mo. App. 643; *Bever v. Home Ins. Co. of New York*, 141 Mo. App. 589, 125 S. W. 1184; *La Font v. Home Ins. Co.*, 193 Mo. App. 543, 182 S. W. 1029; *Smith v. Mutual Cash Guaranty Fire Ins. Co.*, 21 S. D. 433, 113 N. W. 94.

An illiterate insured is not barred from recovering on fire insurance policy by false statement in the application prepared by insurer's agent as to stovepipe extending through roof of his house, of which statement insured had no knowledge, when he signed the application without reading. *Turner v. Home Ins. Co.*, 195 Mo. App. 138, 189 S. W. 626.

It seems, also, to be well settled that the insurer is estopped to set up the falsity of a representation, when such falsity is the result of misinterpretation put by the agent on the question or the answer of the insured. So, where the agent of the company in filling out the application for insurance against loss by burglary or larceny construes a certain question to suit the circumstances of the particular case, he acts for the company, and it cannot escape liability on the policy on the ground of the incorrectness of a statement in the application based on a contrary construction (*Kandar v. Aetna Indemnity Co.*, 30 Ohio Cir. Ct. R. 260). And in an action on a fire-policy, where it appeared that at the time of application defendant's agent inquired if there was any lien on the property to be insured, and plaintiff told him that there was a small mortgage thereon, but that he had money in hand sufficient to discharge it, and defendant's agent thereupon answered that question in the policy, that there was no incumbrance, though insured made no declaration of his intention to pay the mortgage, a request to charge that

if defendant's agent actually knew of the alleged mortgage, and told insured to pay it off before the policy was issued, and did not agree for it to remain on the stock of goods after the policy was issued, the agent's act would not operate as a waiver, was properly refused (*Hankinson v. Piedmont Mut. Ins. Co.*, 61 S. E. 905, 80 S. C. 392).

Though an increase of hazard within insured's control may avoid the policy, an agent of the insurer, seeing conditions that might increase the hazard, is bound to instruct insured with reference thereto. So, where plaintiff, about to insure his property, which was being inspected by the insurer's agent, inquired as to whether the operation of a clothes cleaning and pressing business was hazardous, was entitled to rely on the inspector's answer in the negative (*Mongeau v. Liverpool & London & Globe Ins. Co. of Liverpool, Eng.*, 128 La. 654, 55 South. 6).

Where one story of an insured building was occupied by a single man, the other story not being occupied at all, a description of it as a dwelling house in the application could not be complained of by the insurer, where it was inserted by its agent (*Walrod v. Des Moines Fire Ins. Co.*, 159 Iowa, 121, 140 N. W. 218). So, too, where there was a mutual agreement between an insurance agent and the insured to insure the property in a negro cabin, and by error, mistake, or fraud the agent described the property as located in another building, the insurer was bound, whether the agent, at the time the policy was prepared, intended to write the insurance to cover the property in the cabin, or elsewhere (*Ætna Ins. Co. of Hartford, Conn., v. Brannon* [Tex. Civ. App.] 91 S. W. 614). But in this last case it was also held that the insurer was not estopped to show that in fact the property was not misdescribed.

2559-2562. (b) Same—Life and accident insurance

2559 (b). If the insured makes truthful statements in response to the questions contained in the application, and untrue answers are inserted by the agent through fraud, mistake, or negligence of such agent, the insurer is estopped to set up the untruth of the statements as a defense.

Gray v. Stone, 102 Ark. 146, 143 S. W. 114; *Fidelity & Casualty Co. v. Meyer*, 106 Ark. 91, 152 S. W. 995, 44 L. R. A. (N. S.) 493; *Pacific Mut. Life Ins. Co. v. Van Fleet*, 47 Colo. 401, 107 Pac. 1087; *Farrenkoph v. Holm*, 86 N. E. 702, 237 Ill. 94; *Johnson v. Royal Neighbors of America*, 159 Ill. App. 269, judgment affirmed 253 Ill. 570, 97 N. E. 1084; *Picek v. Modern Brotherhood of America*, 177 Ill.

App. 113; *Groffinger v. Metropolitan Life Ins. Co.*, 183 Ill. App. 618; *Teegarden v. Supreme Tribe of Ben Hur*, 190 Ill. App. 474; *United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760; *Iowa Life Ins. Co. v. Haughton* (Ind. App.) 85 N. E. 127; *General Accident, Life & Fire Assur. Corp. v. Richardson*, 163 S. W. 482, 157 Ky. 503; *Mallen v. National Life Ass'n*, 168 Mo. App. 503, 153 S. W. 1065; *Snyder v. Loyal Protective Ins. Co.* (Mo. App.) 196 S. W. 1022; *Higgins v. Supreme Castle of Highland Nobles*, 120 N. W. 137, 83 Neb. 504; *Wisenshine v. Interstate Business Men's Acc. Ass'n*, 98 Neb. 365, 152 N. W. 742; *Williams v. Metropolitan Life Ins. Co.*, 109 App. Div. 843, 96 N. Y. Supp. 823; *Moore v. Prudential Casualty Co.*, 156 N. Y. Supp. 892, 170 App. Div. 849; *Carrozza v. National Life Ins. Co.*, 62 Pa. Super. Ct. 153; *Huestess v. South Atlantic Life Ins. Co.*, 70 S. E. 403, 88 S. C. 31; *Home Circle Soc., No. 2, v. Shelton* (Tex. Civ. App.) 85 S. W. 320; *North American Acc. Ins. Co. v. Trenton* (Tex. Civ. App.) 99 S. W. 740; *Turner v. American Casualty Co.*, 69 Wash. 154, 124 Pac. 486. But see *Miller v. Maryland Casualty Co.*, 193 Fed. 343, 113 C. C. A. 267; *Porter v. General Acc. Fire & Life Assur. Corp.*, 157 Pac. 825, 30 Cal. App. 198.

The rule that where the insured in good faith makes truthful answers to the questions in the application, and the answers, owing to the fraud or mistake of the agent filling out the application, are not correctly transcribed, the insurer is estopped from asserting their falsity as a defense, is applicable to mutual fraternal societies, where the applicant is not a member until after the making of his application. *Lyon v. United Moderns*, 83 Pac. 804, 148 Cal. 470, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672.

In *Modern Woodmen v. Lawson*, 110 Va. 81, 65 S. E. 509, 135 Am. St. Rep. 927, it appeared that questions in an application as to whether insured entirely abstained from intoxicants, and as to how long he had totally abstained, were answered "Yes" and "Always," and questions whether he was ever intoxicated and was intoxicated daily were answered "No" the answers being inserted by the deputy head clerk of the society without giving insured an opportunity to answer, the former remarking: "I know you don't. All of us take a drink. It means a straight drunkard, stays drunk all the time." The report of the society's physician stated that insured's personal habits and physical and mental condition made his prospects to attain the full life expectancy first class, but at the time the deputy clerk, examining physician, and other local officers knew of the falsity of the statements in the application as to insured's habits in the use of intoxicants. It was held that the society was bound by the knowledge of its agents, and was estopped from

claiming a forfeiture because of the false statements in the application.

2561 (b). So, too, where a medical examiner acting within the apparent scope of his duties writes false answers after the applicant has answered correctly and procures the signature of the applicant thereto, the company will be estopped to insist on the falsity of the answers.

Mutual Reserve Fund Life Ass'n v. Cotter, 81 Ark. 205, 99 S. W. 67; *Hutchins v. Globe Life Ins. Co.*, 126 Ark. 360, 190 S. W. 446; *Lyons v. United Moderns*, 83 Pac. 804, 148 Cal. 470, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672; *Northwestern Mut. Life Ins. Co. v. Farnsworth*, 60 Colo. 324, 153 Pac. 699; *Turner v. Modern Woodmen of America*, 186 Ill. App. 404; *Stapleton v. National Council, Knights and Ladies of Security*, 192 Ill. App. 482; *Atkinson v. National Council, Knights and Ladies of Security*, 193 Ill. App. 215; *Sargent v. Modern Brotherhood of America*, 148 Iowa, 600, 127 N. W. 52; *McCombs v. Travelers' Ins. Co. of Hartford, Conn.*, 159 Iowa, 435, 141 N. W. 328; *Masonic Life Ass'n v. Robinson*, 156 Ky. 371, 160 S. W. 1078; *Floyd v. Modern Woodmen of America*, 166 Mo. App. 166, 148 S. W. 178; *Kribs v. United Order of Foresters*, 177 S. W. 766, 191 Mo. App. 524; *Carmichael v. John Hancock Mut. Life Ins. Co.*, 95 N. Y. Supp. 587, 48 Misc. Rep. 386; *Gioia v. Metropolitan Life Ins. Co.*, 161 N. Y. Supp. 234, 97 Misc. Rep. 380; *Lindstrom v. National Life Ins. Co. of United States*, 84 Or. 588, 165 Pac. 675; *Supreme Lodge of the Fraternal Brotherhood v. Jones (Tex. Civ. App.)* 143 S. W. 247.

As the medical examiner is the agent of the insurer the fact that an applicant for insurance certified that his answers to the medical examiner were correctly recorded is only prima facie evidence of that fact; but the burden is on plaintiff to allege and prove that the answers were not correctly written by the medical examiner if she wishes to benefit by this contention. *Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866.

Where the application is filled up by the agent without consulting the applicant, and without any declarations by him, the insurer is estopped to claim that any of the statements are untrue.

Maloney v. Maryland Casualty Co., 113 Ark. 174, 167 S. W. 845; *Roe v. National Life Ins. Ass'n*, 137 Iowa, 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144; *Hewey v. Metropolitan Life Ins. Co.*, 100 Me. 523, 62 Atl. 600.

In the *Hewey Case* it was said that where an application was signed in blank by the applicant and delivered to an agent of the company to be filled out from information contained in a previous application which had been made out in his presence and signed by

him, and the second application as filled out was forwarded to the company and the policy issued, delivered and accepted, the applicant was bound by the second application if the agent filled it in accordance with the terms of the first one; but if he filled in the second application with answers not contained in the first one, or changed the answers, the applicant was not bound. And, moreover, if a comparison of the two applications showed that if the applicant had been asked questions contained in the second application he might have answered, the same as he did the first, but might have answered in an entirely different way, the answers in the second application could not be said to be such necessary inferences from those contained in the first as to be binding upon the applicant.

2562 (b). If the agent or medical examiner undertakes to interpret the questions or answers, the company is bound by any misinterpretation by such agent, which results in untrue statements in the application.

Masonic Life Ass'n of Western New York v. Robinson, 149 Ky. 80, 147 S. W. 882, 41 L. R. A. (N. S.) 505; Masonic Life Ass'n v. Robinson, 156 Ky. 371, 160 S. W. 1078; Wisenstine v. Interstate Business Men's Acc. Ass'n, 98 Neb. 365, 152 N. W. 742; Mutual Reserve Life Ins. Co. v. Dobler, 137 Fed. 550, 70 C. C. A. 134. But see Erickson v. Ladies of the Maccabees of the World, 25 S. D. 183, 126 N. W. 259, where it was held that the act of the soliciting agent of a mutual benefit society in advising assured that the "word 'Accident' would do as an answer" to the question "State the cause of your father's death" cannot be held binding upon the society, where assured expressly agreed in her application that no verbal statement, to whomsoever made, should modify the answers therein, and that she had read and fully understood the same.

An applicant for insurance may rely upon the superior knowledge of the agent, and, in absence of notice of limitations upon his powers, may assume that his authority is commensurate with his employment, and act in good faith upon information and instructions given by him relating to preparing the application (*Modern Woodmen of America v. Lawson*, 110 Va. 81, 65 S. E. 509, 135 Am. St. Rep. 927). So the company is estopped to claim breach of warranty as to full and complete answers, where the company's agent wrote the application and included only what he conceived to be necessary (*Floyd v. Modern Woodmen of America*, 166 Mo. App. 166, 148 S. W. 178).

And where insured orally gave insurer's agent literally true answers, and the agent wrote down answers not literally true, if insured accepted

such answers, she will be deemed to have done so in acceptance of the construction put upon the matter by the agent, and a by-law providing that no officer of the beneficial society is authorized or permitted to waive any of the laws of the society relating to the contract for payment of benefits between any member and the society does not apply (*Schwartz v. Royal Neighbors of America*, 108 Pac. 51, 12 Cal. App. 595).

The applicant may also rely on the agent's determination of the materiality of the questions and answers and the necessity of disclosure called for by the questions.

Sargent v. Modern Brotherhood of America, 148 Iowa, 600, 127 N. W. 52; *Modern Woodmen of America v. Angle*, 104 S. W. 297, 127 Mo. App. 94.

The company is estopped to assert the falsity of statements as to the occupation of the insured, where the classification of insured's occupation was made by the agent, who knew the facts.

Gilmore v. Modern Protective Ass'n, 171 Ill. App. 525; *Perry v. John Hancock Mut. Life Ins. Co.*, 111 N. W. 195, 147 Mich. 645; *Lessnau v. Catholic Order of Foresters*, 163 Mich. 111, 128 N. W. 201; *Parker v. North American Accident Ins. Co.* (W. Va.) 92 S. E. 88, L. R. A. 1917D, 1174.

2562-2566. (c) Same—Contrary doctrine, based on inadmissibility of parol evidence to vary the contract

2563 (c). In New Jersey, the rule that the company is estopped by the fraud, mistake or negligence of the agent in filling up the application is rejected on the theory that to allow the insured to show that he made true answers different from those inserted by the agent would violate the rule that parol evidence is inadmissible to vary a written contract.

Fish v. Metropolitan Life Ins. Co., 75 N. J. Law, 822, 69 Atl. 176; *Silcox v. Grand Fraternity*, 79 N. J. Law, 502, 76 Atl. 1018.

The courts of Oklahoma, following the decision of the United States Supreme Court in the *Northern Assurance Co. Case*, have held the same as to policies issued before Oklahoma became a state (*State Mut. Ins. Co. v. Craig*, 27 Okl. 90, 111 Pac. 325).

2567-2569. (d) Same—Application of doctrine of estoppel where statements are warranties

2567 (d). The doctrine of estoppel by the insertion of false answers applies, whether the statements are warranties or representations.

Scarlett v. National Live Stock Ins. Co., 193 Ill. App. 488; Weisguth v. Supreme Tribe of Ben Hur, 112 N. E. 350, 272 Ill. 541, affirming judgment 194 Ill. App. 17; National Live Stock Ins. Co. v. Simmons, 62 Ind. App. 15, 111 N. E. 18; Bednarek v. Brotherhood of American Yeomen, 48 Utah, 67, 157 P. 884.

2569-2575. (e) Good faith and diligence of insured

2569 (e). The decisions supporting the rule that insured is not responsible for false answers inserted in the application by the fraud, mistake, or negligence of agent are usually based on the theory that the insured has acted in good faith throughout.

The importance of good faith on the part of the insured and his lack of knowledge of the fraud or negligence of the agent are emphasized in the following cases: Lyon v. United Moderns, 148 Cal. 470, 83 Pac. 804, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672; Schwartz v. Royal Neighbors of America, 12 Cal. App. 595, 108 Pac. 51; McCombs v. Travelers' Ins. Co. of Hartford, Conn., 159 Iowa, 435, 141 N. W. 328; Bonewell v. North American Acc. Ins. Co., 160 Mich. 137, 125 N. W. 59; T. S. Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co., 113 S. W. 217, 133 Mo. App. 57; Mallen v. National Life Ass'n, 153 S. W. 1065, 168 Mo. App. 503.

In accordance with rule that good faith is necessary, it has been held that, where an applicant for a benefit certificate, knowing that he had been insane, stated in his medical examination that he had not, the fact that both the agent who took the application and the physician who made the examination knew that insured had been insane, and that his answer was false, does not estop insurer from denying the truth of the answer (Mudge v. Supreme Court I. O. F., 112 N. W. 1130, 149 Mich. 467, 14 L. R. A. [N. S.] 279, 119 Am. St. Rep. 686).

2570 (e). In some jurisdictions it has been held that, if the insured has a copy of the application containing the false answers and fails to inform himself thereof, or remains silent after reading the application, there is such an absence of good faith as will prevent him from relying on the estoppel.

This principle seems to govern in Porter v. General Acc. Fire & Life Assur. Corp., 157 Pac. 825, 30 Cal. App. 198; Goldstone v. Columbia Life & Trust Co., 33 Cal. App. 119, 164 Pac. 416; McGreevy v. Na-

tional Union, 152 Ill. App. 62; *Casey v. Prudential Ins. Co. of America*, 162 Ill. App. 581; *Forwood v. Prudential Ins. Co. of America*, 83 Atl. 169, 117 Md. 254; *Metropolitan Life Ins. Co. v. Freedman*, 123 N. W. 547, 159 Mich. 114, 32 L. R. A. (N. S.) 298; *Modern Woodmen of America v. Angle*, 104 S. W. 297, 127 Mo. App. 94; *Bollard v. New York Life Ins. Co.*, 162 N. Y. Supp. 706, 98 Misc. Rep. 286; *Curry v. Stone* (Tex. Civ. App.) 92 S. W. 263; *Sovereign Camp Woodmen of the World v. Lillard* (Tex. Civ. App.) 174 S. W. 619.

But in *Bever v. Home Ins. Co.*, 141 Mo. App. 589, 125 S. W. 1184, where at the time of signing an application for a fire policy, the insured did not have his glasses with him and consequently was unable to read the application, it was held that he was not, on the ground of lack of good faith, prevented from relying on the estoppel of the company to set up the falsity of his answers.

2571 (e). In *Thomas v. Modern Brotherhood of America*, 25 S. D. 632, 127 N. W. 572, it appeared that the medical examiner of a benefit order did not propound to applicant in her examination the question whether she had ever had a miscarriage, but inserted the answer, "No," without her knowledge. Subsequently the question and answer were discovered by her, and both she and her husband called the attention of the person who acted as agent of the order in obtaining the application to the mistake, applicant in fact, having had a miscarriage. Such agent then said that it made no difference and the application with such answer was sent in to the order. It was held that applicant having sought to have the application corrected, and having been informed by the agent that it was not necessary, the knowledge of the agent was the knowledge of the order, and it was estopped to set up the falsity of the answer to avoid the policy.

2572 (e). On the other hand, in other jurisdictions it has been held that the mere failure to read the application does not convict the insured of bad faith or lack of diligence in discovering the fraud, mistake or negligence of the agent.

Springfield Fire & Marine Ins. Co. v. Price, 132 Ga. 687, 64 S. E. 1074; *Eckert v. Century Fire Ins. Co.*, 147 Iowa, 507, 124 N. W. 170; *Williams v. Metropolitan Life Ins. Co.*, 109 App. Div. 843, 96 N. Y. Supp. 823; *Israelson v. Williams*, 166 App. Div. 25, 151 N. Y. Supp. 679.

So, where insured, when applying for insurance, makes truthful statements to the agent, who fills out the application not in accordance therewith, but falsely, the insured not reading over such

application or suspecting disparity, he is not guilty of fraud, and may recover on the policy (*Simmons v. National Live Stock Ins. Co.*, 187 Mich. 551, 153 N. W. 696, Ann. Cas. 1917D, 42). And where the insured under a health policy answered truthfully questions as to previous illness, and was induced by company's agent not to read application before signing it, the omission to read was excused and cannot be imputed as negligence which would exonerate company (*Collins v. United States Casualty Co.*, 172 N. C. 543, 90 S. E. 585).

2574 (e). The principle that the insured is not bound to know the contents of the application will, of course, apply with special force when the insured is illiterate and unable to read.

Baumler v. Farmers' Northern Mut. Fire Ins. Co., 111 N. W. 1069, 148 Mich. 430; *Home Circle Soc., No. 2, v. Shelton* (Tex. Civ. App.) 85 S. W. 320.

If the insured participates in the fraud of the agent in inserting false answers in the application he cannot of course escape responsibility therefor on the ground that the company is estopped by the acts of its agent.

Loftin v. Great Southern Home Benevolent Ass'n, 9 Ga. App. 121, 70 S. E. 353; *Bonewell v. North American Acc. Ins. Co.*, 125 N. W. 59, 160 Mich. 137; *Mallen v. National Life Ass'n*, 168 Mo. App. 503, 153 S. W. 1065; *Curry v. Stone* (Tex. Civ. App.) 92 S. W. 263; *Wilhelm v. Order of Columbian Knights*, 136 N. W. 160, 149 Wis. 585; *Mutual Life Ins. Co. of New York v. Powell*, 217 Fed. 565, 133 C. C. A. 417.

2577-2580. (g) Nature of agency and general powers of agents—Limitations on powers of agents and other restrictions in application or policy

2577 (g). In some jurisdictions it is held that the insured cannot rely on the estoppel of the company by reason of the insertion of false answers in the application by the agent, when the powers of the agent to waive are limited by the provisions of the policy or application.

Reference may be made to *Fish v. Metropolitan Life Ins. Co.*, 75 N. J. Law, 822, 69 Atl. 176; *Silcox v. Grand Fraternity*, 79 N. J. Law, 502, 76 Atl. 1018; *Sovereign Camp Woodmen of the World v. Lillard* (Tex. Civ. App.) 174 S. W. 619. And the same rule was applied in Oklahoma prior to statehood. *State Mut. Ins. Co. v. Craig*, 27 Okl. 90, 111 Pac. 325.

2579 (g). Obviously the doctrine of estoppel should not be affected by limitations on the power to waive, and, moreover, limita-

tions on the power to waive do not generally apply to matters which would render the policy void in its inception. Consequently it has been held that limitations on the power of an agent to waive forfeitures cannot affect the result of the insertion by the agent either intentionally or by mistake of false answers in the application.

Pacific Mut. Life Ins. Co. of California v. Van Fleet, 107 Pac. 1087, 47 Colo. 401; *Despain v. Pacific Mut. Life Ins. Co.*, 106 Pac. 1027, 81 Kan. 722; *Itzkowitz v. Grand Lodge Independent Western Star Order* (N. Y. Mun. Ct.) 161 N. Y. Supp. 837; *Fishblate v. Fidelity & Casualty Co. of New York*, 53 S. E. 354, 140 N. C. 589; *Suravitz v. Prudential Ins. Co.*, 91 Atl. 495, 244 Pa. 582, L. R. A. 1915A, 273.

2580-2583. (h) Agency for insurer or insured

2580 (h). The general rule seems to be well established that one employed by the insurer in soliciting insurance and filling out the application acts as the agent of the insurer and not of the insured.

Allen v. Phoenix Assur. Co., 95 Pac. 829, 14 Idaho, 728; *Guptill v. Pine Tree State Mut. Fire Ins. Co.*, 84 Atl. 529, 109 Me. 323; *Williams v. Metropolitan Life Ins. Co.*, 96 N. Y. Supp. 823, 109 App. Div. 843; *Leisen v. St. Paul Fire & Marine Ins. Co.*, 20 N. D. 316, 127 N. W. 837, 30 L. R. A. (N. S.) 539; *French v. State Farmers' Mut. Hail Ins. Co.*, 29 N. D. 426, 151 N. W. 7, L. R. A. 1915D, 766; *Smith v. Mutual Cash Guaranty Fire Ins. Co.*, 21 S. D. 433, 113 N. W. 94; *Modern Order of Prætorians v. Hollmig* (Tex. Civ. App.) 103 S. W. 474, judgment reversed on rehearing 105 S. W. 846. But see, contra, *Lynch v. Travelers' Ins. Co.*, 200 Fed. 193, 118 C. C. A. 379.

The same rule has been applied in the case of medical examiners of life insurance companies.

Iowa Life Ins. Co. v. Haughton, 46 Ind. App. 467, 87 N. E. 702, reversing on rehearing 85 N. E. 127; *Modern Order of Prætorians v. Hollmig* (Tex. Civ. App.) 103 S. W. 474, judgment reversed on rehearing 105 S. W. 846; *Supreme Lodge of the Fraternal Brotherhood v. Jones* (Tex. Civ. App.) 143 S. W. 247.

2583 (h). A mere broker, however, is the agent of the insured, and the insertion of false answers by such broker is the act of the insured and not of the company.

Enthoven v. American Fidelity Co. of Montpelier, Vt. (Sup.) 128 N. Y. Supp. 805; *Wolowitch v. National Surety Co. of New York*, 130 N. Y. Supp. 793, 152 App. Div. 14.

In *Mahon v. Royal Union Mut. Life Ins. Co.*, 67 C. C. A. 636, 134 Fed. 732, it appeared that decedent's application for insurance in the E. Company having been declined, such company's agents ap-

plied to defendant's agent for a policy on decedent's life, and were furnished with an application, which they filled up and signed without notice to or authority from deceased, and procured the physician to copy therein the medical examination and certificate which he had previously made on the rejected application, whereupon such agents delivered the application to defendant's agent, who had no notice of the manner in which it was prepared, on which defendant issued a policy, which was delivered to deceased's wife, who paid therefor, believing it to be the policy applied for in the E. Company. It was held that the E. Company's agents in such transaction acted simply as brokers, and not as defendant's agents, and that defendant was therefore not liable on the policy.

In *Travelers' Ins. Co. v. Thorne*, 103 C. C. A. 436, 180 Fed. 82, 38 L. R. A. (N. S.) 626, the facts were as follows: Plaintiff was born without fingers on his right hand, and testified that his right eye had become inflamed through a cold caught while a boy; that the eye was still disfigured; and that its removal had been suggested by a surgeon, though he did not notice any impairment of sight. B., an insurance agent, not employed by defendant, applied to plaintiff to take out insurance, which he agreed to do. B. applied to his own company, but the application was refused. He then went to defendant's office and presented an application for the policy in question, in which B. answered the question as to whether plaintiff had ever been refused, with the words, "not to my knowledge," plaintiff not having been informed of the refusal by B.'s company. B. also answered in the affirmative a statement that plaintiff was in sound condition mentally and physically, that his hearing and vision were not impaired, and that he was not suffering from any mental or bodily infirmity or deformity; the application being signed: "I personally solicit and recommend this risk," B., "Broker, Solicitor, Agent or Subagent." The policy was made out, delivered to B., who collected the premiums from plaintiff, paid the same to defendant's agent, by whom B. was paid his commissions. The policy provided that all the warranties made by insured on acceptance of the policy were true. It was held that B. was the agent of plaintiff, and not of the insurance company, and that the latter was therefore not estopped to assert B.'s misstatements as constituting breaches of warranty in defense to an action on the policy.

2583-2585. (i) Same—Effect of provisions of application or policy

2584 (i). A soliciting agent and a medical examiner of a beneficial association are both agents of the association, and can bind it within the respective scope of their employment, despite a stipulation in the benefit certificate that they are to be considered agents of the applicant (*Masonic Life Ass'n of Western New York v. Robinson*, 147 S. W. 882, 149 Ky. 80, 41 L. R. A. [N. S.] 505).

2591-2592. (k) Same—Statutory provisions

2591 (k). The Missouri statute (Rev. St. 1909, § 6938), making an authorized insurance solicitor the agent of the insurer, does not bind the insurer as to an insured who has entered into a conspiracy with such agent to deceive and defraud it (*Mallen v. National Life Ass'n*, 168 Mo. App. 503, 153 S. W. 1065). So, too, it has been held that the rule pronounced by Civ. Code Ga. 1910, § 3599, that notice to an agent of any matter connected with his agency is notice to the principal, does not apply where an insurance agent proves false to his principal and at another's instance aids in the communication of false reports as to an applicant's insurability, for the purpose of benefiting the other and defrauding his principal; and if the other, with knowledge of the fraud of the agent and its purpose, accepted the policy, she adopted the fraud, and also adopted the agent as her own, and her administrator could not recover on the policy, of which she was beneficiary (*Loftin v. Great Southern Home Benev. Ass'n*, 9 Ga. App. 121, 70 S. E., 353). And under the Maine statute (Rev. St. c. 49, § 93), providing that insurance agents shall be regarded as in the place of their principals, an accident insurance company is bound by its general agent's act in writing and signing an application, at applicant's request, containing representations as to applicant's occupation and habits (*Washburn v. United States Casualty Co.*, 108 Me. 429, 81 Atl. 575).

2592-2594. (l) Mutual companies

2593 (l). Where the soliciting agent of a mutual fire insurance company incorrectly set down plaintiff's answers, and plaintiff signed the application without knowledge thereof, plaintiff could recover for a subsequent loss, though the insurer's by-laws would have forbidden the risk (*Broadly v. Patrons' Fire & Tornado Ass'n*, 94 Kan. 245, 146 Pac. 343).

6. FORM, REQUISITES, AND CONSTRUCTION OF WAIVER IN GENERAL**2595-2601. (c) Prior parol waivers**

2598 (c). An oral executory agreement of the insurer's agent to waive any future breaches of the conditions of the policy is not enforceable, for such an agreement is not a waiver of the effect of an existing condition, but an amendment of the written contract of insurance (*Home Fire Ins. Co. v. Wilson*, 109 Ark. 324, 159 S. W. 1113). Thus it was held in *Robb v. Millers' Mut. Fire Ins. Co.*, 230 Pa. 44, 79 Atl. 150, that an insurance company did not waive the forfeiture under a stipulation against employment of mechanics upon the building without the consent of the insurer, because when the insurance was placed the secretary of the insurance company was told of a proposed change in the insured building, and said that it was all right. Such language does not bind the company, where both the written application and the by-laws printed in the policy provide that the company should not be bound by any act of an agent, unless indorsed on the policy or acknowledged in writing by the president or secretary. So in *Patterson v. American Ins. Co. of Newark*, 164 Mo. App. 157, 148 S. W. 448, it was held that an oral agreement that an insurer would grant a vacancy permit whenever the premises protected by a fire policy should become vacant is not enforceable, not being supported by any new consideration.

2601-2604. (d) Subsequent parol waivers

2601 (d). The general rule seems to be well settled that subsequent parol waivers of conditions and forfeitures are valid and enforceable.

Cooper v. German-American Ins. Co. of New York, 104 N. W. 687, 96 Minn. 81; *Caledonian Fire Ins. Co. v. Shepherd*, 111 Miss. 175, 71 South. 314; *Gorton v. Milwaukee Mechanics' Ins. Co.*, 115 Mo. App. 69, 90 S. W. 747; *British American Assur. Co. v. Francisco*, 58 Tex. Civ. App. 75, 123 S. W. 1144; *Reliance Ins. Co. of Philadelphia v. Dalton* (Tex. Civ. App.) 178 S. W. 966, rehearing denied 180 S. W. 668; *New Jersey Fire Ins. Co. v. Baird* (Tex. Civ. App.) 187 S. W. 356.

2602 (d). Even if a policy requires the insurer's consent to changes to be indorsed thereon, such consent may be given by parol subsequent to the issuing of the policy, as the stipulation

requiring indorsement may be modified the same as any other stipulation.

Phenix Ins. Co. v. Grove, 74 N. E. 141, 215 Ill. 299, 25 L. R. A. (N. S.) 1, affirming judgment 116 Ill. App. 529; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Black v. Grain Shippers' Mut. Fire Ins. Ass'n*, 171 Iowa, 309, 152 N. W. 7; *Gorton v. Milwaukee Mechanics' Ins. Co.*, 90 S. W. 747, 115 Mo. App. 69.

2604-2606. (e) Same—Where policy requires waivers to be in writing

2604 (e). Though the limitation in the policy is that waivers must be in writing, it is quite generally held that a subsequent waiver may rest in parol.

Allen v. Phoenix Assur. Co., 95 Pac. 829, 14 Idaho, 728; *Farmers' & Mechanics' Life Ass'n v. Caine*, 224 Ill. 599, 79 N. E. 956, affirming 123 Ill. App. 419; *Northwestern Nat. Ins. Co. of Milwaukee v. Avant*, 132 Ky. 106, 116 S. W. 274; *People's Nat. Fire Ins. Co. v. Jackson*, 155 Ky. 150, 159 S. W. 688; *Bush v. Hartford Fire Ins. Co.*, 71 Atl. 916, 222 Pa. 419; *Delaware Ins. Co. v. Wallace* (Tex. Civ. App.) 160 S. W. 1130; *Delaware Ins. Co. of Philadelphia v. Hill* (Tex. Civ. App.) 127 S. W. 283; *Mechanics' & Traders' Ins. Co. v. Dalton* (Tex. Civ. App.) 189 S. W. 771. And see *National Live Stock Ins. Co. v. Jackson*, 169 S. W. 695, 160 Ky. 228.

The theory of these cases seems to be that such a limitation may itself be waived (*Queen of Arkansas Ins. Co. v. Forlines*, 94 Ark. 227, 126 S. W. 719). Thus it was held in *Indiana* that a provision that no waiver unless written upon or attached to policy is binding, and that unauthorized incumbrance of property avoids policy, are stipulations in favor of company which it may waive by express agreement or conduct (*Continental Ins. Co. v. Bair* [Ind. App.] 116 N. E. 752). And it was also said in *Northwestern Nat. Ins. Co. of Milwaukee v. Avant*, 132 Ky. 106, 116 S. W. 274, that the consideration supporting the original contract of insurance, stipulating against additional insurance unless the agreement therefor shall be in writing, is sufficient to support a subsequent parol agreement for additional insurance.

2605 (e). In some cases the courts have taken the opposite view, and held that if the policy so prescribes waivers must be in writing.

Nowell v. British-American Assur. Co., 17 Ga. App. 46, 85 S. E. 498; *Bailey v. First Nat. Fire Ins. Co. of Washington*, D. C., 18 Ga. App. 213, 89 S. E. 80; *People's Bank of Mansfield v. Insurance Co. of North America*, 146 Ga. 514, 91 S. E. 684, L. R. A. 1917D, 868; *Sullivan v. Metropolitan Life Ins. Co.*, 88 Pac. 401, 35 Mont. 1;

Billings v. National Ins. Co., 27 Ohio Cir. Ct. R. 552; *Beddall v. Citizens' Ins. Co.*, 28 Pa. Super. Ct. 600.

In *Mulrooney v. Royal Ins. Co. of Liverpool, England*, 163 Fed. 833, 90 C. C. A. 317, it was said that a provision in a policy that none of its terms shall be modified or waived by an agent, except in writing indorsed upon the policy, is valid, both under the general law and under Code Iowa, § 1750, which provides that any agent who may solicit insurance, procure applications, issue policies, adjust losses, or transact business generally for an insurance company "shall be held to be the agent of such insurance company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws, or articles of incorporation of such company to the contrary notwithstanding"; such provision of the policy being one merely regulating the manner in which the agent may exercise his authority.

2606-2607. (f) Same—Where policy requires waivers by agent to be in writing or signed by certain officers

2606 (f). A subsequent waiver may rest in parol, though the application or policy stipulates that no waiver shall be effective unless indorsed in writing on the policy at the home office of the company (*People's Fire Ins. Ass'n of Arkansas v. Goyne*, 96 S. W. 365, 79 Ark. 315, 16 L. R. A. [N. S.] 1180, 9 Ann. Cas. 373). And it is recognized in several cases that such limitations do not apply to the cases of implied waiver.

Security Mut. Life Ins. Co. v. Riley, 157 Ala. 553, 47 South. 735; *Rosater v. Peoria Life Ass'n*, 149 Ill. App. 536; *Wilson v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 91 Atl. 913, 77 N. H. 344.

In *Home Ins. Co. v. Myers (Ky.)* 107 S. W. 719, it was said that a consent on behalf of the company by a local agent to the assignment of a policy was binding on the company, or his act constituted a waiver of the right of forfeiture, notwithstanding the policy declared that no assignment thereof should be valid without the company's consent indorsed on the policy at a designated office, where assignor and assignee were not advised that the agent had no authority to make such waiver and give such consent himself, and, though the agent knew of the assignment, no objection was made by him or the company, and the company did not, under its theory that the policy was rendered void by the assignment, offer to return the part of the premium unearned.

On the other hand, in other courts it has been held that the limitation so restricts the power to waive that even a subsequent waiver cannot rest in parol.

Crook v. New York Life Ins. Co., 75 Atl. 388, 112 Md. 268; *McElroy v. Metropolitan Life Ins. Co.*, 122 N. W. 27, 84 Neb. 866, 23 L. R. A. (N. S.) 968, 19 Ann. Cas. 28; *Meigs v. London Assur. Co.*, 134 Fed. 1021, 68 C. C. A. 249, affirming (C. C.) 126 Fed. 781.

2607-2609. (g) Same—Where policy requires waivers by “officers, agents, or representatives,” to be in writing

2607 (g). The provision in a policy of fire insurance that no officer or agent of the insurer has power to waive any condition thereof unless in writing, and that no privilege affecting the insurance should exist unless so written or attached, does not prevent a change of the contract by oral agreement, and policies to which were attached clear-space clauses, with which insured had not complied, were enforceable against the insurer on proof of an oral agreement between the insurer and agent to abrogate such clauses, made prior to the loss in consideration of an increased premium (*German-American Ins. Co. v. Yellow Poplar Lumber Co.*, 84 S. W. 551, 27 Ky. Law Rep. 105).

2608 (g). On the other hand, in Georgia it is held that under a stipulation that no agent of the company should have power to waive any of the provisions of the policy, except such as by agreement might be indorsed thereon, an agent had no power to bind the company by parol (*Athens Mut. Ins. Co. v. Evans*, 64 S. E. 993, 132 Ga. 703). And a limitation of like character was also regarded as effectual in *Becker v. Exchange Mut. Fire Ins. Co.* (C. C.) 165 Fed. 816.

2609-2610. (h) Statutory provisions

2609 (h). The Michigan Standard Policy Law (Pub. Acts 1905, No. 277), as amended and extended by Pub. Acts 1907, No. 307, and Pub. Acts 1911, No. 246, does not preclude a parol waiver of a breach of a condition in a standard policy (*Dahrooge v. Sovereign Fire Assur. Co.*, 175 Mich. 248, 141 N. W. 572).

Under the Oregon Standard Policy Law (L. O. L. §§ 4666, 4668, as amended by Laws 1911, p. 279), the statutory conditions as to ownership of insured property cannot be waived except in writing attached to or upon the face of the policy (*Boardman v. Insurance Co. of State of Pennsylvania*, 84 Or. 60, 164 Pac. 558).

2610-2614. (i) Construction and operation of waiver or indorsement

2610 (i). An agent, with power to waive in writing certain printed provisions of a fire policy, has authority to write into such policy provisions in conflict with such printed provisions, and such written provisions will be deemed a waiver in writing of any such printed provisions in direct conflict therewith (*Farmers' Nat. Bank v. Delaware Ins. Co.*, 94 N. E. 834, 83 Ohio St. 309). A waiver by the company of one ground of forfeiture is not a waiver of another ground of which it has no knowledge (*Kansas City Life Ins. Co. v. Blackstone* [Tex. Civ. App.] 143 S. W. 702). So the fact that the insurer allowed insured to move his building did not estop it from relying upon the breach of a condition declaring that the policy should be void if the premises were unoccupied for over 10 days (*Fireman's Fund Ins. Co. v. Lyon* [Tex. Civ. App.] 171 S. W. 801). Similarly the written consent of an insurance company that the interest of an insured "as owner of the property" insured be assigned to another, indorsed on the policy by an agent, is not a consent to the incumbering of the property by a mortgage, although the agent knew that such was the nature of the transaction and verbally consented thereto (*Mulrooney v. Royal Ins. Co. of Liverpool, England*, 163 Fed. 833, 90 C. C. A. 317).

A letter of insurer to insured that a note would be accepted "as settlement of premium" did not alter the legal effect of provisions in note and policy that on nonpayment of note at maturity, the policy would cease (*Wichita Southern Life Ins. Co. v. Roberts* [Tex. Civ. App.] 186 S. W. 411). An indorsement by insurer on the policy of consent to change of ownership, without more, cannot be construed as agreement by insurer to become liable to new owner for loss after change of ownership but before consent given (*Swiller v. Home Ins. Co.* [N. J.] 101 Atl. 516, L. R. A. 1917F, 1040). A rider on a fire insurance policy stating "notice of incumbrance waived" is not a waiver of policy provision for forfeiture if foreclosure proceedings are commenced (*Terminal Ice & Power Co. v. American Fire Ins. Co.*, 196 Mo. App. 241, 194 S. W. 722).

2611 (i). It has been held in Massachusetts that an alleged waiver of a condition against vacancy had no relation to the present use of the property, which had never been occupied at the time of the insurance, but could only apply to a possible future condition of the property insured (*Harris v. North American Ins. Co.*, 77 N. E. 493, 190 Mass. 361, 4 L. R. A. [N. S.] 1137). On the other hand, in *Caledonian Ins. Co. v. Smith*, 65 Fla. 429, 62 South. 595,

47 L. R. A. (N. S.) 619, it was said that, where a policy contained a clause providing for invalidity in case of vacancy, an indorsement on the policy authorizing vacancy waived a prior vacancy and continued the policy with the same binding force as it originally possessed. So, too, where the buildings insured were not completed when the policy issued and the fire occurred, and were therefore unoccupied, an agreement annexed to the policy, giving permission to make completions, waived, till the buildings were completed, the provisions of the policy and warranty requiring the buildings to be occupied (*Bakhaus v. Caledonian Ins. Co.*, 77 Atl. 310, 112 Md. 676).

2613 (i). An agreement that other insurance might be procured by insured eliminates the provision in the policy against other insurance (*Northwestern Nat. Ins. Co. of Milwaukee v. Avant*, 132 Ky. 106, 116 S. W. 274). But a condition avoiding a fire insurance policy for additional insurance is not nullified by a permit to take out a limited amount of such insurance (*Teter v. Norfolk Fire Ins. Corp.*, 74 W. Va. 461, 82 S. E. 201).

2614 (i). Notwithstanding the provision in a fire policy that, unless otherwise provided by agreement indorsed thereon, it shall be void if the risk is increased, and that no agent of the insurer shall have power to waive a provision of the policy except in writing indorsed thereon, insured has the right to increase the hazard by operation of a smelter on the premises, where for a consideration a general agent gives permission therefor and attempts to indorse it on the policy, but states the "within smelter," where the smelter was not described therein (*Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234). In *German American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77, the facts were as follows: Defendants issued policies of insurance on plaintiff's building, conditioned to be void if any illuminating gas or vapor be generated in the building, or if any benzine or gasoline be allowed on the premises. It was stated in the policies that they were accepted subject to those conditions, and that no representative of the insurers had power to waive any provisions or conditions, except such as by the terms of the policies may be the subject of the agreement indorsed thereon or added thereto, and such waiver must be written on or attached thereto. Tenants of the building subsequently insured their stock of goods kept therein with one of defendants; the insurance being placed by the same agents. The agents, without plaintiff's

knowledge, issued to the tenants a permit to install a device for the generation of gasoline vapor, and the same was installed without plaintiff's knowledge. The building was subsequently damaged by fire and explosion. It was held that the installation and use of the gasoline plant did not render plaintiff's policies void, as the knowledge of the agents, who were general agents for defendants, that the plant had been installed based on their consent to its installation, is the knowledge of defendants, and constitutes a waiver of the condition in the policy.

In *Manheim Ins. Co. v. Tyner*, 142 Ky. 22, 133 S. W. 1000, the policy which was a marine policy, insured a steamer against loss by fire while "in a seaworthy condition," and provided that the policy should be void while the vessel was unseaworthy, except while proceeding to a port for repairs and during the repairs. After the steamer had been laid up for repairs for about seven months, during which time it was unseaworthy, the owners wrote the insurer that they desired to continue the policy because of having determined to repair the vessel at one of the two ports named, and that they would "begin this work in the next two days, as soon as we can arrange with the proper officials," and the company's letter in reply, dated March 10, 1909, acknowledged receipt of the owner's letter, stating their "intention to have the steamer C. docked and all necessary repairs made within the next few days," at such port, and stated that agreeable to the owners' request the policies would be allowed to remain in force. A fire causing slight damage occurred on the vessel on June 16, 1909, and the company paid the loss, but it did not appear that it knew at the time that the repairs had not been made, or that the vessel was still out of commission. It was held that the letters did not waive such provision of the policy except for a few days while the vessel was being repaired as stated therein.

2614-2617. (j) Sufficiency of writing or indorsement

2614 (j). An insurer whose agent consented to additional insurance, and issued a slip showing such agreement, was estopped from asserting a forfeiture, though such slip was not attached to the policy until after the loss (*American Cent. Ins. Co. v. Hardin* [Tex. Civ. App.] 151 S. W. 1152). Where a waiver of certain conditions of the policy is actually made by indorsement of consent on the policy, it is effectual though not signed. Thus, in *Cosmopolitan Fire Ins. Co. v. Gingold*, 3 Ala. App. 537, 57 South. 266,

it appeared that the owner of insured personalty took his policy to the agent who issued it, and handed it to the agent's clerk in the agent's presence, with a request for a consent to an assignment of interest to a partnership which insured had formed, and for a permit for a change of location. The matter was referred to the agent in person who consented, but, after preparation by the clerk of the proper consents, the agent signed only the removal permit. When the owner called for the policy, it was given to him by the clerk, who stated, in the presence of the agent, that it was all right. It was held that, in connection with evidence that the clerk acted as assistant to the agent, the clerk's testimony as to his making of the indorsement on the policy of a consent to a transfer of interest was competent as showing an adoption by the agent, binding on the insurer, of the indorsement, though unsigned, or as showing facts constituting an estoppel to deny consent to the transfer.

A receipt containing a mistaken recital that an insurance premium was paid for August, instead of July, is not a waiver, new agreement, or extension of time of payment (*Gardner v. Inter-Ocean Life & Casualty Co.*, 93 Kan. 810, 145 Pac. 844).

2615 (j). The conditions of a fire policy, issued to insured alone, when the property was owned by him and his wife, that it shall be void if the interest of insured be not truly stated, or be other than unconditional and sole ownership, are waived by a rider making the loss payable to assured "as interest may appear" (*Bakhaus v. Caledonian Ins. Co.*, 77 Atl. 310, 112 Md. 676).

A fire policy, stipulating in the body thereof that it shall be void if insured has or obtains any other insurance without the assent of insurer, and providing in the attached rider, in which the property is described and the amount of insurance is stated, "\$—— other concurrent insurance permitted," does not permit additional insurance without the assent of insurer (*Miller v. St. Paul Fire & Marine Ins. Co.*, 26 S. D. 454, 128 N. W. 609). In *Bolte & Jansen v. Equitable Fire Ass'n*, 23 S. D. 240, 121 N. W. 773, the policy provided that, "unless otherwise provided by agreement indorsed hereon, or added hereto," the policy should be void, if the insured then had or should thereafter procure additional insurance. A rider clause added to the policy at the time it was issued provided that: "If at the time of the fire the whole amount of insurance on the property covered by this policy shall exceed 75 per cent. of the actual cash value thereon, this company, in case of loss or damage,

shall not be liable to pay more than its pro rata share of said 75 per cent. of the actual cash value of such property; and should the whole insurance at the time of the fire exceed the said per cent., a pro rata return of premium on such excess of insurance from the time of the fire to the expiration of this policy shall be made on the surrender of the policy." The warranty in the application for insurance that there was no other insurance on the property was false. It was held that the rider clause constituted a consent to the prior insurance and a waiver of a forfeiture clause in the policy.

2616 (j). Where an insured requests the agent to issue a new policy on the ground of a change of ownership, and the agent, instead of issuing a new policy, indorses a new contract of insurance on the old policy, naming the new beneficiary individually, and not as trustee, as he had been informed and notified by the parties, the company cannot defend because the new beneficiary was not the sole owner, but merely a trustee (*Porter v. Insurance Co. of North America*, 29 Pa. Super. Ct. 75).

2617-2619. (k) Effect of failure to make indorsement

2617 (k). If an insurer or authorized agent consents to changes which are required to be indorsed on the policy, and promises to make the necessary indorsement, having access to the policy for that purpose, but fails, through mistake, oversight or neglect to make the indorsement, the insurer will nevertheless be bound if not by a waiver, at least by an estoppel in pais.

Home Fire Ins. Co. v. Wilson, 109 Ark. 324, 159 S. W. 1113; *Bank of Anderson v. Home Ins. Co. of New York*, 14 Cal. App. 208, 111 Pac. 507; *Eagle Fire Co. v. Lewallen*, 47 South. 947, 56 Fla. 246; *Continental Ins. Co. v. Bair* (Ind. App.) 114 N. E. 763; *German-American Ins. Co. of New York v. Lee* (Okla.) 151 Pac. 642; *National Union Fire Ins. Co. v. Dorroh*, 63 Tex. Civ. App. 620, 133 S. W. 475. But see *Tilton v. Farmers' Ins. Co. of Town of Palatine*, 143 N. Y. Supp. 107, 82 Misc. Rep. 79, and *T. F. Walsh & Co. v. Queen Ins. Co. of America*, 27 Ohio Cir. Ct. R. 313.

Thus, an agreement of the agent to renew a vacancy permit binds the company, so that, it not having been renewed, and loss having occurred during the time for which it was to be renewed, and while the house was still vacant, recovery may be had on the policy (*Sutherland v. Federal Ins. Co.*, 97 Miss. 345, 52 South. 689). But an agreement by defendant's agent to attach a vacancy permit to plaintiff's policy in case the insured property should become vacant

in the future is not a waiver of a forfeiture for a subsequent vacancy (*Patterson v. American Ins. Co. of Newark, N. J.*, 174 Mo. App. 37, 160 S. W. 59).

2618 (k). A failure to make the indorsement as promised will not operate as an estoppel if the policy is in control of the insured and he does not present it for indorsement (*Perry v. Caledonian Ins. Co.*, 103 App. Div. 113, 93 N. Y. Supp. 50). So a mere direction to assured to bring in the policy for indorsement is not sufficient (*People's Nat. Fire Ins. Co. v. Jackson*, 159 S. W. 688, 155 Ky. 150). And where the by-laws of an insurance company require additional insurance to be noted on the policy, and a member, after taking out additional insurance, informs the secretary of this fact in a chance conversation on a street car, and the secretary tells him to bring his policy to the office of the company to have the additional insurance noted, and the member neglects to do this, he cannot thereafter recover from the company for a loss of property (*Monk v. Penn Tp. Mut. Fire Ins. Ass'n*, 27 Pa. Super. Ct. 449).

In *Kompa v. Franklin Fire Ins. Co.*, 28 Pa. Super. Ct. 425, it appeared that the insured, knowing that a change of title should be noted on the policy, went to the office of a local agent of the company, and there talked with two clerks employed by the local agent who told him that the policy was in the possession of a third person. The insured went to this person for the purpose of getting the policy, but the latter declined to let him have it. He went back and reported this fact to the two clerks, "and then they said they were going to fix it all right, it will be all right." The clerks did nothing, however, and the property was subsequently destroyed by fire. There was no evidence that the clerks had any authority from the company, or from their immediate employer, to waive the condition of the policy. There was also no evidence that either the company or the agent had had any knowledge whatever of the change of title. It was held that the evidence was insufficient to establish a waiver of the forfeiture.

7. ESTOPPEL AND WAIVER BY ISSUANCE AND DELIVERY OF POLICY AND ACTS PRIOR THERETO

2619-2627. (a) General principles

2620 (a). Since the forfeiture of an insurance policy is not favored in law, courts are always prompt to seize hold of any circumstance to indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted (*Graham v. Security Mut. Life Ins. Co.*, 62 A. 681, 72 N. J. Law, 298). Hence it is always open for the insured to show a waiver of a condition in the policy, if the conduct of the insurer gives reasonable grounds to infer that a forfeiture would not be exacted (*Gish v. Insurance Co. of North America*, 87 Pac. 869, 16 Okl. 59, 13 L. R. A. [N. S.] 826). So it has been laid down in many cases that an insurance company will not be permitted to defeat a recovery on a policy issued by it by proving the existence of facts which would render it void if it had full knowledge of such facts when the policy was issued. The rule rests on the doctrine of estoppel, rather than on that of waiver (*Draper v. Oswego County Fire Relief Ass'n*, 82 N. E. 755, 190 N. Y. 12, affirming 115 App. Div. 807, 101 N. Y. Supp. 168). The theory is that it will not be presumed that the insurer intended to issue a policy void from the beginning (*Stoats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185). It would be a fraud on the insured to allow the insurer, after a loss, to urge the invalidity of the policy at its inception (*Leisen v. St. Paul Fire & Marine Ins. Co.*, 20 N. D. 316, 127 N. W. 837, 30 L. R. A. [N. S.] 539). The insurer cannot be heard to say that it issued a policy which it then knew to be invalid (*Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* [Tex. Civ. App.] 167 S. W. 816).

2621 (a). The general rule that delivery of the policy with knowledge of facts rendering it invalid at the time estops the insurer to set up such invalidity is supported by numerous cases.

In general: *Wilson v. Germania Fire Ins. Co.*, 140 Ky. 642, 131 S. W. 785; *Parsons, Rich & Co. v. Lane*, 106 N. W. 485, 97 Minn. 98, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144; *Scarritt Estate Co. v. Casualty Co. of America*, 149 S. W. 1049, 166 Mo. App. 567; *Tilton v. Farmers' Ins. Co. of Town of Palatine*, 143 N. Y. Supp. 107, 82 Misc. Rep. 79; *Johnson v. Rhode Island Ins. Co.*, 172 N. C. 142, 90 S. E. 124; *Damms v. Humboldt Fire Ins. Co.*, 75 Atl. 607, 226 Pa. 358, 18 Ann. Cas. 685; *Central Market Street Co. v. North British & Mercantile Ins. Co. of London and Edinburgh*, 91 Atl. 662, 245 Pa. 272; *Porter v. Insurance Co. of North*

America, 29 Pa. Super. Ct. 75; Exchange Mut. Fire Ins. Co. v. Consolidated Mut. Fire Ins. Co., 46 Pa. Super. Ct. 601; McMillan & Son v. Insurance Co. of North America, 58 S. E. 1020, 1135, 78 S. C. 433; Mecca Fire Ins. Co. v. Smith (Tex. Civ. App.) 135 S. W. 688.

■ Title and ownership: Queen of Arkansas Ins. Co. v. Taylor, 100 Ark. 9, 138 S. W. 990; Loring v. Dutchess Ins. Co., 81 Pac. 1025, 1 Cal. App. 186; National Mut. Fire Ins. Co. v. Duncan, 44 Colo. 472, 98 P. 634, 20 L. R. A. (N. S.) 340; Springfield Fire & Marine Ins. Co. v. Price, 132 Ga. 687, 64 S. E. 1074; Athens Mut. Ins. Co. v. R. H. Ledford & Son, 134 Ga. 500, 68 S. E. 91; Keane v. Century Fire Ins. Co., 150 Iowa, 658, 130 N. W. 724; Gorsch v. Northern Assur. Co. of London (Sup.) 131 N. Y. Supp. 670; Arkansas Ins. Co. v. Cox, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808; Damms v. Humboldt Fire Ins. Co., 226 Pa. 358, 75 Atl. 607, 18 Ann. Cas. 685; Metcalf v. Mutual Fire Ins. Co., 132 Wis. 67, 112 N. W. 22.

Other insurance: Kennedy v. Agricultural Ins. Co. of Sioux Falls, 21 S. D. 145, 110 N. W. 116; Lawver v. Globe Mut. Ins. Co., 25 S. D. 549, 127 N. W. 615; Staats v. Pioneer Ins. Ass'n, 55 Wash. 51, 104 Pac. 185.

Incumbrances: Fire Ass'n of Philadelphia v. Yeagley, 34 Ind. App. 387, 72 N. E. 1035.

In accordance with the rule it was held that where an insurer knew, at the issuance of a policy, that the building insured was upon land owned by the Choctaw and Chickasaw Tribes of Indians, it thereby waived a condition in the policy requiring sole and unconditional ownership by the insured (Conley v. Northwestern Fire & Marine Ins. Co., 34 Okl. 749, 127 Pac. 424). But it has been held that though the president of an insurance company knew when a policy was issued that the insured took the policy desiring to have property other than farm property insured, the company was not estopped, in an action on the policy, to claim the property in question not insured (Geraghty v. Washtenaw Mut. Fire Ins. Co., 108 N. W. 1102, 145 Mich. 635).

The New York statute (Laws 1892, p. 1991, c. 690, § 139, as amended by Laws 1894, p. 1378, c. 611, § 1) provides for the appointment of agents to procure policies of fire insurance incorporations not authorized to do business in the state and requires a filing of affidavits with the insurance department showing that insured was unable to procure the full amount of insurance required from corporations authorized to transact business in the state. An applicant for insurance in such a company on request for the names

of three admitted companies on the risk, gave the names of certain companies, which were not on the risk. It was held that, it not being until the placer or the agent of insured went to the insurer's agent to get the binder that any names of admitted companies on the risk were asked for, and the representative of insurer having received notice of loss and a list of insurance on the risk in which the names of the companies given did not appear, and asked for proof of loss, and insurer having delivered the policies two days after notice that the companies given were not on the risk, any rights that the insurer might have had owing to the mistake in naming the admitted companies on the risk were waived (*Hirsch v. Fidelitas Société Anonyme D'Assurances & De Reassurances*, 99 N. Y. S. 517, 50 Misc. Rep. 582).

The doctrine was applied to a policy of strike insurance in *Buffalo Forge Co. v. Mutual Security Co.*, 83 Conn. 393, 76 Atl. 995. A marine policy was involved in *Farmers' Feed Co. of New York v. Insurance Co. of North America (D. C.)* 162 Fed. 379, decree affirmed 166 Fed. 111, 92 C. C. A. 95, wherein it was held that if defendant, knowing the age and exact condition of a barge, insured her for operation in waters adjacent to New York at a high premium, it could not claim as a defense to a loss of the barge by rough water encountered near Brooklyn Bridge, occasioned by wind and tide, that the barge was unseaworthy within the requirements of the policy. So, too, in reinsurance, if, at the time of issuing a contract of reinsurance, the reinsuring company knows that one of the conditions of the policy is inconsistent with the facts, and the insured has been guilty of no fraud, the company is estopped from setting up the breach of such condition (*Exchange Mut. Fire Ins. Co. v. Consolidated Mut. Fire Ins. Co.*, 46 Pa. Super. Ct. 601).

It has also been held that a provision in a fire policy that in any matter relating to the insurance no person, unless authorized in writing, shall be deemed the agent of the insurer, is waived by acceptance of an application from one who is not authorized in writing as an agent, and writing and delivering a policy thereon and receiving and retaining the premium (*Allen v. Phoenix Assur. Co.*, 95 Pac. 829, 14 Idaho, 728).

2622 (a). Under the theory that notice to or knowledge of an agent is imputable to the insurer, the rule stated applies with equal force where delivery of the policy is made by an agent with knowledge of facts which would render it invalid at its inception.

In general: *Merchants' Mut. Fire Ins. Co. v. Harris*, 51 Colo. 95, 116 Pac. 143; *Abrahamson v. Hartford Fire Ins. Co.*, 181 Ill. App.

254; *Cue v. Connecticut Fire Ins. Co.*, 89 Kan. 90, 130 Pac. 664, 44 L. R. A. (N. S.) 1218; *Massachusetts Bonding & Insurance Co. v. Duncan*, 179 S. W. 472, 166 Ky. 515; *Irwin v. Westchester Fire Ins. Co.*, 109 N. Y. Supp. 612, 58 Misc. Rep. 441, affirmed in 133 App. Div. 920, 118 N. Y. Supp. 1115; *Pearlstine v. Phoenix Ins. Co.*, 54 S. E. 372, 74 S. C. 246; *Fire Ass'n of Philadelphia v. La Grange & Lockhart Compress Co.*, 50 Tex. Civ. App. 172, 109 S. W. 1134.

Title and ownership: *Hartford Fire Ins. Co. v. Enoch*, 96 S. W. 393, 79 Ark. 475; *Commercial Fire Ins. Co. v. Belk*, 88 Ark. 506, 115 S. W. 172; *National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340; *Merchants' Mut. Fire Ins. Co. v. Harris*, 51 Colo. 95, 116 Pac. 143; *Johnson v. Aetna Ins. Co.*, 51 S. E. 339, 123 Ga. 404, 107 Am. St. Rep. 92; *Springfield Fire & Marine Ins. Co. v. Price*, 132 Ga. 687, 64 S. E. 1074; *Athens Mut. Ins. Co. v. R. H. Ledford & Son*, 134 Ga. 500, 68 S. E. 91; *Downs v. Michigan Commercial Ins. Co.*, 157 Ill. App. 32; *Miller v. Prussian Nat. Ins. Co.*, 122 N. W. 1093, 158 Mich. 402; *Hilburn v. Phoenix Ins. Co.*, 140 Mo. App. 355, 124 S. W. 63; *Wisotzkey v. Niagara Fire Ins. Co.*, 112 App. Div. 599, 98 N. Y. Supp. 760, affirmed in 189 N. Y. 532, 82 N. E. 1134; *Leisen v. St. Paul Fire & Marine Ins. Co.*, 20 N. D. 316, 127 N. W. 837, 30 L. R. A. (N. S.) 539; *Stotlar v. German Alliance Ins. Co.*, 23 N. D. 346, 136 N. W. 792; *Same v. Citizens' Ins. Co. of Mo.*, 23 N. D. 352, 136 N. W. 794; *Germania Fire Ins. Co. v. Barringer*, 43 Okl. 279, 142 Pac. 1026; *Plunkett v. Piedmont Mut. Ins. Co.*, 80 S. C. 407, 61 S. E. 893; *Fosmark v. Equitable Fire Ass'n*, 23 S. D. 102, 120 N. W. 777; *Shawnee Fire Ins. Co. v. Chapman*, 63 Tex. Civ. App. 61, 132 S. W. 854; *Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co. (Tex. Civ. App.)* 167 S. W. 816; *Camden Fire Ins. Ass'n v. Wandell (Tex. Civ. App.)* 195 S. W. 289; *National Union Fire Ins. Co. v. Burkholder*, 116 Va. 942, 83 S. E. 404. Where a fire policy stipulates that it shall be void if the interest of insured is not truly stated therein, and insured without title falsely, though honestly, states that he is the owner, the insured may recover to the extent of his interest if the insurer's agent knows or has means of knowing of insured's interest in the property. *Wilson v. Germania Fire Ins. Co.*, 131 S. W. 785, 140 Ky. 642.

Other insurance: *Continental Ins. Co. v. Rosenberg*, 7 Pennewill (Del.) 174, 74 Atl. 1073; *Insurance Co. of North America v. De Loach & Co.*, 61 S. E. 406, 3 Ga. App. 807; *Johnson v. Farmers' Ins. Co., of Cedar Rapids*, 102 N. W. 502, 126 Iowa, 565; *Wilson v. Anchor Fire Ins. Co.*, 143 Iowa, 458, 122 N. W. 157; *Connecticut Fire Ins. Co. v. Moore*, 156 S. W. 867, 154 Ky. 18, Ann. Cas. 1914B, 1106; *Kelly v. Citizens' Mut. Fire Ass'n*, 105 N. W. 675, 96 Minn. 477; *Fields v. German American Ins. Co.*, 140 Mo. App. 158, 120 S. W. 697; *Same v. Queen Ins. Co.*, 140 Mo. App. 168, 120 S. W. 700; *Utz v. Orient Ins. Co.*, 123 S. W. 538, 139 Mo. App. 552; *Western*

Nat. Ins. Co. v. Marsh, 34 Okl. 414, 125 Pac. 1094, 42 L. R. A. (N. S.) 991; Lawver v. Globe Mut. Ins. Co., 25 S. D. 549, 127 N. W. 615.

Incumbrances: Queen of Arkansas Ins. Co. v. Laster, 108 Ark. 261, 156 S. W. 848; Merchants' Mut. Fire Ins. Co. v. Harris, 51 Colo. 95, 116 Pac. 143; Hollstrom v. Forest City Ins. Co., 168 Ill. App. 214; German Fire Ins. Co. of Indiana v. Greenwald, 51 Ind. App. 469, 99 N. E. 1011; Fosmark v. Equitable Fire Ass'n, 23 S. D. 102, 120 N. W. 777.

Use and occupancy: Athens Mut. Ins. Co. v. O'Keefe, 133 Ga. 792, 66 S. E. 1093; Germania Fire Ins. Co. v. Greenwald, 51 Ind. App. 469, 99 N. E. 1011; Guptill v. Pine Tree State Mut. Fire Ins. Co., 84 Atl. 529, 109 Me. 323. *

The fact that persons other than the party to a preliminary oral contract of insurance owned interests in the property insured did not invalidate the contract where the insurer's agent knew the facts in relation to the ownership and that the contract was for the benefit of all the owners (Austin Fire Ins. Co. v. Brown [Tex. Civ. App.] 160 S. W. 973). And where the agent of defendant insurance company accepted applications for insurance, knowing that plaintiff wanted his property insured for \$7,000, and pursuant to his promise to procure such insurance secured applications for policies issued by defendant for \$4,000, and at the same time and as a part of the same transaction undertook to and did obtain the balance from other companies, defendant was estopped from setting up a breach of condition against additional or concurrent insurance in the policies issued (Wensel v. Property Mut. Ins. Ass'n of Waterloo, 105 N. W. 522, 129 Iowa, 295).

In Bemis v. Pacific Coast Casualty Co., 125 Minn. 54, 145 N. W. 622, it was held that the delivery of a policy of burglary insurance by an agent, with knowledge of the actual situation of the risk covered, estops the insurer from denying that the property was insured. In Fire Ass'n of Philadelphia v. La Grange & Lockhart Compress Co., 50 Tex. Civ. App. 172, 109 S. W. 1134, the policy stipulated that if the insurer should claim that a fire was caused by the neglect of another person it should, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured, and that the policy should be void if the insured concealed a material fact concerning the insurance. The agent of the insurer knew that the insured had released a railroad company from liability for loss by fire set by it. The agent acquired the knowledge of the release while acting as a director of

insured. It was held that the insurer was bound by the facts known by the agent at the time of the issuance of the policy, and was liable thereon.

It has been held in Oregon (*Oatman v. Bankers' Fire Relief Ass'n*, 66 Or. 388, 134 Pac. 1033, denying rehearing 66 Or. 388, 133 Pac. 1183) that the rule does not apply to a policy in the standard form containing limitations as to the manner of waiving.

2625 (a). The rule applies to contracts of life and accident insurance as well as to insurance on property.

Reference may be made to *Fair v. Metropolitan Life Ins. Co.*, 5 Ga. App. 708, 63 S. E. 812; *Rome Ins. Co. v. Thomas*, 75 S. E. 894, 11 Ga. App. 539; *Supreme Lodge K. P. v. Few*, 142 Ga. 240, 82 S. E. 627; *Garfinkel v. Alliance Life Ins. Co.*, 140 Ill. App. 380; *Deming v. Prudential Ins. Co. of America*, 169 Ill. App. 96; *Eagleton v. Prudential Ins. Co. of America*, 193 Ill. App. 306; *Ætna Life Ins. Co. v. Bockting*, 39 Ind. App. 586, 79 N. E. 524; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Masonic Life Ass'n v. Robinson*, 156 Ky. 371, 160 S. W. 1078; *Reserve Loan Life Ins. Co. v. Boreing*, 157 Ky. 730, 163 S. W. 1085; *Thorne v. Casualty Co. of America*, 106 Me. 274, 76 Atl. 1106; *Thompson v. Metropolitan Life Ins. Co.*, 99 N. Y. Supp. 1006, reversed on other grounds 113 N. Y. Supp. 225, 128 App. Div. 420; *Lynch v. Germania Life Ins. Co.*, 132 App. Div. 571, 116 N. Y. Supp. 998; *McClelland v. Mutual Life Ins. Co. of New York*, 135 N. Y. Supp. 735, 151 App. Div. 264; *Robinson v. Brotherhood of Locomotive Firemen & Engineers*, 170 N. C. 545, 87 S. E. 537; *Fludd v. Equitable Life Assur. Soc. of United States*, 55 S. E. 762, 75 S. C. 315; *Life & Casualty Ins. Co. v. King*, 137 Tenn. 685, 195 S. W. 585; *Security Mut. Life Ins. Co. v. Calvert* (Tex. Civ. App.) 100 S. W. 1033, judgment reversed 101 Tex. 128, 105 S. W. 320.

Mutual benefit associations: *Peebles v. Eminent Household of Columbian Woodmen*, 111 Ark. 435, 164 S. W. 296; *Walker v. American Order of Foresters*, 162 Ill. App. 30; *Cundiff v. Royal Neighbors of America*, 162 Mo. App. 117, 144 S. W. 128; *Daffron v. Modern Woodmen of America*, 190 Mo. App. 303, 176 S. W. 498.

Of course, if the conditions are such that the knowledge of the agent is not imputable to the company, the rule does not apply. *Iverson v. Metropolitan Life Ins. Co.*, 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N. S.) 866.

Where an accident policy provided that it should be void as to persons under 18 and over 65 years of age, if defendant's agent who sold the policy knew when he did so that insured was over 65 years old defendant could not plead such provision in defense (*Travelers' Ins. Co. of Hartford, Conn., v. Crawford's Adm'r*, 106 S. W. 290, 32 Ky. Law Rep. 517). So, too, the provisions in a post

card accident policy, which was issued to a railway passenger for two days, that the policy did not insure any person over 65 years old, was waived, where the clause was not drawn to the attention of insured, who was 66 years old, and it does not appear that he knew of the clause (*Hause v. Standard Accident Ins. Co.*, 172 Mich. 59, 137 N. W. 694). And it was held in *Daffron v. Modern Woodmen*, 190 Mo. App. 303, 176 S. W. 498, that although the officers of a fraternal benefit society may not waive a by-law providing that applicants over a certain age shall be ineligible, nevertheless the continued delivery of contracts in violation of such provision, so notorious as to charge the society with notice may estop the society to defend on the ground that the age limit had been violated.

Having entered into a contract of life insurance with knowledge of the agent's rebate, the insurer could not defeat the contract on the ground that it prohibited rebating of agent. *Commercial Life Ins. Co. v. McGinnis*, 50 Ind. App. 630, 97 N. E. 1018.

The doctrines of waiver and estoppel, arising out of the knowledge and acts of agents, apply to mutual companies as well as to old line insurance companies.

Hankinson v. Piedmont Mut. Ins. Co., 50 S. C. 392, 61 S. E. 905; *McCarty v. Same*, 81 S. C. 152, 62 S. E. 1, 18 L. R. A. (N. S.) 729; *Metcalf v. Mutual Fire Ins. Co.*, 132 Wis. 67, 112 N. W. 22.

2629-2630. (c) Insurer put on inquiry

2629 (c). If at the time the policy is issued the insurer or its agent had information which if pursued would lead to actual knowledge of facts rendering the policy void at its inception, the insurer is estopped to rely on such facts to avoid the policy. Thus a statement, in the schedule of warranties in an accident policy, that insured, a sales agent, had "supervising duties, not setting up or testing machinery," was sufficient to put the insurer on inquiry as to the nature of insured's supervision of the installation of gas engines sold by him, and, having made no inquiry, it was precluded from claiming, after an accident, that his employment was extrahazardous (*Shoop v. Fidelity & Deposit Co. of Maryland*, 91 Atl. 753, 124 Md. 130, Ann. Cas. 1916D, 954). So, where the policy provides that the loss shall be payable to a trustee as his interest might appear, the insurer is estopped to deny liability on the ground that it did not know the nature and character of the trust (*Peerless Mineral Springs Co. v. German American Ins. Co. of*

New York, 151 Wis. 352, 138 N. W. 1023). And it has been held in some cases that the company is estopped if the facts are such as it ought to have known or could readily ascertain.

Porter v. Insurance Co. of North America, 29 Pa. Super. Ct. 75; National Union Fire Ins. Co. v. Burkholder, 116 Va. 942, 83 S. E. 404.

Thus an insurer issuing a policy on a building described as a dwelling house, while, in fact, it was used for factory purposes, may not defeat a recovery for fraudulent concealment of the use of the building, where the agent negligently failed to learn the use of the building when inspecting it prior to the issuance of the policy (Bailey v. Liverpool, London & Globe Ins. Co., 149 S. W. 1169, 166 Mo. App. 593).

2630 (c). On the other hand, where there is a false representation by the insured, the insurer is not estopped merely because the agent had an opportunity to ascertain the actual facts. So the effect of a misrepresentation as to the age of an automobile is not avoided by the fact that the agent saw the car (Smith v. American Automobile Ins. Co., 188 Mo. App. 297, 175 S. W. 113).

2630-2632. (d) Issuing policy without application or representations

2630 (d). Where no written application for insurance is required by the insurer, and it asks no questions of insured, and he makes no statements as to certain facts, and the policy is accepted in good faith it will be presumed that the insurer has knowledge of the facts, and by issuing the policy with the knowledge thus imputed the insurer cannot complain that the facts were not correctly stated (Glens Falls Ins. Co. v. Michael, 74 N. E. 964, 167 Ind. 659, 8 L. R. A. [N. S.] 708, rehearing denied 79 N. E. 905, 167 Ind. 659, 8 L. R. A. [N. S.] 708). Consequently some courts lay down the rule that an insurer, issuing a policy without any application or statements as to particular facts and without inquiry in regard thereto, cannot insist that conditions of the policy are violated by such existing facts, but will be considered to have waived the conditions which would otherwise have rendered the policy void at its inception.

Reference may be made to Raulet v. Northwestern Nat. Ins. Co. of Milwaukee, 157 Cal. 213, 107 Pac. 292; German Fire Ins. Co. v. Herbertson, 49 Colo. 217, 112 Pac. 690; Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; Manufacturers' Mut. Fire Ins. Co. v. Swaney, 53 Ind. App. 429, 101 N. E. 843; Clymer Opera Co. v. Flood City Mut. Fire Ins. Co., 85 Atl. 1111, 238 Pa. 137; Clymer Opera Co. v. Birmingham

Fire Ins. Co., 50 Pa. Super. Ct. 639; *Same v. India Mut. Ins. Co.*, Id. 644; *Same v. Safety Mut. Fire Ins. Co.*, Id. 645. And see *Coats v. Camden Fire Ins. Ass'n*, 135 N. W. 524, 149 Wis. 129, where no application was attached to the policy as required by statute.

The Virginia statute (Code 1904, § 1338) declares that all beds of bays and shores of the sea shall be the property of the commonwealth. A building insured in a fire policy stood on a pier built on the bed of Chesapeake Bay, and the insured merely ordered the policy to be taken out, and the insurer delivered the same without any application or representation concerning the property of the insured, but the policy contained a condition that it should be void if the building insured should be on ground not owned by the insured in fee simple. It was held in *Westchester Fire Ins. Co. v. Ocean View Pleasure Pier Co.*, 106 Va. 633, 56 S. E. 584, that the insurer was estopped to set up a breach of the condition.

2631 (d). The rule has been strictly construed in some jurisdictions to the effect that, where the policy is issued without any written application or any statements being made by the insured, and no inquiry by the insurer, the insurer is not estopped to set up a breach of condition rendering the policy void at its inception, if it does not appear that the insurer had knowledge of the particular facts.

This rule seems to underlie the decisions in *Parsons, Rich & Co. v. Lane*, 106 N. W. 485, 97 Minn. 98, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144; *Schiavoni v. Dubuque Fire & Marine Ins. Co.*, 48 Pa. Super. Ct. 252; *Virginia Fire & Marine Ins. Co. v. J. I. Case Threshing Mach. Co.*, 107 Va. 588, 59 S. E. 369, 122 Am. St. Rep. 875.

2632-2634. (e) Issuing policy on written application

2633 (e). The insurer cannot avoid the policy on the ground of misrepresentation in the written application if it issues the policy with knowledge that the statements are false.

Iverson v. Metropolitan Life Ins. Co., 91 Pac. 609, 151 Cal. 746, 13 L. R. A. (N. S.) 866; *Garfinkel v. Alliance Life Ins. Co.*, 140 Ill. App. 380; *Reserve Loan Life Ins. Co. v. Boreing*, 163 S. W. 1085, 157 Ky. 730; *Lynch v. Germania Life Ins. Co.*, 116 N. Y. Supp. 998, 132 App. Div. 571; *Plunkett v. Piedmont Mut. Ins. Co.*, 61 S. E. 893, 80 S. C. 407; *Liverpool & London & Globe Ins. Co. v. Lester* (Tex. Civ. App.) 176 S. W. 602; *Coats v. Camden Fire Ins. Ass'n*, 149 Wis. 129, 135 N. W. 524.

So, in *Ætna Life Ins. Co. v. Bockting*, 39 Ind. App. 586, 79 N. E. 524, it was said that where defendant's agent, who solicited the insurance in question, had knowledge that insured was intemperate

in the use of liquor, and knew before he delivered the policy that insured had falsely stated in his application that he did not use spirituous liquors habitually, the insurer, not having offered to rescind and return the premiums paid within a reasonable time, could not resist payment of the insurance because of insured's fraud, in which the agent participated. And an insurer, having knowledge when it issued a certificate of the falsity of an answer as to insured's prior rejection by defendant, is estopped to assert invalidity of a subsequent certificate by reason of such falsity (*Cundiff v. Royal Neighbors of America*, 144 S. W. 128, 162 Mo. App. 117).

2634-2635. (f) Same—Ambiguous or indefinite answers

2634 (f). The issuance of a policy on an application containing ambiguous, indefinite, or incomplete answers to questions propounded therein will waive any objections to the answers on the ground that they are defective.

Knights of Modern Maccabees v. Gillespie, 14 Ala. App. 493, 71 South. 67; *Security Mut. Ins. Co. v. Berry*, 81 Ark. 92, 98 S. W. 693; *Fidelity Mut. Life Ins. Co. v. Beck*, 104 S. W. 533, 84 Ark. 57, rehearing denied 104 S. W. 1102, 84 Ark. 57; *Buffalo Forge Co. v. Mutual Security Co.*, 76 Atl. 995, 83 Conn. 393; *Allen v. Phoenix Assur. Co.*, 95 Pac. 829, 14 Idaho, 728; *Peterson v. Manhattan Life Ins. Co.*, 91 N. E. 466, 244 Ill. 329, 18 Ann. Cas. 96, reversing 115 Ill. App. 421; *Sterling Life Ins. Co. v. Rapps*, 130 Ill. App. 121; *L. Black & Co. v. London Guarantee & Accident Co.*, 159 App. Div. 186, 144 N. Y. Supp. 424; *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011. Contra, see *Keatley v. Grand Fraternity (D. C.)* 198 Fed. 272.

But, of course, the rule cannot be indulged where there is no evidence that the answers were incomplete (*Nedved v. Court of Honor*, 183 Ill. App. 390).

2635-2636. (g) Same—Effect of failure to answer

2636 (g). Where an applicant for life insurance does not state that he has had asthma, if the company delivers the policy with the knowledge of its agent and general manager that the insured is then suffering with asthma, the concealment will not defeat a recovery on the policy (*Diehl v. Mutual Life Ins. Co. of New York*, 176 Ill. App. 462).

2638-2639. (i) Subsequent breaches which are only a continuation of existing conditions in general

2638 (i). A waiver by delivery of a policy with knowledge is not restricted to matters violating the policy at its inception, but

extends also to a continuation of such violations without any change. Thus, if insured informed the agent who solicited his application that, the surrender of other fire policies having been demanded, he sent them by mail to the insurer for cancellation, and there was no insurance on the property, and his application was accepted and policies issued thereon, there was a waiver of the warranty as to other insurance, though such other policies were never in fact received by such other insurer and canceled (*Merchants' Fire Ins. Co. v. McAdams*, 115 S. W. 175, 88 Ark. 550).

But the rule will not apply, though the same condition is violated, if the violation is of an entirely different nature. So, where the insurer waived its right to avoid a certificate on the ground that the insured was engaged in the sale of liquor as a beverage, in that he drove a beer wagon when the certificate was issued, does not estop it to claim a forfeiture five years later when insured entered the saloon business (*Supreme Tribe of Ben Hur v. Lennert*, 178 Ind. 122, 98 N. E. 115, overruling [*Ind. App.*] 94 N. E. 889, which on rehearing affirmed 93 N. E. 869).

2639-2641. (j) Vacancy

2639 (j). If property is insured with knowledge that it is vacant or unoccupied, the insurer cannot insist on a forfeiture because the premises were vacant or unoccupied and so continue.

Home Fire Ins. Co. v. Wilson, 109 Ark. 324, 159 S. W. 1113; *Dodge v. Grain Shippers' Mut. Fire Ins. Ass'n*, 176 Iowa, 316, 157 N. W. 955; *Guptill v. Pine Tree State Mut. Fire Ins. Co.*, 84 Atl. 529, 109 Me. 323; *New York Mut. Savings & Loan Ass'n v. Westchester Fire Ins. Co.*, 97 N. Y. Supp. 436, 110 App. Div. 760, affirmed 82 N. E. 1129, 189 N. Y. 525.

In *Mississippi Home Ins. Co. v. Stevens*, 93 Miss. 439, 46 South. 245, it appeared that plaintiff purchased an old courthouse, which was thereafter used as a schoolhouse. He insured the same as a schoolhouse, and informed the soliciting agent that it was so occupied, and was informed by such agent that the vacancy clause in the policy did not apply to churches, courthouses, and schoolhouses. Such agent knew that the building was not occupied at night nor during the vacations of the school, during one of which it was destroyed by fire. It was held that insurer was estopped to deny liability because of such vacancy. But the issuance of a policy, upon an application showing the title of insured to be a sheriff's certificate of purchase at execution sale under which a deed could not be issued for some months, was not a waiver of a provision of the policy

that it should be void if the premises should become unoccupied (*Chismore v. Anchor Fire Ins. Co.*, 108 N. W. 230, 131 Iowa, 180).

2641-2643. (k) Use and location

2641 (k). The rule that a policy cannot be avoided by continued violation of a condition, where the violation was known to the insurer at the time of delivery of the policy, is also applied to representations and conditions as to the use and operation of the property.

Arkansas Mut. Fire Ins. Co. v. Claiborne, 82 Ark. 150, 100 S. W. 751 (use as dwelling); *Athens Mut. Ins. Co. v. O'Keefe*, 133 Ga. 792, 66 S. E. 1093 (occupancy by tenant); *Ohio Farmers' Ins. Co. v. Vogel* (Ind. App.) 73 N. E. 612 (occupancy by tenant); *Simpson v. Ohio Farmers' Ins. Co.*, 184 Mich. 547, 151 N. W. 610 (use as dwelling); *De Noyelles v. Delaware Ins. Co. of Philadelphia*, 138 N. Y. Supp. 855, 78 Misc. Rep. 649 (use as dwelling).

So, too, where an insurance agent to whom application was made for a policy of fire insurance, and who issued it and received the premium, had full knowledge before the policy was issued, not only that it was claimed by some people that part of the structure insured was a public nuisance as in violation of the city ordinance, but also that it had been so declared by court and its removal ordered, and subsequently, while proceedings were being had with his knowledge involving the question whether the part of the structure should be removed as a nuisance, he permitted the policy to remain uncanceled and unchanged, the insurance company was bound by the policy, since the knowledge of the agent was the knowledge of the company, and it could not deny liability upon its policy by claiming the existence of facts rendering it void where it had full knowledge of the facts when the policy was issued (*Irwin v. Westchester Fire Ins. Co.*, 58 Misc. Rep. 441, 109 N. Y. Supp. 612, affirmed in 118 N. Y. Supp. 1115, 133 App. Div. 920).

2642 (k). If an insurer knows at the time of issuing a policy on a manufacturing establishment that on account of the nature of the business carried on, or the severity of the climate, continuous operation is not contemplated or is impracticable, the insurer is estopped to forfeit the policy for breach of the condition providing for forfeiture if the plant should cease to be operated.

Rochester German Ins. Co. v. Schmidt (C. C.) 151 Fed. 681 (ice plant operated only part of year); *Waukau Milling Co. v. Citizens' Mut. Fire Ins. Co.*, 109 N. W. 937, 130 Wis. 47, 118 Am. St. Rep. 998, 10 Ann. Cas. 795 (mill closed in winter).

2643-2644. (l) Keeping prohibited articles

2643 (l). The rule as to the continuation of existing violations of conditions also applies to the condition prohibiting the keeping of certain hazardous articles on the premises.

Keeping gasoline: *Cue v. Connecticut Fire Ins. Co.*, 130 Pac. 664, 89 Kan. 90, 44 L. R. A. (N. S.) 1218; *American Cent. Ins. Co. v. Chan- cey*, 60 Tex. Civ. App. 61, 127 S. W. 577; *Oklahoma Fire Ins. Co. v. McKey* (Tex. Civ. App.) 152 S. W. 440.

An insurance policy rider, which redistributed the insurance and included new property, constitutes a new insurance contract, within the rule that issuance of a policy with knowledge of assured's use of a substance prohibited by its terms waives such prohibition (*Globe & Rutgers Fire Ins. Co. v. Indiana Reduction Co.*, 62 Ind. App. 528, 113 N. E. 425).

2644-2645. (m) Iron-safe clause

2644 (m). It has been held in several jurisdictions that the failure of insured to keep a safe as required by the iron-safe clause, is waived by issuing the policy with knowledge that the insured had no safe.

Riley v. American Cent. Ins. Co., 117 Mo. App. 229, 92 S. W. 1147; *Rudd v. American Guarantee Fund Mut. Fire Ins. Co.*, 96 S. W. 237, 120 Mo. App. 1; *Weinberger v. Insurance Co. of North America*, 156 S. W. 79, 170 Mo. App. 266; *Plunkett v. Piedmont Mut. Ins. Co.*, 61 S. E. 893, 80 S. C. 407; *Hankinson v. Piedmont Mut. Ins. Co.*, 61 S. E. 905, 80 S. C. 392.

So, too, it has been held that a provision which requires that the insured shall keep an iron safe in which to deposit his books of account is waived where it appears by the application for the policy that he kept no books of account (*Retail Merchants' Ass'n Mut. Fire Ins. Co. v. Cox*, 138 Ill. App. 14). In *Northern Assur. Co. of London v. Carpenter* (Ind. App.) 94 N. E. 779, the insuring clause stated that the company insured against loss by fire for one year in a certain sum, but the defeasance clause stipulated that "as- sured shall before this policy shall take effect * * * make an inventory of the stock covered and keep books of account," show- ing subsequent purchases and sales, and further provided that "failure to observe these conditions shall work a forfeiture of all claims under this policy." The policy also provided that the inven- tory should be kept in an iron safe, or away from the building con- taining the property "hereby insured." It was held, construing the

policy against a forfeiture, that the company, having failed to explain to assured the effect of the inconsistent provision in the defeasance clause, providing that the policy did not take effect until the inventory was made, waived such condition, so that it became effective when it was delivered and the premium was paid.

On the other hand, in *King v. Concordia Fire Ins. Co.*, 140 Mich. 258, 103 N. W. 616, 6 Ann. Cas. 87, it was said that knowledge of the agent of insurer that insured did not have an iron safe is not a waiver of the iron-safe clause, inasmuch as the insured is equally bound by the clause to keep his books secure against fire in another building. And a contention that, as there was no other building in town where insured's property was located safer than the building in which the insured property was located, the iron-safe clause was waived, is untenable, inasmuch as the clause does not impose on insured an obligation to keep his books in a building more secure against fire than his own.

2645. (n) Excepted risks

2645 (n). An averment in a declaration that the agent taking the application for insurance knew that the applicant was an employé of a common carrier does not impose a liability upon the insurer contrary to the terms of the policy (*Ward v. North American Acc. Ins. Co.*, 182 Ill. App. 317).

2645-2648. (o) Delivery with knowledge of intended violations

2646 (o). The delivery of a policy with knowledge of a mere intended violation of its terms will not create a waiver or an estoppel.

Intent to take out additional insurance: *Carleton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 109 Me. 79, 82 Atl. 649, 39 L. R. A. (N. S.) 951; *Rogers v. Home Ins. Co. of New York*, 155 Mo. App. 276, 136 S. W. 743; *Rogers v. Connecticut Fire Ins. Co.*, 157 Mo. App. 671, 139 S. W. 265; *Harwood v. National Union Fire Ins. Co.*, 156 S. W. 475, 170 Mo. App. 298.

Intent to transfer property: *Athens Mut. Ins. Co. v. Evans*, 64 S. E. 993, 132 Ga. 703.

Intent to incumber property: *House v. Security Fire Ins. Co.*, 145 Iowa, 462, 121 N. W. 509; *McCarty v. Piedmont Mut. Ins. Co.*, 62 S. E. 1, 81 S. C. 152, 18 L. R. A. (N. S.) 729.

Intent to make alterations in property: *Atwood v. Caledonian-American Ins. Co. of New York*, 206 Mass. 96, 92 N. E. 32.

2647 (o). There are some cases which apparently support the contrary rule, but it is believed that in most, if not all, of these there

were circumstances existing which actually made the rule inapplicable. Thus in *Furbush v. Consolidated Patrons' & Farmers' Mut. Ins. Co.*, 140 Iowa, 240, 118 N. W. 371, though there was knowledge of an intention to put in an acetylene lighting plant, the insurer consented to an assignment of the policy, after the plant was installed with knowledge of the fact. In *Hulen v. National Fire Ins. Co.*, of Hartford, Conn., 80 Kan. 127, 102 Pac. 52, the policy permitted a certain amount of concurrent insurance. One of the policies necessary to make up the amount was taken out after the policy in suit was issued, and it was properly held that the company was estopped. Similarly, in *Norfolk Fire Ins. Corp. v. Wood*, 113 Va. 310, 74 S. E. 186, 39 L. R. A. (N. S.) 1020, the insured advised the agent that he intended to take out insurance to the amount of \$15,000 on his building. The agent requested that he be allowed to write it; but the insured declined to give him more than \$5,000 desiring to place the rest in other agencies. Nevertheless the agent wrote the policy in suit with a provision forbidding other insurance but the insured was ignorant of the fact that the policy contained such a clause. The court properly decided that the company was estopped to set up a violation of the other insurance clause.

2648-2649. (p) Renewal with knowledge

2649 (p). If an insurer has knowledge of facts avoiding a policy when it was originally issued, he is also estopped to set up such facts against a renewal policy (*Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co.*, 83 C. C. A. 431, 154 Fed. 545). So, too, in *Farley v. Spring Garden Ins. Co.*, 148 Wis. 622, 134 N. W. 1054, it was held that under the Wisconsin statute (St. 1898, § 1941—51) as to renewal of a standard fire policy, an insurer is bound at time of renewal with notice of facts given it at time of issuing the first policy; and the fact that insurer's agent at the time of issuing the renewal policy did not have in mind information furnished when the original policy was issued is immaterial.

In *Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman*, 35 Ind. App. 1, 73 N. E. 730, which was an action on a mutual policy, it appeared that when plaintiff became a member she owned the property in fee simple; that afterward she conveyed the property to her son, retaining a life estate therein; that defendant's secretary was at once notified of the change in title, and he stated that no change in the policy was necessary; that afterward her in-

surance was readjusted, when the company's officers were again notified as to the condition of title to the property, and a new policy was issued containing a condition that a policy issued on property not owned by insured in fee simple would be void; that insured continued to pay assessments until the property was destroyed by fire. It was held that the condition as to the character of insured's title was waived, and defendant is estopped to deny liability on the policy because of such title. So, too, in *German Fire Ins. Co. v. Hebertson*, 49 Colo. 217, 112 Pac. 690, plaintiffs owned an insured building, which was on leased ground, but the policy was secured through the regular agents of the company, which seemed to regard it as an old risk, and the agents, having written insurance on it before, made no inquiries as to the title to the ground, and no representations relative thereto were made, the application not being in writing, the agents apparently attaching no importance to the title, so that the plaintiffs remained in ignorance as to its materiality. The policy was issued, received, and paid for in good faith. It was held that, under all the circumstances, the law imputed to the company a knowledge of the condition of the title to the ground, and it waived the provision relative thereto, when it issued the policy with such knowledge.

Where a mortgagee in possession of a stock of goods insures his interest, and the policy is renewed at the end of the year, thus indicating that the insurer expected the store to continue as a going concern, it cannot insist that insured had no interest in the property at the time of the fire, on the ground that his debt was paid, because he had received proceeds of sales equaling the debt, where, with the acquiescence of the owner of the goods, the mortgagee had, with the proceeds, replenished the stock from time to time, applying the net proceeds only to extinguishment of the debt.

Dalton v. Milwaukee Mechanics' Ins. Co., 126 Iowa, 377, 102 N. W. 120;
Same v. German Ins. Co. (Iowa) 102 N. W. 1131.

Where the field superintendent and local cashier of the defendant insurance company consented to the reinstatement of a life policy after lapse in payment of premiums, knowing that the insured was hopelessly ill, such knowledge was chargeable to the company and it cannot defeat recovery on the ground that a statement signed by the insured recited that he was in good health (*McCormack v. Security Mut. Life Ins. Co.*, 146 N. Y. Supp. 613, 161 App. Div. 33).

2649-2650. (q) Good faith of insured

2650 (q). The rule that it must be presumed that persons are familiar with the contracts to which they are parties, and, in the absence of fraud, are bound by the provisions therein, should not be strictly applied to insurance policies (*Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, 157 Cal. 213, 107 Pac. 292). An insured, receiving a policy of insurance in response to a written application therefor, in which questions are asked and answers given, has a right to presume that the policy is in accord with the application, and that the answers and disclosures made in the application are sufficient to authorize the company to issue the policy, and is not required to return the policy because of conditions in it which might seem in conflict with the application (*Allen v. Phoenix Assur. Co.*, 95 Pac. 829, 14 Idaho, 728). So, too, it was held in *Springfield Fire & Marine Ins. Co. v. Price*, 132 Ga. 687, 64 S. E. 1074, that where, though knowing the facts, the agent failed to note on a policy that the buildings insured were not on ground owned by insured, as required by the policy, the failure of insured to read his policy and observe the omission was not such laches as will defeat a recovery on the policy.

2650-2651. (r) Effect of limitation as to manner of waiver

2650 (r). Notwithstanding the requirement that waivers shall be in writing, the issue of a policy with knowledge or notice of matters vitiating it at its inception will constitute a waiver of such matters.

Fair v. Metropolitan Life Ins. Co., 63 S. E. 812, 5 Ga. App. 708; *Fire Ass'n of Philadelphia v. Yeagley*, 72 N. E. 1035, 34 Ind. App. 387; *People's Nat. Fire Ins. Co. v. Jackson*, 159 S. W. 688, 155 Ky. 150; *Bryant v. Granite State Fire Ins. Co.*, 174 Mich. 102, 140 N. W. 482; *Wisotzkey v. Niagara Fire Ins. Co.*, 112 App. Div. 599, 98 N. Y. Supp. 760, affirmed 82 N. E. 1134, 189 N. Y. 532; *Springfield Fire & Marine Ins. Co. v. Halsey (Okl.)* 153 Pac. 145; *Rearden v. State Mut. Life Ins. Co.*, 79 S. C. 526, 60 S. E. 1106. But see, contra, *Clemments v. German Ins. Co. (C. C.)* 153 Fed. 237; *Roper v. National Fire Ins. Co.*, 76 S. E. 869, 161 N. C. 151; *National Fire Ins. Co. of Hartford, Conn., v. Kneidel*, 30 Ohio Cir. Ct. R. 677.

In Oregon it has been held that the knowledge of the agent of a fire insurance company that the insured did not own the fee simple title to the land cannot waive the provision of the policy, in the standard form prescribed by Laws 1911, pp. 279, 280, that the policy should be void if the insured did not own the fee simple, unless

an agreement to that effect was indorsed upon the policy (*Oatman v. Bankers' Fire Relief Ass'n*, 66 Or. 388, 134 Pac. 1033, denying rehearing 133 Pac. 1183).

2651-2653. (s) Same—Limitations on powers of agents

2651 (s). Restrictions in a policy limiting the power of agents to waive conditions do not apply to those conditions which relate to the inception of the contract, where the agent with full knowledge of the facts issues the policy and collects the premium and insured has acted in good faith.

People's Fire Ins. Co. v. Goyne of Arkansas, 96 S. W. 365, 79 Ark. 315, 16 L. R. A. (N. S.) 1180, 9 Ann. Cas. 373; *Same v. Bird* (Ark.) 96 S. W. 365, 16 L. R. A. (N. S.) 1180; *Same v. H. J. Freeland & Bro.* (Ark.) 96 S. W. 365, 16 L. R. A. (N. S.) 1180; *Wisotzkey v. Niagara Fire Ins. Co.*, 98 N. Y. Supp. 760, 112 App. Div. 599, affirmed 82 N. E. 1134, 189 N. Y. 532; *Leisen v. St. Paul Fire & Marine Ins. Co.*, 20 N. D. 316, 127 N. W. 837, 30 L. R. A. (N. S.) 539; *Insurance Co. of North America v. Little*, 34 Okl. 449, 125 Pac. 1098; *Rear-den v. State Mut. Life Ins. Co.*, 60 S. E. 1106, 79 S. C. 526; *Fosmark v. Equitable Fire Ass'n*, 23 S. D. 102, 120 N. W. 777; *Mecca Fire Ins. Co. v. Smith* (Tex. Civ. App.) 135 S. W. 688.

2653-2655. (t) Same—Doctrine of Northern Assurance Co. Case

2653 (t). The doctrine laid down by the United States Supreme Court in *Northern Assurance Co. v. Grand View Building Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, has, of course, been reaffirmed by that court and in other federal courts.

Penman v. St. Paul Fire & Marine Ins. Co., 30 Sup. Ct. 312, 216 U. S. 311, 54 L. Ed. 493, affirming 81 C. C. A. 151, 151 Fed. 961; *Ætna Life Ins. Co. v. Moore*, 34 Sup. Ct. 186, 231 U. S. 543, 58 L. Ed. 356; *Prudential Ins. Co. of America v. Moore*, 34 Sup. Ct. 191, 231 U. S. 560, 58 L. Ed. 367; *Atlas Reduction Co. v. New Zealand Ins. Co.*, 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433, affirming (C. C.) 121 Fed. 929; *St. Paul Fire & Marine Ins. Co. v. Penman*, 151 Fed. 961, 81 C. C. A. 151; *Clemments v. German Ins. Co.* (C. C.) 153 Fed. 237.

The doctrine of the *Northern Assurance Co. Case* has been recognized as binding on the courts of Oklahoma as to all policies issued prior to statehood.

Deming Inv. Co. v. Shawnee Fire Ins. Co., 83 Pac. 918, 16 Okl. 1, 4 L. R. A. (N. S.) 607; *Sullivan v. Mercantile Town Mut. Ins. Co.*, 20 Okl. 460, 94 Pac. 676, 129 Am. St. Rep. 761; *State Mut. Ins. Co. v. Craig*, 27 Okl. 90, 111 Pac. 325; *Phoenix Ins. Co. v. Ceaphus*, 119 Pac. 583, 29 Okl. 608; *Home Ins. Co. of New York v. Ballard*,

32 Okl. 723, 124 Pac. 316; Des Moines Ins. Co. of Des Moines, Iowa, v. Moon, 126 Pac. 753, 33 Okl. 437; Cosmopolitan Fire Ins. Co. of New York v. Same, 126 Pac. 756, 33 Okl. 445; St. Paul Fire & Marine Ins. Co. v. Peck, 37 Okl. 85, 130 Pac. 805.

In several of the cases cited above the Oklahoma court intimated that its decision was based wholly on the theory that the decision of the United States Supreme Court was binding as to policies issued before statehood, but would not be regarded as binding in cases involving policies issued after statehood. And where the actions involved policies issued since statehood the court has squarely repudiated the doctrine of the Northern Assurance Co. Case.

Western Nat. Ins. Co. v. Marsh, 34 Okl. 414, 125 Pac. 1094, 42 L. R. A. (N. S.) 991; Insurance Co. of North America v. Little, 34 Okl. 449, 125 Pac. 1098; Rochester German Ins. Co. of Rochester, N. Y., v. Rodenhouse, 36 Okl. 378, 128 Pac. 508; Germania Fire Ins. Co. v. Barringer, 43 Okl. 279, 142 Pac. 1026. The Western Nat. Ins. Co. Case contains a very complete list of authorities on the point.

2657. (v) Other acts or conduct before consummation of contract

2657 (v). A clause in a policy by which the insured guaranteed to maintain 80 per cent. insurance is not so inconsistent with a clause providing that the policy should be void in case of additional insurance without the consent of the company, so as to amount to a waiver of the latter provision (*Woolford v. Phenix Ins. Co.*, 76 N. E. 722, 190 Mass. 233). It is to be noted, however, that the additional insurance in this case exceeds the total value of the property.

In *Gambrill v. United States Health & Accident Ins. Co.*, 83 S. C. 236, 65 S. E. 231, the facts were these: An application for health insurance contained statements which plaintiff warranted to be true, one of which recited that he had not had any surgical or medical treatment during the last five years. The policy was issued June 18, 1906, and insurer died April 18, 1907, from cancer. In his preliminary notice of illness, deceased stated that he had been attended by a physician, December 10, 1905, and it was shown that he suffered an operation for cancer on that date, though he was not notified that it was cancer until August, 1906. It was held that a statement made by defendant's agent, who had no knowledge of decedent's illness at the time the application was made, that if decedent got sick he would get his money, was conditioned on the truth of decedent's statement, and, this being false in fact, there was no waiver of the breach of warranty.

8. ESTOPPEL AND WAIVER BY ACTS AND CONDUCT SUBSEQUENT TO DELIVERY

2658-2660. (a) Effect of acts, statements, or conduct in general

2658 (a). Where a policy of insurance is delivered and accepted by the insured, it thereby becomes a contract between the parties, but its terms and conditions may be waived and modified by the application, and the acts of the parties with reference thereto (*Allen v. Phoenix Assur. Co.*, 95 Pac. 829, 14 Idaho, 728). Courts readily seize upon the opportunity to bring about a waiver of a forfeiture of policy by placing a liberal construction upon the acts of the insurer if such construction is demanded by justice, and not repugnant to law (*Occidental Life Ins. Co. v. Jacobson*, 15 Ariz. 242, 137 Pac. 869). And a waiver may be established by evidence of such circumstances as would reasonably result in that conclusion (*Gish v. Insurance Co. of North America*, 87 Pac. 869, 16 Okl. 59, 13 L. R. A. [N. S.] 826).

If, therefore, an insurance company, with knowledge of facts vitiating a policy, enters into negotiations or transactions with the insured, by which the company recognizes or treats the policy as still in force, or by its acts, declarations, or dealings leads the insured to regard himself as protected by the policy, or induces him to incur trouble or expense, such acts, transactions, or declarations will operate as a waiver of the forfeiture, and estop the company from relying thereon as a defense to an action on the policy.

Farmers' Mut. Ins. Ass'n of Alabama v. Tankersley, 13 Ala. App. 524, 69 South. 410; *Queen of Arkansas Ins. Co. v. Forlines*, 94 Ark. 227, 126 S. W. 719; *Home Fire Ins. Co. v. Wilson*, 109 Ark. 324, 159 S. W. 1113; *Queen of Arkansas Ins. Co. v. Malone*, 111 Ark. 229, 163 S. W. 771; *German-American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; *Great Eastern Casualty Co. of New York v. Reed*, 17 Ga. App. 613, 87 S. E. 904; *McKune v. Continental Casualty Co.*, 154 Pac. 990, 28 Idaho, 22; *Dromgold v. Royal Neighbors of America*, 261 Ill. 60, 103 N. E. 584, reversing 177 Ill. App. 1; *Zeman v. North American Union*, 263 Ill. 304, 105 N. E. 22, affirming 181 Ill. App. 551; *Lane v. Yeomen of America*, 125 Ill. App. 406; *Union Cent. Life Ins. Co. v. Burnett*, 136 Ill. App. 187; *Cox v. American Ins. Co.*, 184 Ill. App. 419; *West v. National Casualty Co.*, 61 Ind. App. 479, 112 N. E. 115; *Coppolletti v. Citizens' Ins. Co. of Missouri*, 123 Minn. 325, 143 N. W. 787; *Harris v. Security Life Ins. Co. of America*, 154 S. W. 68, 248 Mo. 304, Ann. Cas. 1914C, 648; *Keys v. National Council, Knights and Ladies of Security*, 174 Mo. App. 671, 161 S. W. 345; *Morgan v. Independent Order of Sons and Daughters of Jacob of America*,

44 South. 791, 90 Miss. 864; *Soehner v. Grand Lodge, Order of Sons of Hermann*, 104 N. W. 871, 74 Neb. 399, *Following Hunt v. State Ins. Co.*, 66 Neb. 121, 92 N. W. 921; *Tilton v. Farmers' Ins. Co. of Town of Palatine*, 143 N. Y. Supp. 107. 82 Misc. Rep. 79; *Holleran v. Prudential Ins. Co. of America*, 159 N. Y. Supp. 284, 172 App. Div. 634; *Liverpool & London & Globe Ins. Co. v. Cargill*, 44 Okl. 735, 145 Pac. 1134; *Shay v. Phoenix Accident & Sick Ben. Ass'n*, 28 Pa. Super. Ct. 527.

Under policy of insurance, where defendant's agent with knowledge waived a condition against generation of gas in building, a subsequent change in the method without the insured's knowledge was not a breach which would avoid the policy. *Marx v. Williamsburgh City Fire Ins. Co.*, 192 Mich. 497, 158 N. W. 1052.

2659 (a). Though it is sometimes said that the doctrine of waiver, whereby the insurer waives its right to declare a forfeiture rests on the assumption that by reason of the action of the insurer the insured has been misled to his prejudice (*Kennedy v. Grand Fraternity*, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. [N. S.] 78), yet it is not necessary that insured be actually misled to his prejudice by the acts claimed to constitute the waiver, but it is sufficient if, after knowledge of all the facts, the conduct of the insurer has been such as to reasonably imply a purpose not to insist upon the forfeiture.

Washburn v. Union Cent. Life Ins. Co., 143 Ala. 485, 38 South. 1011; *Arnold v. American Ins. Co.*, 84 Pac. 182. 148 Cal. 660, 25 L. R. A. (N. S.) 6; *Ballah v. Peoria Life Ass'n*, 159 Ill. App. 222; *Citizens' Mut. Fire Ins. Co. v. Conowingo Bridge Co.*, 113 Md. 430, 77 Atl. 378; *Wintergerst v. Court of Honor*, 185 Mo. App. 373, 170 S. W. 346; *Jensen v. Palatine Ins. Co.*, 81 Neb. 523, 116 N. W. 286; *Graham v. Security Mut. Life Ins. Co.*, 62 Atl. 681, 72 N. J. Law, 298.

The waiver may take place either by express language or by acts from which an intention may be inferred or from which a waiver follows as a legal result, but a waiver cannot as a rule be inferred from mere silence.

Atwood v. Caledonian-American Ins. Co. of New York, 92 N. E. 32, 206 Mass. 96; *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605.

Waiver is essentially a matter of intention, and to establish it there must be some declaration or act, from which the insured might reasonably infer that the insurer did not mean to insist upon a right which because of a change of position induced thereby would be inequitable to enforce. Waiver may be inferred from acts of the insured which show recognition of liability (*Shay v. Phoenix Accident & Sick Ben. Ass'n*, 28 Pa. Super. Ct. 527).

Any agreement or declaration on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by conformity on his part, will estop the company from insisting upon a forfeiture.

Lord v. Des Moines Fire Ins. Co., 99 Ark. 476, 138 S. W. 1008; *National Ben. Ass'n v. Elzie*, 35 App. D. C. 294; *Knoebel v. North American Acc. Ins. Co.*, 135 Wis. 424, 115 N. W. 1094, 20 L. R. A. (N. S.) 1037.

Consequently where, by failure of some exact performance by insured a forfeiture is imposed on him by his contract, the conduct of insurer, sufficient to induce a belief that such strict performance is not insisted on, but that a modified performance will be accepted as equivalent, justifies a conclusion that insurer has waived strict performance (*Seidel v. Equitable Life Assur. Society of the United States*, 119 N. W. 818, 138 Wis. 66). The rule, of course, presupposes knowledge on the part of the insurer or his agent and authority in the person purporting to represent the insurer (*Clair v. Supreme Council, Royal Arcanum*, 172 Mo. App. 709, 155 S. W. 892).

The doctrine of waiver by acts is applicable to mutual benefit societies as well as to regular insurance companies.

Zahm v. Royal Fraternal Union of St. Louis, 154 Mo. App. 70, 133 S. W. 374; *Wintergerst v. Court of Honor*, 185 Mo. App. 373, 170 S. W. 346.

2660-2665. (b) Sufficiency of acts, statements, or conduct

2660 (b). Whether particular acts, statements, or conduct on the part of the insurer or its agent create a waiver or an estoppel has been up for consideration in numerous cases. The following illustrations indicate the varying opinions of the courts as to the effect of the acts or statements:

Where the insurer loaned money to insured and the beneficiary under an agreement whereby the policy was pledged to secure it, and whereby insurer, in case of default, could cancel the policy and apply the cash surrender value to the payment of the loan, the fact that insurer extended by agreement the time for the payment of the debt did not thereby waive its right to cancel the policy for non-payment at the maturity of the debt as fixed by the new agreement, as the new agreement operated for the benefit of insured and beneficiary (*Frese v. Mutual Life Ins. Co. of New York*, 11 Cal. App. 387, 105 Pac. 265).

Where insured, in support of an application for reinstatement in a mutual benefit association, submitted a physician's certificate which showed that he could not be reinstated in any event, and he never was in fact reinstated, the insurer was not estopped to rely on the forfeiture because of a mistake of its local officer in informing insured that a medical certificate was required in order to secure his reinstatement (*Brotherhood of Ry. Trainmen v. Dee*, 101 Tex. 597, 111 S. W. 396, reversing [Tex. Civ. App.] 108 S. W. 492).

The rights of parties relative to double insurance and to building an addition to the premises cannot be affected by subsequent expressions of the agent's opinion as to the necessity of indorsing permission therefor on the policy (*Meigs v. London Assur. Co.*, 134 Fed. 1021, 68 C. C. A. 249, affirming [C. C.] 126 Fed. 781).

In *Dull v. Royal Ins. Co.*, 159 Mich. 671, 124 N. W. 533, the insurer, on being notified of the facts of the title to the insured property and of the refusal of its agent to continue negotiations for a settlement of a loss, wrote that it would take up the matter with the agent and, on receiving notice of the amount of the loss, and a demand for its adjustment, wrote that the holder of the policy, if he believed he had a valid claim, could take such action as he saw fit, but that insurer had not waived, and did not intend to waive, any of its rights under the policy. It was held that insurer did not waive any stipulations in the policy.

Where a fire policy provided that it should be void if the hazard was increased by any means within the knowledge or control of insured, and the hazard came from the presence or the keeping of gasoline on the premises, elsewhere provided against in the policy, and insurer impliedly waived the latter condition, it could not insist that the increased hazard was not also waived (*American Cent. Ins. Co. v. Chancey*, 60 Tex. Civ. App. 61, 127 S. W. 577). But a condition as to increase of risk is not waived because the insurer's agent inspected the property a year before the fire, where the conflagration was caused by a change in the method of manufacture (*Progress Spinning & Knitting Mills Co. v. Southern Nat. Ins. Co.*, 42 Utah, 263, 130 Pac. 63, 45 L. R. A. [N. S.] 122). Neither is such condition waived by a letter written at about the date of the fire which destroyed the policy, by an agent of the company having no authority to waive conditions except by indorsement on the policy or addition thereto, notifying the insured that the policy is canceled, and specifying said violation as the reason therefor (*Ruffner Bros.*

v. Dutchess Ins. Co., 53 S. E. 943, 59 W. Va. 432, 115 Am. St. Rep. 924, 8 Ann. Cas. 866).

A letter written by secretary of insurer is not a waiver of its by-laws providing for death benefit only in event of death within 90 days of accident. *Thompson v. Iowa State Traveling Men's Ass'n* (Iowa) 161 N. W. 655.

In *Springfield Fire & Marine Ins. Co. v. Mattingly* (Ky.) 90 S. W. 577, it appeared that insured conveyed the insured premises, retaining a vendor's lien. The scrivener who drew the contract of sale told the insurer's agent, who was present when the contract was made, that he could either cancel the policy and refund the unearned premium or transfer the policy to the vendee and thus keep the insurance in force for the protection of the vendor's lien. The agent said that he preferred that the transfer should be made. It was held that there was in effect an agreement that the policy should continue in force, notwithstanding a stipulation avoiding the same in case of any change in the title of the property insured; and such contract was enforceable against the insurer, although the policy was not actually transferred in pursuance thereof.

2661 (b). A benefit insurance society waives the right to forfeit by reason of member's occupation as railway brakeman, by assuring his wife that the policy was all right (*Simmons v. Modern Woodmen of America*, 185 Mo. App. 483, 172 S. W. 492). So, too, the forfeiture of a fire policy for vacancy of the property is waived by the agent's assurance, on being notified by the owners of the vacancy, that the insurance was in force (*Home Fire Ins. Co. v. Wilson*, 118 Ark. 442, 176 S. W. 688).

2663 (b). Where the secretary of a county mutual fire insurance company consented to the removal from the county of property insured and subsequently the directors levied and collected assessments on the policy, the company consented to the removal and was liable on the policy for a loss (*Kesler v. Farmers' Mut. Fire & Lightning Ins. Ass'n*, 160 Iowa, 374, 141 N. W. 954). Any rights of insurer, under a clause of its policy that it, unless continued by its consent, shall become void for vacancy for five days without permit, are, of course, waived as to such a vacancy, where it with full knowledge thereof issues a permit for further vacancy (*National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. [N. S.] 340).

Agent of fire insurer, by stating that anything mortgagee or mortgagor of personalty did would be all right, after refusing to indorse

agreement on policy that giving of deed of trust would not void it, did not waive policy provision that it should become void if property was incumbered by mortgage. *Scottish Union & National Ins. Co. v. Bailey*, 114 Miss. 732, 75 South. 593.

In *Henderson v. Standard Fire Ins. Co.*, 143 Iowa, 572, 121 N. W. 714, it was held that the provision of a fire policy forbidding additional insurance was waived, where the company's agent, having placed the insurance, secured another policy for insured in another company for which he was also agent; and it was also said that where insurer's agent, with knowledge of all the existing conditions as to the insurance, secured a permit for insured to remove her stock in one store to another store, in which she also had insured stock, there was a waiver as to the additional insurance clause of the policy. But where an agent, without authority to consent to the removal of property, had transmitted plaintiff's policy to defendant's general agents, who had such authority for their written or printed assent to previous removals, this was unavailable to estop the insurer from relying on the fact that no such assent was procured for the removal in question, because of which defendant denied liability for loss (*Pringle v. Spring Garden Ins. Co.*, 91 N. E. 209, 205 Mass. 88). Where fire policy provided it should be void if insured procured other insurance in excess of \$1,000, insurer's agent, by offering insured policy of another company for greater amount, did not waive additional insurance clause of first policy (*Palatine Ins. Co. v. Smith, McKinnon & Son*, 115 Miss. 324, 75 South. 564).

The provision of a fire policy limiting concurrent insurance to \$3,000 is waived, where, after change in the title, an addition to the building, and concurrent insurance in excess of the \$3,000, application is made to the company for changes in the policy authorizing all of this or for return of the unearned premium, and the same are promised, but the policy is returned with the other changes, but without that as to concurrent insurances, and without any explanation, objection, or return of unearned premium (*Arkansas Mut. Fire Ins. Co. v. Claiborne*, 82 Ark. 150, 100 S. W. 751). And where insurer's agent was told that the property had been sold, and that, on payment of the cash consideration, the deed which was being held in escrow would be delivered to the purchaser, and such agent did not object, but made a memorandum of the information, and requested notification of the consummation of the sale, this constituted a waiver of a provision of the policy rendering it void in case of

transfer without insurer's consent (*British America Assur. Co. v. Francisco*, 58 Tex. Civ. App. 75, 123 S. W. 1144).

Where a fire insurance agent issuing a policy is advised of acts of insured claimed to be in violation of the policy, and such policy is returned by insured to the agent, who notifies the company, which fails to instruct the agent within reasonable time with reference thereto, the return of the policy to insured by the agent, embracing a contract which the agent was then authorized to make, will operate as a new contract between the parties as of the date of its redelivery (*Farmers' Nat. Bank v. Delaware Ins. Co.*, 94 N. E. 834, 83 Ohio St. 309). So, too, the provision of a fire policy that it shall become void if mechanics be employed in the building for more than 15 days at a time is waived, so far as the adding of another story to the building is concerned, by the company amending the policy, after such addition has been made, to cover the building as so changed (*Arkansas Mut. Fire Ins. Co. v. Claiborne*, 82 Ark. 150, 100 S. W. 751). The insurer is not estopped by agent's statement to insured that iron-safe clause was aimed only at dishonest persons, from defending on ground of insured's failure to comply therewith (*Cohen v. Home Ins. Co.* [Del. Super.] 97 Atl. 1014).

2664 (b). The cancellation of a policy after loss and notice of facts, occurring before loss, constituting a forfeiture, coupled with the return of the unearned premium from the date of the forfeiture, does not constitute waiver of forfeiture (*Farmers' & Merchants' Ins. Co. v. Bodge*, 76 Neb. 31, 110 N. W. 1018, reversing on rehearing 76 Neb. 31, 106 N. W. 1004). This case distinguishes *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 78 N. W. 936, 76 Am. St. Rep. 111, as in the latter case the unearned premium was not returned.

A provision in a policy of fire insurance that additional insurance will void the policy unless assented to by the company by indorsement on the policy is not waived by evidence that the insured several months after the policy had been delivered to him procured additional insurance, and thereafter informed the local agent of the company of this fact in a casual conversation on the street, but made no effort to secure an indorsement on the policy either from the company or the local agent, although the latter had power to make the indorsement (*Smith v. West Branch Mut. Fire Ins. Co.*, 31 Pa. Super. Ct. 29). In *Weddington v. Piedmont Fire Ins. Co.*, 141 N. C. 234, 54 S. E. 271, 8 Ann. Cas. 497, the facts were these: After plaintiff had obtained a policy on a stock of goods, he wrote the president of the insurance company requesting a loan or indorse-

ment of his note for \$300 for 12 months, stating that he had purchased goods amounting to \$1,600 on which he had paid over \$700, and that he was willing to give a chattel mortgage on the goods to guaranty payment of the loan requested. Defendant's president replied that he was unable to assist plaintiff, wishing him "success in his undertaking." It was held that the president's letter was not a consent on the part of the insurance company to the mortgaging of plaintiff's goods insured, to the amount of \$867.16, nor operate as a waiver of the breach of the condition in the policy against incumbrances, resulting from the execution of such mortgage.

Sufficiency of acts to show waiver of warranty in a policy insuring lumber that a continuous space of 100 feet should be maintained between the lumber and the mill of assured. *Lumber Underwriters of New York v. Rife*, 35 S. Ct. 717, 237 U. S. 605, 59 L. Ed. 1140, reversing judgment *Rife v. Lumber Underwriters*, 204 F. 32, 122 C. C. A. 346.

2665-2668. (c) Waiver by failure to object or assert forfeiture

2665 (c). An insurance company waives or is estopped to assert a violation of the terms of the insurance contract if the company, on being notified of the violation, remains silent and fails to object or to declare a forfeiture, or cancel, or rescind the contract, within a reasonable time.

The rule is supported by the following cases: *Traders' Ins. Co. v. Letcher*, 39 South. 271, 143 Ala. 400; *Fidelity-Phoenix Fire Ins. Co. v. Ray*, 196 Ala. 425, 72 South. 98; *German-American Ins. Co. v. Harper & Wilson*, 86 S. W. 817, 75 Ark. 98; *Capital Fire Ins. Co. v. Johnson*, 82 Ark. 90, 100 S. W. 749; *Gray v. Stone*, 102 Ark. 146, 143 S. W. 114; *Bank of Anderson v. Home Ins. Co. of New York*, 14 Cal. App. 208, 111 Pac. 507; *German American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; *Phenix Ins. Co. v. Grove*, 74 N. E. 141, 215 Ill. 299, 25 L. R. A. (N. S.) 1, affirming judgment (1904) 116 Ill. App. 529; *Kelly v. People's Nat. Fire Ins. Co.*, 262 Ill. 158, 104 N. E. 188, 50 L. R. A. (N. S.) 1164, affirming 181 Ill. App. 142; *Hollstrom v. Forest City Ins. Co.*, 168 Ill. App. 214; *Glens Falls Ins. Co. v. Michael*, 74 N. E. 964, 167 Ind. 659, 8 L. R. A. (N. S.) 708, rehearing denied 79 N. E. 905, 167 Ind. 659, 8 L. R. A. (N. S.) 708; *Farmers' Mut. Fire Ins. Co. v. Hill*, 45 Ind. App. 605, 91 N. E. 361; *Brashears v. Perry County Farmers' Protective Ins. Co.*, 51 Ind. App. 8, 98 N. E. 889; *York v. Sun Ins. Office (Ind. App.)* 113 N. E. 1021; *North British & Mercantile Ins. Co. v. Robertson*, 134 Ky. 529, 121 S. W. 630; *Mutual Protective League v. Walker*, 163 Ky. 346, 173 S. W. 802; *Mitchell v. Aetna Ins. Co.*, 111 Miss. 253, 71 South. 382; *Riley v. American Cent. Ins. Co.*, 117 Mo. App. 229, 92 S. W. 1147; *McIntyre v. Liver-*

pool, London & Globe Ins. Co., 110 S. W. 604, 121 Mo. App. 88; Fields v. German American Ins. Co., 140 Mo. App. 158, 120 S. W. 697; Same v. Queen Ins. Co., 140 Mo. App. 168, 120 S. W. 700; Rogers v. Home Ins. Co., 155 Mo. App. 276, 136 S. W. 743; Shutts v. Milwaukee Mechanics' Ins. Co., 141 S. W. 15, 159 Mo. App. 436; Patterson v. American Ins. Co. of Newark, 164 Mo. App. 157, 148 S. W. 448; Smith v. Columbia Ins. Co., 145 App. Div. 889, 129 N. Y. Supp. 775; North River Ins. Co. of New York v. O'Conner (Okla.) 164 Pac. 982; Powell v. Continental Ins. Co. of City of New York, 81 S. E. 654, 97 S. C. 375; Lawver v. Globe Mut. Ins. Co., 25 S. D. 549, 127 N. W. 615; Order of United Commercial Travelers v. Simpson (Tex. Civ. App.) 177 S. W. 169; Guarantee Life Ins. Co. v. Evert (Tex. Civ. App.) 178 S. W. 643; Robinson v. Western Assur. Co. (D. C.) 211 Fed. 747.

Life insurance: Modern Woodmen of America v. Vincent, 40 Ind. App. 711, 80 N. E. 427, 82 N. E. 475, 14 Ann. Cas. 89; State Life Ins. Co. v. Jones (Ind. App.) 92 N. E. 879; Commercial Life Ins. Co. v. Schroyer, 176 Ind. 654, 95 N. E. 1004, Ann. Cas. 1914A, 968; American Nat. Ins. Co. v. Fawcett (Tex. Civ. App.) 162 S. W. 10.

So it was held that where it appeared on the face of reinsurance policies that a statement that the reinsured retained a risk of \$750 on the same property was untrue, the reinsurers could not take advantage of the mistake after loss, but would be treated as having waived the same (Scottish Fire Ins. Co. v. Stuyvesant Ins. Co., 161 N. C. 485, 76 S. E. 728). In American Cent. Life Ins. Co. v. Rosenstein, 46 Ind. App. 537, 92 N. E. 380, affirming on rehearing 88' N. E. 97, it appeared that defendant issued a policy on deceased's life December 29, 1905, and insured died January 19, 1906. In March following defendant knew the facts on which it might base a rescission of the contract, and then inquired whether letters of administration had been issued. Suit on the policy was commenced in June, 1906, and on September 15th defendant answered on the theory that the contract was absolutely void, without returning or offering to return the premiums. On October 31st the property of the insured was set off to the widow, and on November 1st the money received by insurer on the policy was tendered to the widow. On March 15, 1907, insurer pleaded a tender of the premium, and paid the same into court for the use of the party entitled thereto. It was held that insurer's election to rescind and offer of statu quo was not made within a reasonable time, and constituted an election to waive the forfeiture. But the fact that an insurance company may by conduct have waived the right to cancel a policy because of the intemperate use by the insured of intoxicating liquors does not

affect its right to defend against an action on such policy on the ground that the death of the insured resulted from the effects of intoxication (*Lowenstein v. Franklin Life Ins. Co.*, 122 Ill. App. 632).

2668-2670. (d) Same—Contrary doctrine

2668 (d). In some instances the rule laid down in the preceding paragraph has been qualified in that it has been held that the insured must have been misled by the insurer's failure to act (*Scheeler v. Casualty Co. of America* [Sup.] 137 N. Y. Supp. 811), or must have altered his position or foregone some right (*Krey Packing Co. v. United States Fidelity & Guaranty Co.*, 189 Mo. App. 591, 175 S. W. 322). So, too, it has been said that mere neglect to insist upon a forfeiture is of itself insufficient (*Rundell & Hough v. Anchor Fire Ins. Co.*, 105 N. W. 112, 128 Iowa, 575, 25 L. R. A. [N. S.] 20).

Mere knowledge of the breach is insufficient: *Home Fire Ins. Co. v. Wilson*, 109 Ark. 324, 159 S. W. 1113; *Gragg v. Home Ins. Co.*, 139 Ky. 472, 107 S. W. 321; *Kamm & Schellinger Brewing Co. v. St. Joseph County Village Fires Ins. Co.*, 134 N. W. 999, 168 Mich. 606.

In South Dakota it has been held that the provision that the standard fire policy prescribed by Laws 1909, c. 164, unless otherwise provided by agreement indorsed thereon, shall be void in case additional insurance is procured, is not waived by the failure of the insurer to cancel the policy, although its agent had notice of the procurement of concurrent insurance (*Hronish v. Home Ins. Co. of New York*, 33 S. D. 428, 146 N. W. 588). And in Minnesota it is said that where the procurement of additional insurance, unless consented to, ipso facto avoids a policy, the mere failure of the insurer to cancel such policy after knowledge of the additional insurance will not constitute an election to continue the policy in force (*Coppoletti v. Citizens' Ins. Co. of Missouri*, 123 Minn. 325, 143 N. W. 787).

The doctrine is also denied in *Beasley v. Phoenix Ins. Co.*, 78 S. E. 722, 140 Ga. 126; *Moller v. Niagara Fire Ins. Co.*, 103 P. 449, 54 Wash. 439, 24 L. R. A. (N. S.) 807, 132 Am. St. Rep. 1115.

2670-2673. (e) Same—Application of doctrine to particular circumstances

2670 (e). In many instances the decisions are, as might be expected, based on the circumstances peculiar to the particular case under consideration. Thus, where the insurer's agent knew that some changes had been made in the insured property, but did not

know whether they were changes in interest or physical changes in its operation, and was then trying to cancel the policy, he did not assent to any change in ownership (*American Steam Laundry Co. v. Hamburg Bremen Fire Ins. Co.*, 121 Tenn. 13, 113 S. W. 394, 21 L. R. A. [N. S.] 442). In *Neimeyer v. Claiborne*, 87 Ark. 72, 112 S. W. 387, the facts were these: A policy contained a stipulation that it should be void if there should be other insurance on the property without the written consent of the insurer indorsed on the policy, and another stipulation that by the "acceptance of this policy, the assured covenants that the application hereof and the by-laws on the back of this policy shall be and form a part hereof, and a warranty by the assured, and the company shall not be bound by any act or statement made by an agent or solicitor unless inserted in this policy." In the complaint in an action on the policy, the administratrix of the estate of assured alleged that defendant was notified on a given date that the amount of concurrent insurance on the property had been increased to a specified amount, and demand was made that the policy be amended to authorize such increase, or canceled and the unearned premium returned, and that defendant at that time promised to make such amendment, and, for the purpose of making such amendment, defendant kept such policy in its possession from such date until the date of the destruction of the property, over a month later. It was held that the facts set up in the complaint constituted a waiver of the forfeiture; it being impossible to abolish the law of waiver by contract.

In *Tucker v. Supreme Tent, Knights of Maccabees of the World*, 123 App. Div. 223, 108 N. Y. Supp. 279, it appeared that the by-laws of the society, made part of a contract of insurance, provided that the benefit certificate of any member who engaged in the manufacture or sale of liquor should become void from the date of his so engaging without any act by the order; that the record keeper should not receive any other assessments from such suspended member; that he should enter the suspension on his records; and that the receipt of subsequent assessments should not continue the benefit certificate in force nor constitute a waiver. After obtaining the insurance, the insured technically took up the prohibited business, but his connection with it was such that he might have concluded that the contract was not thereby affected. After the death of the member, in an action on the certificate, his beneficiaries offered to show that for more than two years after the insured engaged in the prohibited occupation, the record keeper of the local

tent had knowledge of the fact and repeatedly assured the insured that it would not affect the validity of his insurance, and that the insured thereafter continued to pay his assessments. It was held that the evidence was competent, since the jury might have found that the insured had the right to and did assume that the local record keeper had, as his duty required, reported the facts as to change of occupation to the supreme record keeper, and that the forfeiture had been waived.

In *Hollstrom v. Forest City Ins. Co.*, 168 Ill. App. 214, it was said that if the agent of the company is notified that the insured has mortgaged the property covered, and the company does not cancel the policy and return the unearned premium, a defense predicated upon such mortgaging will be deemed to have been waived. Moreover, if, after a policy has been issued, the insured mortgages the property covered, and the insurance company does not elect to cancel the policy and return the unearned premium after it has received notice of such mortgaging, the giving of the second mortgage by the insured to secure the debt covered by the first mortgage will constitute no defense to an action upon the policy; and further, if, after one policy has been issued, the insured mortgages the property covered thereby, and the company, upon notice of such mortgaging, does not cancel the policy and return the unearned premium, the issuance by it of a second policy, with knowledge of such mortgage upon the property covered by the second policy, will preclude a defense predicated upon the failure of the application to recite the existing mortgage.

The failure to declare a forfeiture or cancel the policy was regarded as a waiver in the following cases:

Additional insurance: *Traders' Ins. Co. v. Letcher*, 143 Ala. 400, 39 South. 271; *German-American Ins. Co. v. Harper & Wilson*, 75 Ark. 98, 86 S. W. 817; *Bank of Anderson v. Home Ins. Co. of New York*, 14 Cal. App. 208, 111 Pac. 507; *Phenix Ins. Co. v. Grove*, 215 Ill. 299, 74 N. E. 141, 25 L. R. A. (N. S.) 1, affirming 116 Ill. App. 529; *North British & Mercantile Ins. Co. v. Robertson*, 134 Ky. 529, 121 S. W. 630; *Polk v. Western Assur. Co.*, 90 S. W. 397, 114 Mo. App. 514; *Lawver v. Globe Mut. Ins. Co.*, 25 S. D. 549, 127 N. W. 615.

Title and ownership: *Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 8 L. R. A. (N. S.) 708, rehearing denied 79 N. E. 905; *O'Toole v. Ohio German Fire Ins. Co.*, 123 N. W. 795, 159 Mich. 187, 24 L. R. A. (N. S.) 802; *Fields v. German American Ins. Co.*, 140 Mo. App. 158, 120 S. W. 697; *Same v. Queen Ins. Co.*, 140 Mo. App. 168, 120 S. W. 700.

Removal of property: *McIntyre v. Liverpool, London & Globe Ins. Co.*, 110 S. W. 604, 131 Mo. App. 88; *Shutts v. Milwaukee Mechanics'*

Ins. Co., 159 Mo. App. 436, 141 S. W. 15; *Powell v. Continental Ins. Co.*, 97 S. C. 375, 81 S. E. 654.

Vacancy: *Beashears v. Perry County Farmers' Protective Ins. Co.*, 51 Ind. App. 8, 98 N. E. 889; *Patterson v. American Ins. Co. of Newark*, 148 S. W. 448, 164 Mo. App. 157.

The condition against incumbrances was involved in *Capital Fire Ins. Co. v. Johnson*, 82 Ark. 90, 100 S. W. 749.

Where a fire policy provided that it should become void if, with the knowledge of the insured, foreclosure proceedings should be commenced, the insurer waived a breach of the condition where, upon notice of proceedings, it neglected to cancel the policy. *Kelley v. People's Nat. Fire Ins. Co.*, 104 N. E. 188, 262 Ill. 158, 50 L. R. A. (N. S.) 1164, affirming judgment 181 Ill. App. 142.

Evidence that an insurance agent, who had authority to waive a provision in a fire policy requiring the insured to keep his books in a fireproof safe, knew at the time of issuing the policy that the insured had no such safe, and on the day before the fire, while he saw that insured still failed to comply with the provisions of the policy, instead of canceling the policy, solicited additional insurance, authorized a finding that the provision of the policy was waived. *Riley v. American Cent. Ins. Co.*, 92 S. W. 1147, 117 Mo. App. 229.

In the following cases it was held that there was no waiver: *Gragg v. Home Ins. Co. of New York*, 107 S. W. 321, 32 Ky. Law Rep. 988 (change in title); *Home Fire Ins. Co. v. Wilson*, 109 Ark. 324, 159 S. W. 1113 (vacancy); *Beasley v. Phoenix Ins. Co.*, 140 Ga. 126, 78 S. E. 722 (additional insurance).

That insurer's agent, when notified by insured that the latter would take out other insurance, failed to dissent, was not a waiver of a provision of the policy avoiding it in case of other insurance without insurer's consent and indorsement on the policy; the amount of such additional insurance not being stated, and some of such insurance not being taken out for several weeks afterwards. *Rogers v. Home Ins. Co. of New York*, 155 Mo. App. 276, 136 S. W. 743.

An insurer, merely by failing to object to removal of goods insured in a described building, does not waive the provision that the goods should not be protected elsewhere, for it is essential that there be some waiver or estoppel (*Steil v. Sun Ins. Office of London*, 171 Cal. 795, 155 Pac. 72).

2673-2676. (f) Admission of liability on policy

2673 (f). An admission or recognition of liability, with knowledge of facts vitiating the policy, will waive the breach.

Fireman's Fund Ins. Co. v. Globe Nav. Co., 1236 Fed. 618, 149 C. C. A. 614; *J. Frank & Co. v. New Amsterdam Casualty Co. (Cal.)* 165

Pac. 927; *Queen Ins. Co. v. Patterson Drug Co.* (Fla.) 74 South. 807, L. R. A. 1917D, 1091; *Farmers' Mut. Fire Ass'n v. Steed* (Ga. App.) 93 S. E. 75; *Travis v. Continental Ins. Co.* (Mo. App.) 179 S. W. 766; *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605.

But an admission of liability will not amount to a waiver of violations of the policy unless the insurer has knowledge of the facts at the time, or has been put on inquiry as to such matters.

Schoeller v. Grand Lodge, A. O. U. W. of State of New York, 96 N. Y. Supp. 1088, 110 App. Div. 456; *Kelly v. United States Health & Accident Ins. Co.*, 65 S. E. 949, 84 S. C. 95.

2676-2680. (g) Consent to assignment of policy

2676 (g). As a general rule, qualified according to circumstances existing in a particular case, by consenting to the assignment of the policy with knowledge of violations of its terms, an insurance company waives such violations.

Padrnos v. Century Fire Ins. Co., 142 Iowa, 199, 119 N. W. 133; *Gartsee v. Citizens' Ins. Co.*, 30 Pa. Super. Ct. 602; *State Mut. Life Ins. Co. v. Rosenberry* (Tex. Civ. App.) 175 S. W. 757.

Thus in *Padrnos v. Century Fire Ins. Co.*, 142 Iowa, 199, 119 N. W. 133, the policy was forfeited by the sale of the property and the giving of a purchase price mortgage thereon. Thereafter a soliciting insurance agent, knowing all the facts, and at the instance of a proposed purchaser of the subsequent mortgage, undertook to protect the mortgagee's interest by an assignment of the policy to the purchaser. The policy was sent to the proper officers, who knew of the transfer of the property, and was assigned, and a new premium note taken from the purchaser. It was held that as the knowledge of its agent as to the mortgage was the knowledge of the company, and as breach of the conditions occurred before the assignment, and the purchaser did nothing thereafter to forfeit the policy, the company was estopped to insist on a forfeiture as against the purchaser. In *Furbush v. Consolidated Patrons' & Farmers' Mut. Ins. Co.*, 140 Iowa, 240, 118 N. W. 371, it appeared that the owner of a dwelling house, insured by defendant company, being about to transfer the same, telephoned the company's secretary that the policy thereon would be transferred to plaintiff, the vendee, and on March 7, 1905, wrote for permission, which was given by the company's secretary on the 10th. An assignment was indorsed on the policy on March 11th, but was

not presented to the company, nor was the transfer recorded on the books of the company until after a fire, which occurred on March 18, 1905, and on April 1st the company's secretary wrote under the assignment an approval thereof. It was held that the company was estopped to claim that the transfer was invalid for failure to strictly comply with the insurer's by-laws requiring entry on insurer's books, etc. And in the same case it appeared, further, that plaintiff's vendor, while constructing a house on which defendant issued insurance, informed defendant's secretary that he was going to put in an acetylene plant, and asked if it would make any difference as to the insurance. He was informed that it would not, and the plant was therefore installed, in accordance with the original plan, within three months after the policy was written, and the plant was in the house when defendant consented to the assignment of the policy to plaintiff, to the knowledge of defendant's secretary. It was held that defendant was estopped to claim that the policy was unenforceable because of an increase in the risk by the gas plant.

2679 (g). However, an indorsement of an insurance policy to a third person, as his interest may appear, held not a consent to the incumbering of the insured personal property by a chattel mortgage (*Atlas Reduction Co. v. New Zealand Ins. Co.*, 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. [N. S.] 433, affirming [C. C.] 121 Fed. 929). And a policy cannot be validated by consent to assignment after loss (*Harper v. Michigan Mut. Tornado, Cyclone & Windstorm Ins. Co.*, 173 Mich. 459, 139 N. W. 27).

2680-2683. (h) Stating grounds of forfeiture not relied on as waiving other grounds

2680 (h). If the company sets up one ground of forfeiture as a defense to an action on a policy, and denies liability on this ground alone, it thereby waives all other known grounds of forfeiture or breaches of conditions of the policy.

Security Ins. Co. v. Laird, 182 Ala. 121, 62 South. 182; *National Life & Accident Ins. Co. v. Singleton*, 193 Ala. 84, 69 South. 80; *Fidelity-Phoenix Fire Ins. Co. v. Ray*, 196 Ala. 425, 72 South. 98; *Farmers' Alliance Ins. Co. v. Ferguson*, 78 Kan. 791, 98 Pac. 231; *Ward v. Queen City Fire Ins. Co.*, 69 Or. 347, 138 Pac. 1067; *Shay v. Phoenix Accident & Sick Ben. Ass'n*, 28 Pa. Super. Ct. 527.

An offer of compromise of an insurance claim, referring to a forfeiture by misrepresentations and another undisclosed defense, and suggesting the uncertainty of litigation as a reason for compromise,

is not admissible, under a claim of waiver of a failure to produce an inventory and of a breach of the iron-safe clause. *Continental Ins. Co. v. Cummings* (Tex. Civ. App.) 95 S. W. 48.

So where, after loss, defendant, a mutual insurance company, denied liability solely on the ground of plaintiff's failure to pay an assessment which had been illegally levied, defendant could not, after suit brought and costs incurred by plaintiff, claim freedom from liability on the ground that plaintiff's policy had been canceled by the exercise of the discretion of defendant's board of directors, as authorized by one of its articles of incorporation (*Farmers' Milling Co. v. Mill Owners' Mut. Fire Ins. Co.*, 103 N. W. 207, 127 Iowa, 314). And where a fraternal order declined to pay a benefit certificate on the sole ground that the member died because of the excessive use of narcotics, in violation of a rule of the order, it is estopped in a suit thereon to assert a forfeiture of the certificate because the wife of the member, who was designated beneficiary, obtained, subsequent to the issuance of the certificate, a divorce (*Snyder v. Supreme Ruler of Fraternal Mystic Circle*, 122 S. W. 981, 122 Tenn. 248, 45 L. R. A. [N. S.] 209).

The refusal to pay an accident policy on the ground that it had not received notice of the injury within the time limited by the policy, is a waiver of any other objection to payment (*Moore v. National Acc. Soc.*, 80 Pac. 171, 38 Wash. 31).

2681 (h). The application of the rule has in some cases been strictly limited to those instances where the insured has been misled by the acts of the insurer.

Weston v. State Mut. Life Assur. Soc. of Worcester, 84 N. E. 1073, 234 Ill. 492, affirming judgment 137 Ill. App. 319; *Peckham v. Modern Woodmen of America*, 151 Ill. App. 95; *Eaton v. Western Life Indemnity Co.*, 185 Ill. App. 217.

In North Dakota it has been held that, though the insurer, during negotiations after a loss, refused to pay because of nonpayment of premium, this did not preclude it from defending on the ground that the conditions of the policy as to inventory and keeping of books of account and preservation of same in an iron safe were violated (*Ennis v. Retail Merchants' Ass'n Mut. Fire Ins. Co.*, 33 N. D. 20, 156 N. W. 234).

Of course, the rule will not apply if the insurer had no knowledge of the unassigned grounds of forfeiture.

Sovereign Camp Woodmen of the World v. Hall, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517; *Hexom v. Knights of Maccabees*

of the World, 140 Iowa, 41, 117 N. W. 19; *Brittenham v. Sovereign Camp Woodmen of the World*, 167 S. W. 587, 180 Mo. App. 523; *Taylor-Baldwin Co. v. Northwestern Fire & Marine Ins. Co.*, 18 N. D. 343, 122 N. W. 396, 20 Ann. Cas. 432.

The application of the rule has been withheld in other cases, due probably to the particular circumstances of the cases. Thus, where a mutual benefit certificate provided that it should be void if assured engaged in liquor selling, the fact that after assured engaged in the prohibited business his local lodge declared him suspended for failure to pay dues did not prevent the association from defending an action on the certificate on the ground of the violation of its provisions (*Pauley v. Modern Woodmen of America*, 87 S. W. 990, 113 Mo. App. 473). And in *Dennis v. Fidelity Mut. Life Ins. Co.*, 159 Mich. 594, 124 N. W. 575, it was held that plaintiff's claim, in an action on a life policy, that defendant was estopped to insist on nonperformance of the condition that the policy should not become operative till the initial premium was paid, and the policy delivered during applicant's lifetime, by not basing its claim of nonliability thereon, has no foundation; defendant's letter, in answer to a request for proof blanks, calling attention to the condition and non-compliance therewith. An insurer is not estopped to rely upon representations and concealment as to the persons constituting the firm to which the policy was issued, though it did not plead such defense in a prior discontinued action (*Jacobs v. Queen Ins. Co.*, 183 Mich. 512, 150 N. W. 147).

Cancellation of a fire insurance policy, by an agent having no authority to waive conditions except by indorsement on the policy, does not imply a waiver of a breach previously made on a warranty therein contained, or estop the company from relying upon such breach as defense to an action on the policy, though the agents had knowledge of the breach (*Ruffner Bros. v. Dutchess Ins. Co.*, 53 S. E. 943, 59 W. Va. 432, 115 Am. St. Rep. 924, 8 Ann. Cas. 866).

9. ESTOPPEL AND WAIVER BY ACCEPTANCE AND RETENTION OF PREMIUMS OR ASSESSMENTS IN GENERAL

2683-2688. (b) Acceptance of premiums unearned at time of forfeiture or avoidance

2683 (b). The acceptance by an insurer, with knowledge of facts authorizing a forfeiture or avoidance of the policy, of premiums or assessments not earned at the time of such forfeiture or avoidance, constitutes a waiver thereof.

Reference may be made to the following cases of property insurance:

Fitzsimmons-Kreider Milling Co. v. Ohio Millers' Mut. Fire Ins. Co., 158 Ill. App. 174; Ohio Farmers' Ins. Co. v. Vogel, 76 N. E. 977, 166 Ind. 239, 117 Am. St. Rep. 382, transferred from appellate courts 73 N. E. 612, and 75 N. E. 849; Northern Assur. Co. v. Carpenter, 52 Ind. App. 432, 94 N. E. 779; Farmers' Alliance Ins. Co. v. Ferguson, 78 Kan. 791, 98 Pac. 231; Kentucky Live Stock Ins. Co. v. Stout, 175 Ky. 343, 194 S. W. 318; Laxton v. Patrons' Mut. Fire Ins. Co. of Michigan, 134 N. W. 467, 168 Mich. 448; Scottish Union & National Ins. Co. v. Wylie, 110 Miss. 681, 70 South. 835; Bushnell v. Farmers' Mut. Ins. Co., 85 S. W. 103, 110 Mo. App. 223; Hearsh v. German Fire Ins. Co., 110 S. W. 23, 130 Mo. App. 457; Rogers v. Connecticut Fire Ins. Co., 157 Mo. App. 671, 139 S. W. 265; Godfrey v. Atlantic Horse Ins. Co., 169 N. C. 238, 84 S. E. 339; McClure v. Mutual Fire Ins. Co. of Chester County, 88 Atl. 921, 242 Pa. 59, 48 L. R. A. (N. S.) 1221; Central Market Street Co. v. North British & Mercantile Ins. Co. of London and Edinburgh, 91 Atl. 662, 245 Pa. 272; Norris v. China Traders' Ins. Co., 100 Pac. 1025, 52 Wash. 554.

And to employers' liability insurance: *Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co.*, 83 C. C. A. 431, 154 Fed. 545.

The rule has also been applied in life and accident insurance: *National Union v. Sherry*, 180 Ala. 627, 61 South. 944; *United States Health & Accident Ins. Co. v. Goin*, 197 Ala. 584, 73 South. 117; *Grand Lodge, A. O. U. W. of Arkansas v. Davidson*, 127 Ark. 133, 191 S. W. 961, L. R. A. 1917C, 914; *Rasicot v. Royal Neighbors*, 18 Idaho, 85, 108 Pac. 1048, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180; *Price v. North American Accident Ins. Co.*, 152 Pac. 805, 28 Idaho, 136; *Dromgold v. Royal Neighbors of America*, 103 N. E. 584, 261 Ill. 60, reversing judgment 177 Ill. App. 1; *North American Acc. Ins. Co. v. Rehacek*, 123 Ill. App. 219; *Court of Honor v. Dinger*, 123 Ill. App. 406, judgment affirmed 77 N. E. 557, 221 Ill. 176; *United States Health & Accident Ins. Co. v. Krueger*, 135 Ill. App. 432; *Taylor v. American Patriots*, 152 Ill. App. 578; *O'Brien v. Catholic Order of Foresters*, 172 Ill. App. 638; *Metropolitan Life Ins. Co. v. Willis*, 76 N. E. 560, 37 Ind. App. 48; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Supreme Tribe*

of *Ben Hur v. Lennert*, 178 Ind. 122, 98 N. E. 115, overruling 94 N. E. 889, which affirmed on rehearing (Ind. App.) 93 N. E. 869; *Sovereign Camp of Woodmen of the World v. Latham*, 59 Ind. App. 290, 107 N. E. 749; *Collver v. Modern Woodmen of America*, 154 Iowa, 615, 135 N. W. 67; *E. C. Winsor & Son v. Mutual Fire & Tornado Ass'n*, 170 Iowa, 521, 153 N. W. 97; *Western & Southern Life Ins. Co. v. Oppenheimer*, 104 S. W. 721, 31 Ky. Law Rep. 1049; *Masonic Life Ass'n v. Robinson*, 149 Ky. 80, 147 S. W. 882, 41 L. R. A. (N. S.) 505; *Commonwealth Life Ins. Co. v. Rider*, 154 S. W. 906, 153 Ky. 130; *Masonic Life Ass'n v. Robinson*, 160 S. W. 1078, 156 Ky. 371; *Rivard v. Continental Casualty Co. (Me.)* 100 Atl. 101; *Monahan v. Mutual Life Ins. Co.*, 103 Md. 145, 63 Atl. 211, 5 L. R. A. (N. S.) 759; *Lessnau v. Catholic Order of Foresters*, 163 Mich. 111, 128 N. W. 201; *Johnson v. Modern Brotherhood of America*, 114 Minn. 411, 131 N. W. 471; *Hendrickson v. Grand Lodge A. O. U. W.*, 120 Minn. 36, 138 N. W. 946; *Edmonds v. Modern Woodmen*, 125 Mo. App. 214, 102 S. W. 601; *Righter v. Loyal Protective Ass'n*, 131 Mo. App. 496, 110 S. W. 11; *Galvin v. Knights of Father Mathew*, 169 Mo. App. 496, 155 S. W. 45; *Jones v. Prudential Ins. Co. of America*, 173 Mo. App. 1, 155 S. W. 1106; *Simmons v. Modern Woodmen of America*, 194 Mo. App. 29, 188 S. W. 932; *Pringle v. Modern Woodmen*, 76 Neb. 384, 113 N. W. 231, affirming on rehearing 76 Neb. 384, 107 N. W. 756; *Modern Woodmen of America v. Berry*, 100 Neb. 820, 161 N. W. 534; *Ostmann v. Supreme Lodge Knights and Ladies of Honor*, 85 N. J. Law, 86, 88 Atl. 949; *Stewart v. General Accident Ins. Co.*, 39 Pa. Super. Ct. 396; *Beard v. North State Life Ins. Co.*, 104 S. C. 45, 88 S. E. 285. But see *Vant v. Grand Lodge, Knights of Pythias, of South Carolina*, 102 S. C. 413, 86 S. E. 677.

The theory of the cases seems to be, as stated in *Rasicot v. Royal Neighbors of America*, 18 Idaho, 85, 108 P. 1048, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180, that it is contrary to public policy to allow an insurer to collect premiums from insured for years, and, after his death, to allow it to repudiate the contract on the ground that it never went into effect because of some temporary cause or disability existing at the time of delivery of the certificate of which applicant had no knowledge, and which in no wise contributed to the cause of death nor increased the risk.

The collection of a premium note with knowledge of a forfeiture will also create an estoppel (*Continental Ins. Co. v. Thomasson* [Ky.] 84 S. W. 546). If, however, the agent has remitted a premium to the company with his monthly remittance, his subsequent acceptance of the amount of the premium from the assured as in payment of a private debt due to him as an individual does not constitute a waiver on the part of the company of the assured's fraud in obtaining the policy, though at the time both the agent and the

company's adjuster had full knowledge of all the facts and the representations by which the policy was procured (*American Cent. Ins. Co. v. Antram*, 38 South. 626, 86 Miss. 224).

In *Edmonds v. Modern Woodmen*, 125 Mo. App. 214, 102 S. W. 601, the insured signed an application for a certificate in a fraternal benefit society reciting that he was born August 22, 1851, and was at the date of signing the application between 44 and 45 years old. The blank was first filled with the year 1852, and then the figure "1" was drawn over and through the figure "2," so it was apparent that at the time the application was signed insured was more than 45 years old. The society, however, issued a certificate notwithstanding its by-laws expressly prohibited it to insure persons older than 45, and collected dues from insured and retained him in fellowship, for nine years, until his death, during which time defendant transcribed its records on a card system which showed that insured was born in 1851. Held, that defendant was estopped to deny that it was bound by the certificate, on the theory that it had no power to insure deceased. So, too, it has been held that benefit society, which has failed to suspend a member who has disappeared and has continued to collect assessments on the certificate, is estopped to deny liability.

Keith v. Modern Woodmen, 167 Iowa, 239, 149 N. W. 225, L. R. A. 1915B. 793; *Supreme Ruling of Fraternal Mystic Circle v. Hoskins* (Tex. Civ. App.) 171 S. W. 812.

In an action on a benefit certificate, where plaintiff was beneficiary and a by-law provided that upon disappearance of insured and failure to reappear within one year from the date of such disappearance insured should stand suspended, and such disappearance took place November 7, 1905, the acceptance by defendant of the assessment for the month of November, 1906, is not a waiver of its rights under the by-law; it appearing that such assessment became payable before the expiration of one year after such disappearance (*Apitz v. Supreme Lodge Knights and Ladies of Honor*, 196 Ill. App. 278, judgment affirmed 113 N. E. 63, 274 Ill. 196, L. R. A. 1917A, 183).

2686 (b). The rule is especially applicable where an additional premium is required for the increased risk; and in *Lowenstein v. Old Colony Life Ins. Co.*, 179 Mo. App. 364, 166 S. W. 889, it was held that where an insurer, upon discovering that the insured had understated his age, offered him the privilege of continuing the policy upon payment of the proper assessment and the deficiency, and

this was accepted by the insured, there was a new contract, and the insurer could not thereafter defeat recovery because of the insured's misstatement, though it failed to collect the correct rate; and in the same case it was held, further, that where a corporation, which assumed liability on a certificate issued by a fraternal order, upon discovering that insured understated his age, required him to pay the deficiency in assessments, defendant, which assumed the obligations of the corporation, could not revive the original application as basis for assessments so as to take advantage of the misrepresentation, unless insured was notified.

The rule has also been applied, though the assessment or premium is received after a loss has occurred.

Stewart v. General Accident Ins. Co. of Philadelphia, 39 Pa. Super. Ct. 396; *National Council Junior Order United American Mechanics of the United States v. Thomas*, 163 Ky. 364, 173 S. W. 813.

In *North American Accident Ins. Co. v. Rehacek*, 123 Ill. App. 219, a claim against defendant, on an accident policy, was paid plaintiff, who signed with his mark a paper which acknowledged the receipt of the money and also purported to cancel the policy, but plaintiff, who was unable to read English, testified that he was not aware that the policy was canceled. Subsequently, the company received and retained for a period of 13 days a premium payment on the policy. It was held that this constituted an election by the company to keep in force the policy previously canceled.

2687 (b). A subordinate lodge of a mutual benefit association which has power to discipline and expel a member for violation of the by-laws, knowing that the member has forfeited his benefit certificate by such violation, waives the right to insist on the forfeiture by receiving dues and treating him as a member until his death (*Modern Woodmen of America v. Breckenridge*, 89 Pac. 661, 75 Kan. 373, 10 L. R. A. [N. S.] 136, 12 Ann. Cas. 636).

2688 (b). The rule that, where by its terms the policy is suspended while certain risks continue or such risks become excepted risks, acceptance of the premium to keep the policy alive as other risks will not operate as a waiver, is well illustrated by the cases involving prohibited occupations. The general rule is, of course, that acceptance of the premium with knowledge that the insured is engaged in a prohibited extrahazardous occupation estops insurer to claim a forfeiture on that ground.

Zeman v. North American Union, 105 N. E. 22, 263 Ill. 304, affirming judgment 181 Ill. App. 551; *Taylor v. American Patriots*, 152 Ill.

App. 578; *O'Brien v. Catholic Order of Foresters*, 172 Ill. App. 638; *Supreme Tribe of Ben Hur v. Lennert*, 178 Ind. 122, 98 N. E. 115, overruling judgment (Ind. App.) 94 N. E. 889, which on rehearing affirmed (Ind. App.) 93 N. E. 869; *Lessnau v. Catholic Order of Foresters*, 163 Mich. 111, 128 N. W. 201; *Johnson v. Modern Brotherhood of America*, 131 N. W. 471, 114 Minn. 411; *Hendrickson v. Grand Lodge A. O. U. W.*, 120 Minn. 36, 138 N. W. 946; *Ostmann v. Supreme Lodge, Knights and Ladies of Honor*, 85 N. J. Law, 86, 88 Atl. 949.

If, however, the conditions of the contract are such that entering upon a prohibited occupation renders the certificate void only as to claims for death directly traceable to such occupation, then the acceptance of premiums, since it operates to keep the policy alive as to all other risks, cannot be regarded as waiving the entrance into a prohibited occupation.

Ridgeway v. Modern Woodmen of America, 157 Pac. 1191, 98 Kan. 240, L. R. A. 1917A, 1062; *Showalter v. Modern Woodmen*, 156 Mich. 390, 120 N. W. 994; *Abell v. Modern Woodmen*, 96 Minn. 494, 105 N. W. 65, reargument denied 96 Minn. 494, 105 N. W. 906; *Modern Woodmen of America v. Talbot*, 107 N. W. 790, 76 Neb. 621; *Crites v. Modern Woodmen*, 82 Neb. 298, 117 N. W. 776; *Modern Woodmen v. Weekley*, 42 Okl. 25, 139 Pac. 1138.

Where the local camp clerk received the ordinary assessment, though insured had entered a hazardous occupation which insurance did not cover, unless certificate was issued and additional assessments paid, the insurer could defeat a claim for death resulting from the hazards of such occupation, no certificate having been issued. *Frain v. Modern Woodmen of America*, 60 Colo. 585, 155 Pac. 330.

The *Abell* Case, cited above, may be distinguished from *Johnson v. Modern Brotherhood*, 109 Minn. 288, 123 N. W. 819, 27 L. R. A. (N. S.) 446. In the *Johnson* Case the by-laws of the association prohibited the acceptance as members of persons engaged in extra-hazardous employments, and provided that, if a certificate holder entered such employment after becoming a member, he might, by filing a waiver of liability because of such increased hazard, continue his certificate, except as to injury or death traceable to his prohibited employment. It was held that if, after notice and without filing of written waiver, the association continued to receive assessments, the certificate was continued in force without amendment. The theory of the court is that in the *Abell* Case there was no provision for a waiver of liability by agreement, but an exception of risk, while in the *Johnson* Case there was a provision for waiver of liability and, as no agreement to waive was filed, the policy con-

tinued on its original terms after insured entered on the prohibited occupation, and consequently the effect of such act on part of the insured might be waived by the insurer. This view of the case is also supported by *Crites v. Modern Woodmen*, 82 Neb. 298, 117 N. W. 776. The certificate in that case provided that the insured should observe the by-laws of the order, and the certificate should be void if the insured engaged in certain named hazardous occupations. The certificate also allowed insured to engage in such occupation on filing a waiver of liability of the order for death arising from accident occurring in such occupation. By amendment of the by-laws no waiver of liability was required, but the certificate became void as to any claim on death of the insured traceable directly to employment in such an occupation, but remained in force on account of death from other causes. It was held that the order was not estopped from pleading its exemption from liability for death of insured, due to his engaging in a prohibited occupation by accepting his dues and assessments. And of course there is no waiver if the insurer accepts dues on the condition that the insurance, if restored, shall extend only to the risks originally assumed (*Pendergast v. Royal Highlanders*, 90 Neb. 117, 132 N. W. 931).

The rule that acceptance of assessments will waive existing forfeitures known to the insurer has in a few instances been restricted to those cases in which the insured was not guilty of fraud.

Hexom v. Knights of Maccabees of the World, 140 Iowa, 411, 117 N. W. 19; *Krecek v. Supreme Lodge of Fraternal Union of America*, 95 Neb. 428, 145 N. W. 859.

An association is not estopped to deny the rights of a divorced husband as beneficiary on his wife's policy by the fact that it accepted payments of premiums thereon from him after divorce, or that it paid him, after her death, a funeral benefit. *Lawson v. United Benev. Ass'n* (Tex. Civ. App.) 185 S. W. 976.

2689-2690. (c) Acceptance of premiums earned or due, though forfeiture be enforced

2689 (c). The insurer is not estopped by the acceptance of assessments earned or absolutely payable without regard to the continuance of the insurance.

Bennett v. Beavers' Reserve Fund Fraternity, 159 Wis.*145, 150 N. W. 181; *Lewis v. Farmers' Mut. Fire Ins. Co. of Town of Clarno*, 159 Wis. 547, 150 N. W. 949.

So, too, where, after the date of fire by which insured's buildings were destroyed, defendant company sent him an assessment card

informing him that an assessment made by the company some three months after the fire was due, and requesting payment, this assessment covered eight losses that occurred prior to the fire and ten that occurred after the same, and the forfeiture of plaintiff's policy by nonoccupancy was not waived by the company by the acceptance of the payment of such assessment (*Knowlton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 62 Atl. 289, 100 Me. 481, 2 L. R. A. [N. S.] 517). And in *Mutual Fire Ins. Co. v. Turner*, 115 Va. 631, 79 S. E. 1067, it was said that, where a mutual assessment fire company reinstated insured's policy after default in payment of assessments, the reinstatement which came after the insured had discharged a lien on the premises is the waiver of the original ground of forfeiture on account of the lien.

2690-2691. (d) Retention of premium unearned at time of forfeiture

2690 (d). The retention after loss of the premiums paid, with knowledge of a forfeiture occurring before, may operate as a waiver of the defense.

Property insurance: *Security Ins. Co. v. Laird*, 182 Ala. 121, 62 South. 182; *Northern Assur. Co. of London v. Carpenter*, 52 Ind. App. 482, 94 N. E. 779; *Brashears v. Perry County Farmers' Protective Ins. Co.*, 51 Ind. App. 8, 98 N. E. 889; *Ohio Farmers' Ins. Co. v. Williams* (Ind. App.) 112 N. E. 556; *National Live Stock Ins. Co. v. Owens* (Ind. App.) 113 N. E. 1024; *Caledonian Ins. Co. v. Indiana Reduction Co.* (Ind. App.) 115 N. E. 596; *Utz v. Orient Ins. Co.*, 123 S. W. 538, 139 Mo. App. 552; *Rogers v. Connecticut Fire Ins. Co. of Hartford*, 157 Mo. App. 671, 139 S. W. 265; *Manning v. Connecticut Fire Ins. Co.*, 176 Mo. App. 678, 159 S. W. 750; *Harland v. Liverpool & London & Globe Ins. Co.*, 192 Mo. App. 198, 180 S. W. 998; *State Mut. Ins. Co. v. Green* (Okl.) 166 Pac. 105, L. R. A. 1917F, 663; *Scott v. Liverpool & London & Globe Ins. Co.*, 102 S. C. 115, 86 S. E. 484; *Hamilton v. Fireman's Fund Ins. Co.* (Tex. Civ. App.) 177 S. W. 173; *Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185.

Life insurance: *Allen v. Standard Ins. Co.* (Ala.) 73 South. 897; *Kidder v. Supreme Assembly of American Stars of Equity*, 154 Ill. App. 489; *McCurrey v. Metropolitan Life Ins. Co.*, 168 Ill. App. 625; *Groffinger v. Metropolitan Life Ins. Co.*, 183 Ill. App. 618; *State Life Ins. Co. v. Jones*, 48 Ind. App. 186, 92 N. E. 879; *Supreme Tribe of Ben Hur v. Lennert* (Ind. App.) 93 N. E. 869, rehearing denied (Ind. App.) 94 N. E. 889; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Catholic Order of Foresters v. Collins*, 51 Ind. App. 285, 99 N. E. 745; *Supreme Lodge of Modern American Fraternal Order v. Watkins* (Ind. App.) 110 N. E. 1008; *Righter v. Loyal Protective Ass'n*, 110 S. W. 11, 131 Mo. App. 496;

Pringle v. Modern Woodmen of America, 76 Neb. 384, 113 N. W. 231, affirming on rehearing 76 Neb. 384, 107 N. W. 756; Downs v. Knights of Columbus, 80 Atl. 227, 76 N. H. 165; Prudential Ins. Co. v. Shively, 1 Ohio App. 238, 34 Ohio Cir. Ct. R. 357; Pacific Mut. Life Ins. Co. v. O'Neil, 36 Okl. 792, 130 Pac. 270; Spence v. Phoenix Assur. Co., Ltd., of London, 104 S. C. 403, 89 S. E. 319; Peterson v. Grand Lodge, A. O. U. W. of South Dakota, 36 S. D. 539, 156 N. W. 70, L. R. A. 1916F, 751. But see *Columbian Nat. Life Ins. Co. v. Mulkey*, 19 Ga. App. 247, 91 S. E. 344; *McKinney v. Metropolitan Life Ins. Co.*, 191 Ill. App. 592; *Falberg v. Continental Casualty Co.*, 195 Ill. App. 237; *Terminal Ice & Power Co. v. American Fire Ins. Co.*, 196 Mo. App. 241, 194 S. W. 722.

In *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785, the rule was applied, though the policy provided that on forfeiture the premiums should be retained.

The rule was applied to a policy of strike insurance in *Buffalo Forge Co. v. Mutual Security Co.*, 76 Atl. 995, 83 Conn. 393.

The retention of the premium in connection with other circumstances was involved in *Allen v. Phoenix Assur. Co.*, 95 Pac. 829, 14 Idaho, 728; *Continental Ins. Co. v. Buchanan*, 108 S. W. 355, 32 Ky. Law Rep. 1298; *Reimold v. Farmers' Mut. Fire Ins. Co.*, 162 Mich. 69, 127 N. W. 17; *Farmers' Nat. Bank v. Delaware Ins. Co.*, 94 N. E. 834, 83 Ohio St. 309; *Pacific Mut. Life Ins. Co. v. O'Neil*, 36 Okl. 792, 130 Pac. 270.

2691 (d). Where an insurance company has knowledge of facts avoiding the policy and consents to an assignment of the policy to a purchaser and takes his notes for premiums in lieu of the notes of the seller and retains the premiums paid and at no time offers to return the same, it is estopped to set up the invalidity of the policy (*Padrnos v. Century Fire Ins. Co.*, 142 Iowa, 199, 119 N. W. 133).

Where loss occurred under insurance policy before maturity of premium note and insurer was held liable, and second loss occurred after maturity and demand for payment of note, and insurer had not paid first loss, insurer cannot pay first loss in full and declare policy forfeited (*Oklahoma Fire Ins. Co. v. Reddington* [Okl.] 156 Pac. 1165).

2691-2693. (e) Retention of premium earned or due, though forfeiture be enforced

2692 (e). The retention of a premium for which the risk had attached at the time of forfeiture will not amount to a waiver, knowledge of the breach being obtained after loss.

Capital Fire Ins. Co. v. Shearwood, 87 Ark. 326, 112 S. W. 878; *Home Fire Ins. Co. v. Wilson*, 109 Ark. 324, 159 S. W. 1113; *Goorberg*

(1019)

v. Western Assur. Co., 150 Cal. 510, 89 Pac. 130, 10 L. R. A. (N. S.) 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801; Benanti v. Delaware Ins. Co., 84 Atl. 109, 86 Conn. 15, Ann. Cas. 1913D, 826.

So, where a policy of tornado insurance contained a provision that if the building became vacant the policy should be void and after loss, the company, being informed of the loss as well as the breach of the condition, canceled the policy, but retained the premium up to and including the time of loss, it was not a waiver of the breach of condition (*Farmers' & Merchants' Ins. Co. v. Bodge*, 110 N. W. 1018, 76 Neb. 31, reversing on rehearing 76 Neb. 31, 106 N. W. 1004).

Where the premium on a fire policy was paid by insured on delivery of the policy, insurer's failure to return such premium before action brought did not amount to a waiver of its right to forfeit the policy for noncompliance of the insured with the positive terms of the policy (*Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc.*, 146 Fed. 695, 77 C. C. A. 121).

The rule has also been applied in life insurance where knowledge of the forfeiture was not obtained until after loss.

Showalter v. Modern Woodmen, 156 Mich. 390, 120 N. W. 994; *Hefernan v. Prudential Ins. Co. of America*, 88 Misc. Rep. 93, 150 N. Y. Supp. 644; *Moore v. Supreme Assembly of Royal Soc. of Good Fellows*, 93 S. W. 1077, 42 Tex. Civ. App. 366.

In *Taylor v. Grand Lodge A. O. U. W.*, 96 Minn. 441, 105 N. W. 408, 3 L. R. A. (N. S.) 114, it appeared that A. applied for membership in a lodge, stating that he was 44 years of age. The laws of the order restricted the membership to persons under 45. Accompanying the application and as a part thereof was a certificate that the answers to the questions propounded and attached to the application were true, and that if any false statements were made, though in the meantime all assessments were paid, the false statements should render the beneficiary certificates thereafter issued null and void. A certificate was issued to A. in 1893, and until his death in 1903 he paid all dues and assessments. On his death the lodge learned that he was more than 45 years of age at the time the application was made. The assessments paid were never returned, but the lodge was at all times willing to return the same and advised the beneficiary to consult a lawyer. It was held that, as the certificate was obtained by actual fraud, the lodge was under no legal obligation to return what had been paid as assessments before it could claim that the contract was not in force.

Where a part of the insurance was still in force, the fact that the insurer retained an assessment, part of the amount of which included a fraudulent claim, will not estop the company from setting up such fraud as a defense (*Lewis v. Farmers' Mut. Fire Ins. Co. of Town of Clarno*, 159 Wis. 547, 150 N. W. 949). And the breach of fireproof safe clause, whereby insured's inventory and books were destroyed by fire, was not waived by retaining entire premium, for merchandise and for store; there being no dispute as to liability for store (*Crandon v. Home Ins. Co.*, 99 Kan. 785, 163 Pac. 458). So, too, where, after refusal of defendant insurance company to accept a certain risk, it retained the premium sent by plaintiff as part of a larger check in settlement of current accounts, it did not estop defendant from asserting that the policy was not in force (*Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co. of Hartford*, 117 N. W. 825, 105 Minn. 483). The making of an assessment upon a premium note by a mutual company and the collection and retention of the assessment after the loss has occurred, and after the company has become informed of facts creating a forfeiture, is not a waiver of the forfeiture, and does not revive a void policy, though the person owning the property and paying the assessments did not give the note but was the grantee of the maker's devisee, where the note was treated by both parties as a valid existing obligation (*Towle v. Dirigo Mut. Fire Ins. Co.*, 107 Me. 317, 78 Atl. 374).

2693 (e). Where the policy stipulates that if the policy should become void the unearned portion of the premium should be returned, the insurer does not waive a breach of the iron-safe clause by failing, after knowledge of the loss, to return or offer to return the unearned portion of the premium; no demand having been made, nor any offer to surrender the policy (*Ætna Ins. Co. v. Mount*, 90 Miss. 642, 44 South. 162, 15 L. R. A. [N. S.] 471). And in *Weddington v. Piedmont Fire Ins. Co.*, 141 N. C. 234, 54 S. E. 271, 8 Ann. Cas. 497, it was held that where a fire policy provided that, if it became void, the unearned portion of the premium should be returned on surrender of the policy, the tender of the unearned portion of the premium paid was not a condition precedent to the insurer's right to insist on a forfeiture of the policy for a breach of condition against incumbrances as a defense to an action on the policy, there having been no surrender of the policy by plaintiff.

2693-2694. (f) Offer to return premium

2693 (f). Conceding that the insurer must return the premium in order to assert a forfeiture the offer to return must in general be made in a reasonable time (*Supreme Tribe of Ben Hur v. Lennert* [Ind. App.] 93 N. E. 869, rehearing denied 94 N. E. 889). And what is a reasonable time for the return of premiums in order to avoid the policy is ordinarily a question of fact (*United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760). If offer is refused, no tender need be made.

Brown v. Great Camp of Knights of Modern Maccabees, 167 Mich. 123, 132 N. W. 562; *Osterhoudt v. Prudential Ins. Co. of America*, 120 N. Y. Supp. 641, 136 App. Div. 123.

2694-2695. (g) Knowledge of forfeiture or avoidance

2694 (g). No waiver of a forfeiture or avoidance arises from the acceptance or retention of a premium, unless the insurer at the time of such action had knowledge of the facts authorizing forfeiture or avoidance.

Grand Lodge A. O. U. W. v. Burns, 80 Atl. 157, 84 Conn. 356; *Edwards v. Farmers' Mut. Ins. Ass'n of Georgia*, 57 S. E. 707, 128 Ga. 353, 12 L. R. A. (N. S.) 484, 119 Am. St. Rep. 385, 10 Ann. Cas. 1036; *United States Indemnity Soc. v. Griggs*, 118 Ill. App. 577; *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570; *Nyman v. Manufacturers' & Merchants' Life Ass'n*, 104 N. E. 653, 262 Ill. 300, reversing judgment 182 Ill. App. 511; *Germania Life Ins. Co. v. Lauer*, 123 Ky. 727, 97 S. W. 363, 30 Ky. Law Rep. 3; *Brown v. Great Camp of Knights of Modern Maccabees*, 167 Mich. 123, 132 N. W. 562; *Meyer v. Grand Lodge of Order of Sons of Hermann*, 108 Minn. 25, 121 N. W. 235; *Clair v. Supreme Council of the Royal Arcanum*, 172 Mo. App. 709, 155 S. W. 892; *Harwood v. National Union Fire Ins. Co.*, 156 S. W. 475, 170 Mo. App. 298; *American Cent. Ins. Co. v. Antram*, 38 South. 626, 86 Miss. 224; *Gienty v. Knights of Columbus*, 55 Misc. Rep. 98, 105 N. Y. Supp. 244, affirmed in 110 N. Y. Supp. 1129, 126 App. Div. 934; *Klein v. Supreme Council of Loyal Ass'n*, 163 N. Y. Supp. 5, 98 Misc. Rep. 218.

An insurer levying an assessment on the premium note of an insured did not waive the defense of other insurance not permitted by the insurer, of which it had no knowledge. *Carleton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 109 Me. 79, 82 Atl. 649, 39 L. R. A. (N. S.) 951.

2695 (g). Notice given to an insurer of the death of insured, with directions to send the notices of assessments thereafter to another person, did not charge the insurer with notice that the insured property had been sold to such other person, so as to estop

the insurer by the making of assessments upon the premium notes and the giving of notice thereof to such person and the receipt and retention of the assessments paid by him from setting up the conveyance to him of the insured premises by the devisee of the former owner without the insurer's assent, contrary to the provisions of the policy, as a defense in an action upon the policy (*Towle v. Dirigo Mut. Fire Ins. Co.*, 107 Me. 317, 78 Atl. 374). And in *Berman v. Fraternities Health & Accident Ins. Ass'n*, 107 Me. 368, 78 Atl. 462, it was held that, where a health policy provided that insured should pay in advance without notice his specified assessments, the insurer, which had no information of facts establishing a forfeiture of the policy except what it had acquired from its investigations after his proof of claim for benefits was presented, and which turned the claim over to its attorney for investigation, did not waive the forfeiture by receiving in the ordinary course of business, and receipting for, two monthly assessments during the period of the investigation, and before all the material facts had been acquired, showing that insured's answers in his application were untrue, insured knowing when he voluntarily made the payments that his claim had been turned over to the company's attorney.

In *Norton v. Catholic Order of Foresters*, 138 Iowa, 464, 114 N. W. 893, 24 L. R. A. (N. S.) 1030, the insured after taking out a certificate in defendant society insuring him as a railway brakeman, changed his employment and became a switchman in a railroad yard, in a city of more than 10,000 inhabitants, where he was killed. After execution of insured's certificate the society adopted a new by-law to which insured was subject; placing the occupation of switching in railroad yards in cities of 10,000 inhabitants or over in a prohibited class. A local camp of the society accepted an assessment after his death, which matured prior thereto, with knowledge that insured had been killed while switching. It was held that such knowledge did not necessarily indicate a violation of the by-law, which only prohibited switching in a railroad yard in cities of 10,000 inhabitants. The theory of the decision was that knowledge that insured was killed while switching did not imply knowledge of switching in a city of more than 10,000 inhabitants.

Where from the circumstances of the case the insurer should have had the requisite knowledge, it will be charged. Thus, where a life policy provided that it should be void in case a policy issued by insurer on the same life should be in force, and the company received premiums for a number of years on the policy in question,

it was estopped to deny its validity because of the fact that there was a previous policy in force, though, owing to the insurer's system of bookkeeping, it did not know as a matter of fact of the existence of the previous policy (*Monahan v. Mutual Life Ins. Co.*, 63 Atl. 211, 103 Md. 145, 5 L. R. A. [N. S.] 759).

2695-2698. (h) Form of waiver—Agency

2695 (h). It has been held in some cases that where the policy provides that failure to comply with certain conditions shall render the policy void, unless consent be indorsed on the policy, acceptance and retention of premiums will not result in an estoppel in the absence of indorsement.

Ohio Farmers' Ins. Co. v. Titus, 82 Ohio St. 161, 92 N. E. 82; *Woodard v. German American Ins. Co.*, 106 N. W. 681, 128 Wis. 1, 116 Am. St. Rep. 17.

But the contrary doctrine was expressed in *Continental Ins. Co. v. Thomasson*, 84 S. W. 546, 27 Ky. Law Rep. 158.

Since waiver by acceptance of premiums rests on grounds of estoppel rather than waiver, restrictions on the powers of agents to waive are ineffectual (*Pringle v. Modern Woodmen*, 76 Neb. 384, 107 N. W. 756, affirmed on rehearing 76 Neb. 384, 113 N. W. 231). And to the same effect is *Collver v. Modern Woodmen*, 154 Iowa, 615, 135 N. W. 67.

2697 (h). The agent of a life insurance company, the scope of whose duties was to write applications and collect premiums and turn them over to the company, could bind the company by the receipt of premiums with full knowledge of facts avoiding the policy (*Metropolitan Life Ins. Co. v. Willis*, 76 N. E. 560, 37 Ind. App. 48). But an agent cannot, by accepting assessments, waive conditions which define the powers of the association (*National Council Junior Order United American Mechanics v. Thompson*, 153 Ky. 636, 156 S. W. 132, 45 L. R. A. [N. S.] 1148). And the acceptance of premiums by an agent authorized merely to issue receipts, but not to issue policies, will not estop the insurer (*American Nat. Ins. Co. v. Roberts* [Tex. Civ. App.] 146 S. W. 326). So, too, where under the by-laws of the association the secretary of a local lodge is the agent of the lodge, and not of the supreme body, and it is provided that no act of his can waive provisions of the by-laws, his acceptance of assessments will not estop the association (*Jones v. Modern Brotherhood*, 153 Wis. 223, 140 N. W. 1059).

10. ESTOPPEL AND WAIVER AS TO NONPAYMENT OF PREMIUMS AND ASSESSMENTS

2699-2706. (b) Estoppel by acts and conduct in general

2699 (b). Acts or conduct of the insurer or its authorized agents in dealing with the insured, the effect of which is to mislead the latter and cause him to believe that forfeiture for nonpayment of premiums will not be insisted on, estops the insurer from claiming a forfeiture on that ground.

Head Camp, Pacific Jurisdiction, Woodmen of the World, v. Bohanna, 59 Colo. 545, 151 Pac. 428; Lane v. Yeomen of America, 125 Ill. App. 406; Union Cent. Life Ins. Co. v. Burnett, 136 Ill. App. 187; Blais v. United Brotherhood of Carpenters and Joiners of America, 169 Ill. App. 596; Majestic Life Assur. Co. v. Tuttle, 58 Ind. App. 98, 107 N. E. 22; Farmers' & Merchants' Mutual Life Ass'n v. Mason (Ind. App.) 116 N. E. 852; Bricker v. Great Western Accident Ass'n, 161 Iowa, 61, 140 N. W. 851; Crook v. New York Life Ins. Co., 75 Atl. 388, 112 Md. 268; Keys v. National Council Knights and Ladies of Security, 174 Mo. App. 671, 161 S. W. 345; Kelly v. Security Mut. Life Ins. Co., 94 N. Y. Supp. 601, 106 App. Div. 352, reversed 78 N. E. 584, 186 N. Y. 16, 9 Ann. Cas. 661; Moore v. General Accident, Fire & Life Assur. Corp., 173 N. C. 532, 92 S. E. 362; Pacific Mut. Life Ins. Co. v. McDowell, 141 Pac. 273, 42 Okl. 300; Hall v. Dakota Mut. Life Ins. Co., 37 S. D. 342, 158 N. W. 449; Continental Casualty Co. v. Bridges (Tex. Civ. App.) 114 S. W. 170; Equitable Life Assur. Society of United States v. Ellis (Tex. Civ. App.) 137 S. W. 184; Equitable Life Assur. Society of United States v. Ellis, 105 Tex. 526, 152 S. W. 625, overruling motion for rehearing 105 Tex. 526, 147 S. W. 1152; Lone Star Ins. Union v. Brannan (Tex. Civ. App.) 184 S. W. 691; Crosby v. Vermont Accident Co., 84 Vt. 510, 80 Atl. 817; Baumann v. Metropolitan Life Ins. Co., 144 Wis. 206, 128 N. W. 864. Compare Public Savings Ins. Co. of America v. Manning, 61 Ind. App. 239, 111 N. E. 945.

An agreement to receive an accident insurance premium within a reasonable time after it is due may be inferred from the dealings of the parties. Cornell v. Travelers' Ins. Co., 120 App. Div. 459, 104 N. Y. Supp. 999, affirmed in 85 N. E. 1107, 192 N. Y. 587.

Even where the policy provides that on default in payment of any premium note the company shall not be liable for any loss occurring during the continuance of the default, the company may waive the forfeiture on a breach of such condition by acts from which an intention so to do might be inferred (St. Paul Fire & Marine Ins. Co. v. Cooper, 25 Okl. 38, 105 Pac. 198). While an insur-

er's course of conduct may afford a basis for a reasonable excuse in defaulting a premium when due and a ground of the insured's reliance that forfeiture will not be asserted, a course of action which is no more than action within the express terms of the policy, will not have that effect (*Crosby v. Vermont Accident Ins. Co.*, 80 Atl. 817, 84 Atl. 510). So, where a member of a benefit society has by the terms of the certificate forfeited all his rights for nonpayment of dues, except the right to be admitted into the council chamber during its session, a payment of a fee by the lodge to the national council, based on the fact that the member was carried on its books, is not a waiver of the forfeiture (*Wilkie v. National Council, Junior Order United American Mechanics*, 66 S. E. 579, 151 N. C. 527).

2700 (b). The offer of loan on the policy after lapse, by the superintendent of the department of the company at its home office, for the express purpose of paying the premium, is the act of the company and constitutes a waiver notwithstanding provision that policy could be varied only by specified officers (*Equitable Life Assur. Society of United States v. Ellis*, 105 Tex. 526, 147 S. W. 1152, affirming judgment [Civ. App.] 137 S. W. 184). And where a subordinate lodge, having power to waive strict compliance with the society's by-laws respecting payment of assessments, notified a member that the society would loan him the amount of four assessments for four specified months, after which he would have to pay his assessments or again apply to the lodge for relief, it thereby waived payment of assessment by such member during such period (*Johanson v. Grand Lodge A. O. U. W.*, 86 Pac. 494, 31 Utah, 45). So, too, where an insurance company loans money on a policy after the notes given for premium are due, there is a recognition that the policy is still in force (*Bradley v. Federal Life Ins. Co.*, 178 Ill. App. 524). But letters written by an insurer after the death of the insured, declaring that unless a loan on the policy was paid, its cash value would be applied to the loan, do not show a waiver of the forfeiture of the policy for previous nonpayment of premiums (*Patterson v. Equitable Life Assur. Society*, 112 Ark. 171, 165 S. W. 454). And a letter of insurer after forfeiture of policy for default in premium, written without any knowledge of death of insured or the rights of an assignee, offering to assist insured to carry the policy, is not a waiver of the forfeiture (*Horstmann v. Capitol Life Ins. Co. of Colorado*, 194 Mo. App. 434, 184 S. W. 1164). Where insured requests local lodge or secretary to advance his dues

as a loan, and payments are not forwarded by lodge to association within time specified, association does not waive right to declare forfeiture as provided in contract (*Chandler v. Royal Highlanders* [Neb.] 162 N. W. 642).

Since the rights of the beneficiary in a policy of insurance become fixed by the death of the insured, a waiver of forfeiture for default in payment of premiums cannot be predicated on letters written by the insurer in ignorance of his death (*Patterson v. Equitable Life Assur. Soc.*, 112 Ark. 171, 165 S. W. 454). On the other hand, where insurer waives a forfeiture for nonpayment of a premium note, its liability on the policy becomes fixed by the death of the insured, and his administrator need not tender payment of the note in order to maintain an action on the policy (*Washburn v. Union Cent. Life Ins. Co.*, 38 South. 1011, 143 Ala. 485).

2702 (b). Though the general agent of an insurance company, with the company's knowledge, conducted an independent trust company which issued a contract to each policy holder, whereby the trust company undertook to pay future premiums, the amount, with interest, to be eventually deducted from payment on the policy, which was assigned to the trust company, the insurance company was not estopped from asserting forfeiture for nonpayment of premiums (*Security Life Ins. Co. of America v. Eades' Adm'x*, 153 S. W. 989, 152 Ky. 577, L. R. A. 1917D, 1198). And the delivery of receipt containing a mistaken recital that a premium was paid for August, instead of July, does not estop the insurer from asserting a forfeiture, where it did not appear that insured was misled (*Gardner v. Inter-Ocean Life & Casualty Co.*, 93 Kan. 810, 145 Pac. 844).

In *Continental Casualty Co. v. Bridges* (Tex. Civ. App.) 114 S. W. 170, the plaintiff applied to defendant's agent for a renewal policy, to which when delivered plaintiff objected because it did not provide for sick benefits. The agent, after assuring plaintiff that he would be protected in the meantime, returned the policy, and was informed by defendant's general agents that a new application would be required, and that on its receipt the old policy would be canceled and a new one issued, knowing that unless the premium was paid on the next day the old policy would be forfeited according to its terms. The soliciting agent made no demand for the premium, and testified that he knew plaintiff was solvent and able to pay the premium when demanded. Defendant's managing agents retained the old policy, and did nothing until plaintiff was injured before a new policy was issued or the premium collected, when a for-

feiture was claimed. It was held that such facts established a waiver of payment on the date specified in the policy. The policy in *Crowder v. Continental Casualty Co.*, 115 Mo. App. 535, 91 S. W. 1016, provided for yearly periods at \$36 premiums, with provisions for renewal at four premium payments, and that default in payment would avoid the policy. Insured did not pay the first installment on a renewal until a few days before the second one fell due, and at the time told defendant's agent that he would get some money in a few days and make the second payment, asking the agent to "square him up" for both payments. The agent replied "All right," and marked both installments as paid in an account book which he kept of his business with defendant. It was held that the acts of the agent operated as a waiver of prompt payment. But a statement by the agent who issued the policy that he would take care of it and not allow it to become forfeited is not evidence of a waiver; such statement not being made in the course of his employment by defendant (*Johnson v. Continental Ins. Co.*, 119 Tenn. 598, 107 S. W. 688).

2703 (b). The failure of the collecting officer of the insurer to comply with a custom of sending out notices not required by the policy is available as excuse for the nonpayment of fixed dues only as ground for an estoppel, and unless a member in default or the one assuming to pay his assessments relied on a continuance of the custom, and was misled by failure to receive such notice, there was no estoppel (*Bennett v. Sovereign Camp, Woodmen of the World* [Tex. Civ. App.] 168 S. W. 1023). If an insurance agent states that the insurance will cost a stated sum per year, and applicant relying thereon, pays such amount, and the company issues the policy without informing him that the sum is not a full year's premium, the company is estopped to assert forfeiture for nonpayment of an assessment of which insured had no notice (*Illinois Bankers' Life Ass'n v. Dodson* [Tex. Civ. App.] 189 S. W. 992). In *Britt v. Sovereign Camp of Woodmen of the World*, 153 Mo. App. 698, 134 S. W. 1073, the certificate and by-laws of the association provided that a regular monthly assessment should be levied, with additional irregular assessments, and the by-laws provided only for notice of the irregular assessments. It was the custom of the company to levy the regular assessments with the same formalities as the irregular assessments. Camps of the association carried delinquent members for a time, and such assurance was given the wife of a member before default in his assessments. It was held that this conduct

amounted to a waiver of the provisions of the certificate, whereby the member upon default in an assessment was ipso facto suspended.

2704 (b). A mutual benefit certificate required the payment of quarterly calls for assessments when due as a condition on which the continuance of the certificate depended, and provided that no verbal statement should modify the same unless reduced to writing, and approved by the president and secretary of the society. The society verbally agreed to an extension of the time of the payment of a quarterly call. It was held that the society waived the right to have the evidence of its action in writing, and waived the right to insist on a forfeiture for nonpayment of the call when due (*Farmers' & Mechanics' Life Ass'n v. Caine*, 79 N. E. 956, 224 Ill. 599, affirming judgment 123 Ill. App. 419). But where an insurance company, after receiving a note in payment of a premium, writes, "This note will give you an extension of time in which to pay in cash the semi-annual premium due on your policy," this letter does not have the effect of making the policy void in the event the note is not paid at maturity, when by a subsequent course of dealing the company recognizes the policy as still in force (*Bradley v. Federal Life Ins. Co.*, 178 Ill. App. 524).

Though a failure to cancel a fire policy will authorize a finding that insurer had waived its right to cancel it before a loss, for nonpayment of premium (*Robinson v. Western Assur. Co.* [D. C.] 211 Fed. 747), a waiver of the forfeiture of a life policy stipulating that it shall lapse on the nonpayment of any premium when due, will not be inferred from mere silence after knowledge of the forfeiture (*Equitable Life Assur. Society of United States v. Ellis* [Tex. Civ. App.] 137 S. W. 184). And to the same effect is *Lightner v. Prudential Ins. Co. of America*, 154 Pac. 227, 97 Kan. 97. And where members of a mutual benefit society were suspended without action of the society for nonpayment of dues and assessments, that no action was taken by which insured after suspension for nonpayment of dues and assessments was deprived of his membership, and that the names of suspended members were carried on the books, did not constitute a waiver of the suspension (*Labranche v. St. Jean Baptiste Society*, 76 N. H. 237, 81 Atl. 698). If, however, a benefit society rejects a claim on the ground of forfeiture for failure to pay dues of a certain month, it waives any defense it may have arising out of failure to pay at the proper time dues of two preceding months; such payments having been received out of time by the

proper officer (*Mayes v. National Council of Knights and Ladies of Security*, 142 Pac. 290, 92 Kan. 841).

2705 (b). Statements by the agent who issued the policy that "I am attending to" the policy for you, and "if your house burns, you will get your money," are insufficient to justify insured in assuming that he would recover for a loss after he had failed to pay a premium according to his contract (*Johnson v. Continental Ins. Co.*, 119 Tenn. 598, 107 S. W. 688). But the fact the assignee of the policy, on offering to pay the premium, was informed by a "duly authorized agent" that the company had granted extended term insurance to the insured, and the agent promised to notify the assignee if such insurance had not been extended, but failed so to do, tends to show an estoppel (*Sugg v. Equitable Life Assur. Soc.*, 94 S. W. 936, 116 Tenn. 658).

Under Rev. St. Tex. 1911, art. 4953, life insurance company was not bound by parol promise of agent that there would be no forfeiture of policy for nonpayment of premium, policy containing provision therefor, unless beneficiary was first notified and thereafter defaulted, and by agent's statement that application and policy contained such clause. *Knodel v. Equitable Life Ins. Co.* (Tex. Civ. App.) 193 S. W. 1138.

2706 (b). Where a life policy provided that after lapse thereof for nonpayment of an assessment, insured might have the policy fully restored by paying the arrears of premium, with interest, and furnishing defendant company evidence of his insurability, satisfactory to it, by submitting to an examination by defendant's medical examiner, and, after compliance therewith by insured, defendant's medical examiner negligently failed to submit his report for some 30 days after his examination of insured, and defendant failed to pass on the case for some six weeks after receiving the proof, acted adversely upon the application because of information, obtained secretly, as to insured's health and habits and without giving him an opportunity to be heard, and remained silent in the matter until after his death, it was estopped from subsequently claiming a forfeiture of the policy (*Leonard v. Prudential Ins. Co.*, 107 N. W. 646, 128 Wis. 348, 116 Am. St. Rep. 50).

2706-2709. (c) Custom and course of dealing

2706 (c). Where the insurer, by custom and course of dealing with the insured in receiving, without objection, premiums or assessments past due, has led him to believe that he is entitled to a reasonable time for the payment of premiums or assessments after

they mature, the insurer cannot claim a forfeiture for failure to pay premiums or assessments on the day they become due.

This general rule is supported by *Arnold v. Empire Mut. Annuity & Life Ins. Co.*, 60 S. E. 470, 3 Ga. App. 685; *Bankers' Health & Life Ins. Co. v. Givins*, 12 Ga. App. 378, 77 S. E. 203; *Ballah v. Peoria Life Ass'n*, 168 Ill. App. 603; *Jakes v. North American Union*, 186 Ill. App. 1; *Nebergall v. Prudential Ins. Co. of America*, 193 Ill. App. 189; *Trotter v. Grand Lodge of Iowa Legion of Honor*, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533; *Davidson v. Temple of Supreme Tribe of Ben Hur*, 135 Iowa, 88, 111 N. W. 46; *Triple Tie Ben. Ass'n v. Wood*, 78 Kan. 812, 98 Pac. 219; *Fenn v. Northwestern Nat. Life Ins. Co.*, 90 Kan. 34, 133 Pac. 159; *Edmiston v. The Homesteaders*, 93 Kan. 485, 144 Pac. 826, Ann. Cas. 1916D, 588; *Bruzos v. Peerless Casualty Co.*, 111 Me. 308, 89 Atl. 199; *Leland v. Modern Samaritans*, 111 Minn. 207, 126 N. W. 728; *Dougherty v. Supreme Court, Independent Order of Foresters*, 125 Minn. 142, 145 N. W. 813; *Cline v. Sovereign Camp, Woodmen of the World*, 86 S. W. 501, 111 Mo. App. 601; *Zahm v. Royal Fraternal Union*, 154 Mo. App. 70, 133 S. W. 374; *Griffith v. Supreme Council of Royal Arcanum*, 182 Mo. App. 644, 166 S. W. 324; *Owens v. Travelers' Ins. Co. of Hartford, Conn.*, 156 N. W. 1078, 99 Neb. 560; *Chandler v. Royal Highlanders (Neb.)*, 162 N. W. 642; *Lally v. Prudential Ins. Co.*, 75 N. H. 188, 72 Atl. 208; *Markgraf v. Fellowship of Solidarity*, 119 N. Y. Supp. 665, 134 App. Div. 984; *Id.*, 65 Misc. Rep. 64, 119 N. Y. Supp. 665, affirmed in 201 N. Y. 587, 95 N. E. 1133; *Viginerra v. Commercial Casualty Ins. Co. (Sup.)*, 156 N. Y. Supp. 573; *Pacific Mut. Life Ins. Co. v. McDowell*, 42 Okl. 300, 141 Pac. 273; *Boutin v. National Casualty Co.*, 150 Pac. 449, 86 Wash. 372; *Ramsey v. Travelers' Protective Ass'n of America*, 133 N. W. 634, 147 Wis. 405; *Fugina v. Northwestern Nat. Life Ins. Co.*, 144 N. W. 989, 155 Wis. 480. The rule has also been applied where the tender of the past due premium was not made until after the death of the insured. *Jones v. Supreme Lodge Knights of Honor*, 236 Ill. 113, 86 N. E. 191, 127 Am. St. Rep. 277.

Since the waiver in such cases is in the nature of an estoppel, it is not affected by a provision in the contract that no waiver shall be valid unless in writing and signed by an officer of the association (*Godwin v. National Council Knights & Ladies of Security*, 166 Mo. App. 289, 148 S. W. 980). It has been held, too, that, in order that a waiver may arise through custom and course of dealing, insured need not have known thereof (*Watkins v. Brotherhood of American Yeomen*, 188 Mo. App. 626, 176 S. W. 516).

Attention may be called to the following specific applications of the rule: Where the Supreme Lodge of a benefit society acting for

a long time by its agent collected delinquent assessments and without any action on the part of members and without requiring the certificate of health continued the certificates in force, it cannot declare a forfeiture in a case where, at a time it was accustomed to receive such payments, it ascertained that the insured was sick and refused to receive payment of the delinquent assessment unless certificate was made. *Worley v. Supreme Lodge Royal Achates*, 88 Neb. 440, 129 N. W. 984. A provision of an accident insurance policy that it should be forfeited, unless the monthly premiums were paid before noon of the 1st day of each month, is waived, where the insured, pursuant to a custom followed by all his collaborators because they received their pay late in the month, with the acquiescence of the insurer, paid the premiums on his policy from the 15th to the 25th of each month for four or five months. *Pacific Mut. Life Ins. Co. v. McDowell*, 141 Pac. 273, 42 Okl. 300. That insurer issuing an accident policy calling for the payment of the premium in monthly installments from the wages of insured by its course of conduct ignored the defaults of installments of premiums on policies held by coemployés of insured is a circumstance from which it may be inferred that it intended to treat insured the same as it had treated coemployés under similar circumstances. *Loftis v. Pacific Mut. Life Ins. Co.*, 38 Utah, 532, 114 Pac. 134.

2708 (c). Similarly the insurer may by course of dealing waive provisions as to the mode of payment (*Crawford v. North American Union*, 193 Mo. App. 443, 182 S. W. 1043). Thus the provision of a life policy that "if for any reason the premium is not called for when due by an authorized representative of the company, it shall be the duty of the policy holder" to send same to the home office, may be waived, and, if not insisted on during the life of insured, the company cannot insist on a forfeiture because at death a few months' premiums were unpaid (*Rutherford v. Prudential Ins. Co.*, 73 N. E. 202, 34 Ind. App. 531). So, too, where it was customary for the insurer in a life policy to cause a collector to call for premiums, but he failed to call when a premium was due, and told insured that he had been instructed not to call, whereupon insured tendered the premium at the office, and was informed that the policy had lapsed, the insurer was estopped from claiming a forfeiture (*Carey v. John Hancock Mut. Life Ins. Co.*, 100 N. Y. Supp. 289, 114 App. Div. 769). And where the premiums on a life policy, due on a specified date each year, were customarily paid by the insured by depositing a draft in the post office on that date addressed to an agent of the company, which was received and retained without objection, such custom constituted a practical construction of the con-

tract or a waiver of strict compliance with its terms, which precludes the company from asserting a forfeiture of the policy for nonpayment of a subsequent premium which was deposited in the same way (*Krebs v. Security Trust & Life Ins. Co.* [C. C.] 156 Fed. 294).

Evidence that an insurer had sometimes applied commissions earned by insured on premiums due from him is not evidence that it waived a policy provision forfeiting certificate for nonpayment of premiums as to premiums accruing when insured had no commissions to his credit. *Farmers' & Merchants' Mutual Life Ass'n v. Mason* (Ind. App.) 116 N. E. 852.

The theory of the cases seems to be that the habitual disregard of the strict requirements of the contract has misled the insured.

Dougherty v. Supreme Court of Independent Order of Foresters, 125 Minn. 142, 145 N. W. 813; *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 84 Pac. 412, 7 Ann. Cas. 382.

In some cases it has, however, been held that, where a default results in suspension ipso facto, waiver by course of dealing does not arise. Thus in *Catholic Order of Foresters v. Lynch*, 126 Ill. App. 439, it was held that a suspension taking effect ipso facto upon the failure of a member to pay an assessment is not so waived by a course of dealing which had previously taken place between the member and the local lodge of the supreme council by which such local lodge had accepted after default the assessments against such member and has not required him to proceed to be reinstated, as provided by the constitution and by-laws of the society, that payment made after death has intervened will operate to restore the rights under the certificate. In *Coughlin v. Knights of Columbus*, 79 Conn. 218, 64 Atl. 223, the laws of the society required each member of a subordinate council to pay his monthly assessment for the death benefit fund of his council within 30 days from the 1st day of each month under penalty of ipso facto suspension for failure to so pay. A member of a subordinate council knew the laws. For a long time it had been the practice of members of the subordinate council not to pay their monthly assessments until required so to do by a collecting officer appointed by the council, and it had been the practice of its financial secretary to receive the money so paid after the expiration of 30 days from the 1st day of the month, and not to state in his monthly report the fact that certain members had paid their assessments after the time prescribed. It was held that the fact that a member believed that a violation of the laws of

the society was justified did not save him from the penalty of suspension.

In order that an insurer may escape the effect of an established course of dealing with the insured, it must give him reasonable notice of its intention to change its custom in this regard.

Ballah v. Peoria Life Ass'n, 168 Ill. App. 603; *Supreme Council Catholic Benevolent Legion v. Grove*, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913; *Griffith v. Supreme Council of Royal Arcanum*, 182 Mo. App. 644, 166 S. W. 324.

Thus, where defendant insurance society, prior to April, 1906, had been in the habit of receiving payment of monthly assessments from insured during the month for which they were made, without requiring him to be reinstated, it thereby waived the requirement that insured must pay the assessment on or before the last week day of the month preceding the month for which they were made, and could not, without first giving insured reasonable notice of its intent to change its custom, require him to make payments strictly in accordance with the contract, nor require his reinstatement without notice of such change, for his failure to pay the April, 1906, assessment prior to the last week day in March (*Zahn v. Royal Fraternal Union*, 154 Mo. App. 70, 133 S. W. 374). And in *Majestic Life Assur. Co. v. Tuttle*, 58 Ind. App. 98, 107 N. E. 22, it was said that an insurer, having uniformly accepted payment of premiums after maturity and accepted notes for matured premiums due and unpaid at insured's death, was estopped to insist on forfeiture in the absence of previous notice of intention to do so.

In *Markgrof v. Fellowship of Solidarity*, 119 N. Y. Supp. 665, 65 Misc. Rep. 64, 134 App. Div. 984, affirmed in 201 N. Y. 587, 95 N. E. 1133, it appeared that the provision in a life policy calling for the payment of the annual premium in advance was modified by insurer's agreement to receive it in monthly installments. The course of business between insurer and insured was to receive the installments at any time during the month up to the last day thereof. Insurer sent to insured a notice stating that payment of an installment to carry the policy for the month ending September 30th must be made on or before the last day of August. Insured died August 11th, without having paid the installment. It was held that the insurer could not forfeit the policy for failure to pay the monthly installment on the 1st of the month.

2709-2711. (d) Same—Existence of and reliance on custom and course of dealing

2709 (d). Indulgence on one or two, or a very few, occasions is insufficient to show a custom or course of dealing which will justify the insured in believing that indulgence will as a matter of course be granted as to subsequent premiums.

Citizens' Nat. Life Ins. Co. v. Morris, 104 Ark. 288, 148 S. W. 1019; *Smoot v. Bankers' Life Ass'n*, 120 S. W. 719, 138 Mo. App. 438; *Collins v. Metropolitan Life Ins. Co.*, 80 Pac. 609, 32 Mont. 329, 108 Am. St. Rep. 578, rehearing denied 80 Pac. 1092, 32 Mont. 329, 108 Am. St. Rep. 578; *Thompson v. Fidelity Mut. Life Ins. Co.*, 92 S. W. 1098, 116 Tenn. 557, 6 L. R. A. (N. S.) 1039, 115 Am. St. Rep. 823; *Conway v. Minnesota Mut. Life Ins. Co.*, 62 Wash. 49, 112 Pac. 1106, 40 L. R. A. (N. S.) 148. The mere fact that the company had previously accepted payment of an overdue note and reinstated the policy is not in itself sufficient to establish a course of dealing which justifies the insured in believing that the strict terms of the policy would not be insisted on in the future. *Rhodes v. Royal Union Mut. Life Ins. Co.*, 56 Pa. Super. Ct. 233.

On the other hand, it has been held that indulgences on six or more occasions are sufficient to show such a course of dealing as will justify insured in the belief that like indulgences will be granted as to subsequent premiums.

Jakes v. North American Union, 186 Ill. App. 1; *Davidson v. Temple of Supreme Tribe of Ben Hur*, 135 Iowa, 88, 111 N. W. 46; *Fenn v. Northwestern Nat. Life Ins. Co.*, 133 Pac. 159, 90 Kan. 34; *Lally v. Prudential Ins. Co. of America*, 72 Atl. 208, 75 N. H. 188; *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 84 Pac. 412, 7 Ann. Cas. 382; *Seidel v. Equitable Life Assur. Society of the United States*, 119 N. W. 818, 138 Wis. 66.

But see, contra, *Koehler v. Modern Brotherhood*, 160 Mich. 180, 125 N. W. 49, 136 Am. St. Rep. 424, where insured had been indulged 12 out of 17 times of payment. And see, also, *Hay v. People's Mut. Benev. Ass'n of North Carolina*, 55 S. E. 623, 143 N. C. 256.

2711 (d). The by-laws of a fraternal benefit association providing for the suspension of a member upon nonpayment of dues are not waived by statements of an officer of a subordinate lodge that the lodge would pay insured's dues, in the absence of a showing of a general custom to that effect known and acquiesced in by the governing officers of the order (*Knode v. Modern Woodmen of America*, 157 S. W. 818, 171 Mo. App. 377). And so, too, where a fraternal benefit insurance policy required the prompt payment of monthly premiums to the Supreme Lodge, and for insured's only

failures, so far as known to the Supreme Lodge, to promptly pay his premiums he was suspended, there was no waiver of that provision by the Supreme Lodge because the local lodge for a time paid the premiums out of the funds set aside to assist unfortunate members, and the secretary paid several premiums personally (*Supreme Lodge Knights and Ladies of Honor v. Anderson*, 142 S. W. 1069, 146 Ky. 481). The conduct of fire insurer, in notifying insured the first of the years 1912, 1913, and 1914, to come to its office and sign a receipt for a dividend due him in the amount of his premium and have a receipt therefor indorsed on his policy, waived the insurer's right under the policy, upon insured's failure to pay the premium for 1915, no notice being given, a like dividend being then also due, to forfeit the insured's right to renew (*Davis v. Salem County Mut. Fire Ins. Co.*, 85 N. J. Law, 324, 96 Atl. 391).

In *Thompson v. Fidelity Mut. Life Ins. Co.*, 116 Tenn. 557, 92 S. W. 1098, 6 L. R. A. (N. S.) 1039, 115 Am. St. Rep. 823, it appeared that there were thirty-six premiums due on the policy sued on between the date of its issuance and insured's death. Of these seven were accepted after they were due, and, of the seven, two were accepted only after insured had executed a certificate of good health. Of the remaining five, two were forwarded by mail on the day they became due, and three were paid and accepted after due, unconditionally, of which one was paid one day after it was due; one two days, and one sent by mail to the home office of defendant one day after it was due, and received five days after due. The revival contracts recited that the policy had become forfeited for nonpayment of premiums, and contained an express agreement that insured should pay his future premiums promptly. It was held that such facts were insufficient to establish an habitual course of dealing justifying insured in believing that the insurer would not insist on a forfeiture of the policy for failure to pay premiums at maturity. In *Coughlin v. Knights of Columbus*, 79 Conn. 218, 64 Atl. 223, the laws of the society required each member of a subordinate council to pay his regular monthly assessment within thirty days from the 1st day of each month under penalty of ipso facto suspension for failure to so pay. A subordinate council adopted a practice of not requiring its members to pay their monthly assessments until required so to do by a collecting officer appointed by the council, and the financial secretary received the money so paid after the expiration of thirty days from the 1st day of the month. This practice continued for a long

time. It was held that the practice did not effect a change in the laws of the society, which, under its terms, could only be changed by the national council.

The certificate involved in *United Moderns v. Rathbun*, 104 Va. 736, 52 S. E. 552, required insured to comply with the constitution and laws of the order, and provided that a failure to pay dues or assessments should constitute a forfeiture of all right to benefits. The constitution provided that members failing to make payments as they became due, thereby elected to terminate their membership. Insured failed in health and fell in arrears in the payment of assessments, whereupon his friends undertook to keep his certificate in force for him. Accordingly the financial agent of the order received a payment of back assessments from a friend of insured, who afterwards sent a check to insured's mother for insured's salary, without reserving anything for the payment of assessments. The following month, when the financial agent of the order called on the friend for later assessments, the latter asked him to see insured's mother, and, if she did not pay the assessments, to come back to him. Insured's mother refused to pay the assessments, the financial agent did not return to the friend, and insured died in default. It was held that there was no waiver of the default on the part of the order.

2712-2713. (e) Same—Acceptance under provisions of contract or rules of insurer

2712 (e). Even if there have been such acceptances of past-due premiums as would under ordinary circumstances establish a custom, that result cannot be predicated when the acceptance was in accordance with and expressly limited by the provisions of the contract or rules of the insurer. Thus, if the past-due premiums are accepted under provisions or rules relating to reinstatement of members who have forfeited their membership, such acceptance does not amount to a waiver by custom or course of dealing (*Jenkins v. Ancient Order United Workmen*, 93 Kan. 324, 144 Pac. 223). Especially will the rule prevail where acceptance is conditioned on the continued good health of the insured (*Wilson v. Royal Union Mut. Life Ins. Co.*, 137 Iowa, 184, 114 N. W. 1051).

In *Crosby v. Vermont Accident Ins. Co.*, 84 Vt. 510, 80 Atl. 817, the policy which was of accident insurance provided for a monthly payment to the insured upon total loss of time from an accident which should wholly, and continuously from its date, disable him

from any business or occupation, and if injury therefrom should wholly and continuously, from the date of the accident, prevent him from performing duties pertaining to his occupation. Premiums were required to be paid in advance on or before the first day in each month during the continuance of the policy, and on each of such payments the plaintiff was insured from the date of the contract until the first day of the next calendar month; the acceptance of past due premiums being made optional with the company, and not in any case to be a waiver of forfeiture, but to have the same effect as if a new application had been made and a new policy issued on the day following such acceptance. Each of the payments on the policy for the four months from February was made after the first day of the month and after an accident on June 5th, the insured on June 7th sent the premium for that month which was accepted June 8th in ignorance of the accident. It was held that, construing the provisions of the policy together, it had lapsed from June 1st until its renewal on June 8th, and that as to the accident which occurred during that time the plaintiff was not insured.

In view of Civ. Code S. C. 1912, § 2755, the custom of a local lodge not to declare forfeiture of a mutual benefit policy upon delinquency did not constitute waiver, especially where the constitution prohibited such waiver and was agreed to by the insured. *Sternheimer v. Order of United Commercial Travelers of America* (S. C.) 93 S. E. 8.

2713-2714. (f) Same—As dependent on powers of agents

2713 (f). In several cases it has been held that, where the custom or course of dealing is based on the acts of an agent, no waiver can arise if the agent had no power to waive forfeitures.

American Assur. Ass'n v. Hardiman, 52 S. E. 536, 124 Ga. 379; *Odd Fellows' Benefit Ass'n v. Smith*, 101 Miss. 332, 58 South. 100.

So, where the laws of the grand lodge do not permit a subordinate lodge or its officers to alter or waive any rules relating to the contract, a custom of the subordinate lodge without the knowledge of the officers of the grand lodge, permitting members to remain delinquent, and advancing from its treasury the amount of dues, does not waive a forfeiture for nonpayment of dues (*Burke v. Grand Lodge, A. O. U. W. of Missouri*, 118 S. W. 493, 136 Mo. App. 450). But in the same case it was said that where a custom of a subordinate lodge of allowing members to remain delinquent in violation of a general by-law, or in advancing dues from the lodge funds, is brought to the notice of the officers of the grand lodge and receives

approval, either express or implied, the general by-law must be regarded as waived or modified by the custom. In *Sauerwein v. Grand Lodge of Order of Sons of Herman*, 121 Minn. 229, 141 N. W. 174, it was held that a grand lodge was bound by a subordinate lodge's waiver of prompt payment of dues and assessments through a practice well known and long continued. And in *Pacific Mut. Life Ins. Co. v. Carter*, 92 Ark. 378, 123 S. W. 384, 124 S. W. 764, it was held that, where the insurer holds an agent out to the world as a general agent, it clothes him with the apparent authority of such an agent, and therefore is liable to those dealing with him on the faith of his being such agent, so as to bind the insurer by a waiver of the nonpayment of the premium.

In *Johanson v. Grand Lodge A. O. U. W.*, 31 Utah, 45, 86 Pac. 494, it appeared that by the provisions of the laws of the society the subordinate lodge was bound to see that the assessments were collected. It was expressly given power to suspend members for nonpayment of assessment and to reinstate them on payment of overdue assessments without notice to or direction from the Grand Lodge. Through the exercise of its powers of suspension, the subordinate lodge was authorized to annul the insurance of any member and to revalidate the same. It determined the good standing of its members which was requisite to the validity of their insurance, and was given other powers in respect to members which directly affected their rights in and to the contract of insurance. It was held that such subordinate lodge was not a mere collecting agent, but was authorized to waive a strict compliance of the society's by-laws relating to the payment of assessments.

2714-2715. (g) Same—Insurance of property

2714 (g). In *Home Fire Ins. Co. v. Stancell*, 94 Ark. 578, 127 S. W. 966, it appeared that the maker of premium notes, stipulating that the insurance should be void as long as the notes remained past due and unpaid, notified the insurer upon maturity of the first note that he understood that the notes were to be sent to the insurer's agent at the place where the insurance was effected, to be collected there, and, in effect, asked that the notes should be sent to such agent to be by him presented for payment and collected. The insurer in effect agreed to do so, and, in conformity to such agreement sent the first note to its agent for collection, which was promptly paid. It was held that the insurer by such conduct led the maker to believe that the other notes would be sent to the same

place before payment would be demanded, and forfeiture of the policy insisted upon, and waived any right it might have had to forfeit the policy for nonpayment of subsequent notes which were not sent to its agent for collection.

2715-2718. (h) Acceptance and retention of specific premium

2715 (h). Where there has been a default in the payment of a premium or an assessment, justifying a forfeiture of the contract, such forfeiture is waived if, with knowledge of the facts, the insurer thereafter unconditionally accepts and retains the specific premium or assessment for which the insured was delinquent.

Reference may be made to the following cases: *Mutual Reserve Fund Life Ass'n v. Tuchfeld*, 86 C. C. A. 657, 159 Fed. 833; *Duncan v. Missouri State Life Ins. Co.*, 160 Fed. 646, 87 C. C. A. 542; *Robinson v. Mutual Reserve Life Ins. Co. (C. C.)* 182 Fed. 850; *Security Mut. Life Ins. Co. v. Riley*, 157 Ala. 553, 47 South. 735; *Industrial Mut. Indemnity Co. v. Thompson*, 83 Ark. 574, 104 S. W. 200, 10 L. R. A. (N. S.) 1064, 119 Am. St. Rep. 149; *Knights of Maccabees of the World v. Pelton*, 21 Colo. App. 185, 121 Pac. 949; *National Benefit Ass'n v. Elzie*, 35 App. D. C. 294; *Eureka Life Ins. Co. v. Hawkins*, 39 App. D. C. 329; *Monahan v. Fidelity Mut. Life Ins. Co.*, 90 N. E. 213, 242 Ill. 488, 134 Am. St. Rep. 337; *United States Indemnity Soc. v. Griggs*, 118 Ill. App. 577; *National Council of Knights and Ladies of Security v. Burch*, 126 Ill. App. 15; *Catholic Order of Foresters v. Lynch*, 126 Ill. App. 439; *Saucerman v. Court of Honor*, 150 Ill. App. 550; *O'Malley v. Supreme Council Catholic Mut. Ben. Ass'n*, 165 Ill. App. 186; *United States Benev. Soc. v. Watson*, 84 N. E. 29, 41 Ind. App. 452; *Brotherhood of Painters, Decorators and Paperhangers of America v. Barton*, 46 Ind. App. 160, 92 N. E. 64; *Same v. Peters*, 46 Ind. App. 733, 92 N. E. 183; *Workingmen's Mut. Protective Ass'n v. Levertton*, 178 Ind. 151, 98 N. E. 871; *O'Connor v. Knights and Ladies of Security (Iowa)* 158 N. W. 761, L. R. A. 1917B, 897; *Grand Lodge A. O. U. W. of Kansas v. Smith*, 92 Pac. 710, 76 Kan. 509; *Dobson v. Triple Tie Ben. Ass'n*, 129 Pac. 1173, 88 Kan. 705; *Runbeck v. Farmers' & Bankers' Life Ins. Co.*, 150 Pac. 586, 96 Kan. 186; *Citizens' Nat. Life Ins. Co. v. Egner*, 180 S. W. 778, 167 Ky. 476; *McNicholas v. Prudential Ins. Co.*, 77 N. E. 756, 191 Mass. 304; *Morgan v. Independent Order of Sons and Daughters of Jacob of America*, 44 South. 791, 90 Miss. 864; *Godwin v. National Council Knights and Ladies of Security*, 148 S. W. 980, 166 Mo. App. 289; *Oldham v. Supreme Lodge, Modern Brotherhood of America*, 157 S. W. 92, 170 Mo. App. 564; *Keys v. National Council Knights and Ladies of Security*, 174 Mo. App. 671, 161 S. W. 345; *Jaggi v. Prudential Ins. Co. of America*, 177 S. W. 1064, 191 Mo. App. 384; *Madsen v. Prudential Ins. Co. of America (Mo. App.)* 185

S. W. 1168; *Davis v. National Council of Knights and Ladies of Security*, 196 Mo. App. 485, 196 S. W. 97; *Kennedy v. Grand Fraternity*, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78; *Bohles v. Prudential Ins. Co. of America*, 84 N. J. Law, 315, 86 Atl. 438, affirming judgment (Sup.) 83 Atl. 904, 83 N. J. Law, 246; *Melick v. Metropolitan Life Ins. Co.*, 91 Atl. 1070, 85 N. J. Law, 727, affirming judgment (Sup.) 87 Atl. 75, 84 N. J. Law, 437; *Re-witzer v. Switchmen's Union of North America*, 98 N. Y. Supp. 974, 112 App. Div. 708; *Guntrum v. Prudential Ins. Co. of America*, 159 N. Y. Supp. 1006, 173 App. Div. 512; *Coile v. Order of United Commercial Travelers of America*, 161 N. C. 104, 76 S. E. 622; *Clifton v. Mutual Life Ins. Co.*, 168 N. C. 499, 84 S. E. 817; *Modern Brotherhood of America Lodge v. Bailey* (Okl.) 150 Pac. 673, L. R. A. 1916A, 551; *Patton v. Women of Woodcraft*, 65 Or. 33, 131 Pac. 521; *Crumley v. Sovereign Camp of Woodmen of the World*, 102 S. C. 386, 86 S. E. 954; *Outlaw v. National Council, Junior Order United American Mechanics* (S. C.) 92 S. E. 469; *Continental Casualty Co. v. Jennings*, 45 Tex. Civ. App. 14, 99 S. W. 423; *Grand Fraternity v. Mulkey*, 62 Tex. Civ. App. 147, 130 S. W. 242, 185 S. W. 582; *First Texas State Ins. Co. v. Capers* (Tex. Civ. App.) 183 S. W. 794; *International Brotherhood of Maintenance of Way Employés v. Duncan* (Tex. Civ. App.) 194 S. W. 956; *Schuster v. Knights and Ladies of Security*, 60 Wash. 42, 110 Pac. 680, 140 Am. St. Rep. 905.

An insurance company is estopped to insist on a forfeiture for non-payment of renewal premiums at the stipulated time, where it extends the time, and they are paid according to the extension. *West v. National Casualty Co.*, 61 Ind. App. 479, 112 N. E. 115.

Where an insurer in a life policy became by the acceptance of premiums estopped to assert a forfeiture, the tender by the insurer of all the premiums after the death of insured was insufficient to relieve it from the estoppel. *Monahan v. Mutual Life Ins. Co.*, 63 Atl. 211, 103 Md. 145, 5 L. R. A. [N. S.] 759. A fraternal beneficial society may not defend an action on a certificate on the ground that a payment of dues was made too late, without showing that it had refused to accept the payment, had offered to return it to the beneficiary, and had kept the tender good by bringing the amount into the court. *Modern Woodmen of America v. Jones*, 52 Ind. App. 149, 98 N. E. 1006.

But, contra, see *Wall v. Brotherhood of Painters*, 165 Ill. App. 59; *Wheatley's Adm'r v. Knights of Columbus*, 161 Ky. 331, 170 S. W. 937, holding that the receipt of assessments from a member after an ipso facto forfeiture of his membership for nonpayment of the assessments, did not waive the forfeiture. And see *Sovereign Camp Woodmen of the World v. Jones*, 11 Ala. App. 433, 66 South. 834, holding that a fraternal beneficiary order did not waive a forfeiture of a certificate for nonpayment of dues, though

dues were received prior to the member's death and returned without knowledge of the death subsequent thereto.

Under an accident policy providing for renewal after 1st day of month when premium was due, but that company was not liable for accidents occurring between 1st day of the month and date premium was paid, the previous acceptance of renewal premiums after 1st day of month was not waiver of condition mentioned (*National Life & Accident Ins. Co. v. Reams* [Tex. Civ. App.] 197 S. W. 332).

A forfeiture based on the delinquency of a subordinate lodge may also be waived by acceptance of a past-due assessment (*District Grand Lodge, No. 23, United Order of Odd Fellows, v. Hill*, 3 Ala. App. 483, 57 South. 147).

2717 (h). A waiver of default cannot be predicated on the acceptance of past-due premiums after the death of the insured if the insurer is ignorant of the fact of death.

Brown v. Knights of the Protected Ark, 43 Colo. 289, 96 Pac. 450; *National Council of Knights and Ladies of Security v. Burch*, 126 Ill. App. 15; *Catholic Order of Foresters v. Lynch*, 126 Ill. App. 439; *Nebergall v. Prudential Ins. Co. of America*, 193 Ill. App. 189; *Franklin Life Ins. Co. v. McAfee*, 90 S. W. 216, 28 Ky. Law Rep. 676; *Gifford v. Workmen's Ben. Ass'n*, 72 Atl. 680, 105 Me. 17, 17 Ann. Cas. 1173.

So, in *Matthews v. Travelers' Ins. Co.*, 73 Or. 278, 144 Pac. 85, where an accident policy was involved, it was held that there was no waiver by the acceptance of an overdue premium after the accident but without knowledge thereof. In *Mosaic Templars of America v. Jones*, 99 Ark. 204, 137 S. W. 812, the association designated the local scribes as agents to collect dues and forward them to the national scribe. Dues paid by a member of a local chapter to the local scribe after the day fixed for payment were retained by the national scribe with knowledge that the dues were paid after such date, but he did not know that the member died after the payment and prior to his receipt of the money. It was held that the certificate was not forfeited for nonpayment of dues.

The circumstances under which an overdue premium was accepted will of course determine the effect of such acceptance as a waiver. In order that a payment and acceptance of assessments after forfeiture may operate as a waiver, the payments must be fairly and honestly made, so that, where the company was not informed when payments of past dues were made that insured was then very

ill, acceptance of such payment did not operate as a waiver of forfeiture (*United Order of the Golden Cross v. Hooser*, 160 Ala. 334, 49 South. 354). And if the collector of past-due assessments paid by a beneficiary did not know that the payment was made without the consent of the member, the company is not estopped, by the collector's acceptance of the same, to allege want of authority in the beneficiary to make the payment (*Proctor v. United Order of the Golden Star*, 89 N. E. 1042, 203 Mass. 587, 25 L. R. A. [N. S.] 370).

A company issuing a life policy requiring a weekly payment of premiums, which receives the money of the wife of the insured in consequence of its promise to recognize the truth of her claim as to a disputed payment and to correct the error in the premium receipt book, cannot repudiate liability because the policy stipulated that payments of premiums, to be recognized by the company, "must be entered at the time of the payment in the premium receipt book" (*McNicholas v. Prudential Ins. Co. of America*, 196 Mass. 565, 82 N. E. 692). In *Cardinale v. Society of Civility and Labor* (Sup.) 102 N. Y. Supp. 471, the by-laws of the society were subject to modification by a majority vote at an ordinary meeting. The society at a meeting unanimously agreed that a member in arrears, who desired to place himself on a common basis with the society, would not lose the rights granted. The name of a member in arrears was canceled, and he died without formal reinstatement; but he paid to an officer of the society a sum sufficient to pay the arrears. The officer retained the amount paid about two weeks, until the death of the member. It was held that the society was liable to the member; forfeiture for nonpayment having been avoided by the payment to the officer. In *Veal v. Security Mut. Life Ins. Co.*, 6 Ga. App. 721, 65 S. E. 714, it was held that where an insurer retains a dishonored check and, instead of repudiating the transaction by returning the check and demanding back its receipt, insists that insured pay it after the day on which the policy would otherwise have lapsed, a waiver of the punctual payment of the premium in cash results.

The policy involved in *Jewett v. Northwestern Nat. Life Ins. Co.*, 149 Mich. 79, 112 N. W. 734, required the payment of the annual premiums in four installments on the 1st day of August, November, February, and May in every year. In October the insured wrote for the amount of premium then due on the policy. On October 31st the insurer replied stating the amount due which was the amount of the installment due August 1st, together with interest. On No-

vember 4th, the insured remitted the amount. It was held that the retention of the amount by the insurer was not a waiver of the nonpayment of the installment due November 1st. In *Knights of Columbus v. Burroughs' Beneficiary*, 107 Va. 671, 60 S. E. 40, 17 L. R. A. (N. S.) 246, the by-laws of the society provided that any member who should neglect to pay his assessment should ipso facto forfeit his membership, and that no money should be transferred from the treasury of any council except by two-thirds vote at a regular meeting, etc. A member of a local council failed to pay his assessments, but the local council, without complying with the by-laws, paid the same from its treasury. The order had no knowledge of the facts. It was held that the local council, in undertaking to make good the member's delinquency, acted, as his agent, not as agent of the national council, and that the order did not waive the forfeiture resulting from the nonpayment of the assessments, and was not estopped from setting it up in defense to an action on the certificate. The facts in *Grand Lodge A. O. U. W. v. Crandall*, 80 Kan. 332, 102 Pac. 843, were these: A member of a fraternal benefit association mailed the amount of an overdue assessment and dues to the financier of his lodge. The financier received the amount and reported it, as required by the by-laws, to the lodge at its next meeting, three days thereafter. Two days before the meeting the member died, and, upon the order of the lodge to return the money, the financier tendered it to the mother of the beneficiaries, both being minors, and, upon her refusal to accept it, left it with one of them; no guardian having been appointed. The by-laws provided that, upon default in an assessment, the member's certificate should stand suspended without any action of the lodge or its officers, and that thereupon the beneficiary should lose all right in the beneficiary fund, and made an affirmative vote of the lodge a condition to reinstatement. It was held that there was no waiver of the conditions of forfeiture of the certificate and no liability thereon.

Where an application is made to an insurance company to revive a forfeited policy, and the application is accompanied by a statement of the local agent that the applicant is sick at the time, with a recommendation by the agent that the application be granted for advertising purposes, the delay of the company for two weeks, and until after the death of the applicant, in passing upon the question, will not be presumed to be an acceptance of the premiums accompanying the application (*Ryan v. Prudential Ins. Co.*, 33 Pa. Super. Ct. 364). So, where a life insurance policy has lapsed for nonpay-

ment of premium and an application for revival is made to an agent, subject to acceptance by the company, the requisite premium being paid, and the company's examining physician delays the examination several days, the right of the company to insist on the forfeiture is not thereby waived, and there exists no contract of insurance until the new proposal is accepted by the company and the minds of the parties meet (*Budnik v. Metropolitan Life Ins. Co.*, 177 Ill. App. 14).

Acceptance by a local officer of a fraternal benefit society of overdue assessments from a suspended member, with notice that the member was not in good health, under the by-laws, does not waive a forfeiture. *Sovereign Camp, Woodmen of the World, v. Shaw*, 85 S. E. 827, 143 Ga. 559.

2718-2719. (i) Same—Authority of person accepting premium

2718 (i). The acceptance of a past-due premium by an agent or officer without authority to waive forfeitures or bind the company can have no effect to relieve insured from the consequences of his default.

Order of United Commercial Travelers of America v. Young, 212 Fed. 132, 128 C. C. A. 648; *Cayford v. Metropolitan Life Ins. Co.*, 5 Cal. App. 715, 91 Pac. 266; *Bank of Commerce v. New York Life Ins. Co.*, 125 Ga. 552, 54 S. E. 643; *Dillon v. National Council of Knights and Ladies of Security*, 148 Ill. App. 121, affirmed in 244 Ill. 202, 91 N. E. 417; *Havlicek v. Western Bohemian Fraternal Ass'n (Minn.)* 163 N. W. 985; *Day v. Supreme Forest, Woodmen Circle*, 174 Mo. App. 260, 156 S. W. 721; *Kennedy v. Grand Fraternity*, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78; *Riess v. Supreme Conclave, Improved Order of Heptasophs*, 177 App. Div. 845, 164 N. Y. Supp. 878.

So where the secretary of a life company had no power to forfeit a policy for nonpayment of assessments, his unauthorized acceptance of assessments after forfeiture for nonpayment was not binding on the company, so as to waive a failure to pass a satisfactory medical examination upon application for reinstatement as required by the policy (*Conway v. Minnesota Mut. Life Ins. Co.*, 62 Wash. 49, 112 Pac. 1106, 40 L. R. A. [N. S.] 148). And generally, where the waiver of the payment, within the required time, of a premium or assessment, was the act of an agent, it must be shown either that the agent had express authority from the company to make the waiver or that the company subsequently, with knowledge of the facts, ratified the action of the agent (*Supreme Commandery, Unit-*

ed Order of the Golden Cross of the World, v. Bernard, 26 App. D. C. 169).

2719 (i). If the limitations on the agent's authority are secret, and insured has no notice thereof, such limitations are not effective (Security Mut. Life Ins. Co. v. Riley, 157 Ala. 553, 47 South. 735). An agent clothed with the power of soliciting insurance, delivering policies, and collecting premiums, is the agent of the insurance company, and not the agent of the insured and may waive the default (Continental Casualty Co. v. Johnson, 119 Ill. App. 93). So, too, an officer of a beneficial association, who has power to reinstate a member suspended by reason of delay in remitting dues, may, in the absence of express provision, waive the suspension (Reed v. Bankers' Union of the World, 99 S. W. 55, 121 Mo. App. 419). And generally the relation of subordinate lodges to the grand lodge of a fraternal benefit society is one of agency and the officers of such a subordinate lodge are the agents of the supreme lodge, and as such may waive the prompt payment of premiums.

Saucerman v. Court of Honor, 150 Ill. App. 550; Trotter v. Grand Lodge of Iowa Legion of Honor, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533. The fact that the by-laws of the society declare that no local camp, nor any of its officers, may waive any by-law, and that the clerk of the local camp is the agent of the camp, and not of the society, does not affect the rule since the question of agency is governed by the law, and not by any contract evidenced by the by-laws. Shultice v. Modern Woodmen of America, 65 Wash. 65, 120 Pac. 531.

In Continental Casualty Co. v. Jasper, 121 Ky. 77, 88 S. W. 1078, certain industrial insurance policies provided that the premiums should be paid out of the wages of the insured. Orders were given the insurer by the insured on the employer's paymaster, who did not retain the premiums out of his wages, and insured was notified that the policy had lapsed. Before any further payment became due, the insured died. Subsequently the beneficiary paid the premium to the paymaster and received a receipt, which had been sent to him by the insurer. It was held that the paymaster was without authority to receive the payment; he being the agent of the insured to pay from the wages the premium as it fell due, and the agent of the insurer only in remitting the same to it, and the policy, stipulating that the payment of the premium was a condition to a recovery thereon, was forfeited.

The act of the agent in accepting the overdue premium may be ratified by the insurer thus giving effect to the waiver (Working-

men's Mut. Protective Ass'n v. Leverton, 178 Ind. 151, 98 N. E. 871). Such ratification is shown by retention of the premium.

Brotherhood of Painters, Decorators and Paperhangers of America v. Barton, 46 Ind. App. 160, 92 N. E. 64; Same v. Peters, 46 Ind. App. 733, 92 N. E. 183; Nichols v. Prudential Ins. Co. of America, 155 S. W. 478, 170 Mo. App. 437.

2719-2721. (j) Same—Conditional acceptance

2719 (j). Where the rules of the insurer prescribe certain formalities or conditions for reinstatement after default, acceptance of the past-due premiums subject to compliance with such rules is not a waiver.

Supreme Commandery, United Order of the Golden Cross of the World, v. Bernard, 26 App. D. C. 169; Crook v. New York Life Ins. Co., 75 Atl. 388, 112 Md. 268; Odd Fellows' Ben. Ass'n v. Ivy, 105 Miss. 423, 62 South. 423; Kennedy v. Grand Fraternity, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78; Stack v. Williams, 166 App. Div. 190, 151 N. Y. Supp. 185.

If, however, the insurer imposes unauthorized conditions for reinstatement, the default is waived (Mettner v. Northwestern Nat. Life Ins. Co., 127 Iowa, 205, 103 N. W. 112).

2720 (j). Acceptance of a past-due premium on the condition that insured is in good health, or that he furnish a certificate of good health is not such an acceptance as will waive the forfeiture, the condition not being complied with.

Mutual Reserve Fund Life Ass'n v. Tuchfeld, 159 Fed. 833, 86 C. C. A. 657; Woodmen of the World v. Jackson, 80 Ark. 419, 97 S. W. 673; Bank of Commerce v. New York Life Ins. Co., 54 S. E. 643, 125 Ga. 552.

2721-2723. (k) Same—Insurance of property

2722 (k). The acceptance of a cash premium by the general agents of an insurance company after default in payment of premium note and notice of loss is a waiver of the forfeiture (St. Paul Fire & Marine Ins. Co. v. Cooper, 25 Okl. 38, 105 Pac. 198). In Coleman v. Caldwell County Mut. Fire Ins. Co., 125 Mo. App. 643, 103 S. W. 150, the constitution of the company provided that, if any member should for 60 days after notice of an assessment neglect to pay the assessment, he should cease to have any claim against the company. A policy issued to a member insured the property for a certain term in consideration of a certain premium. During such term the property was destroyed, but at that time the member had failed to pay an assessment for more than 60 days, but subsequently

the company accepted the assessment. It was held that there had been no forfeiture of the policy.

2724-2725. (1) Demand for specific premium after default

2724 (1). An unconditional demand for the payment of a past-due premium, operates as a waiver of the forfeiture from the time of the demand.

Farmers' Mut. Life Protective Ass'n v. Elliott, 4 Ga. App. 342, 61 S. E. 493; *Williams v. Empire Mut. Annuity & Life Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082; *New England Mut. Life Ins. Co. v. Springgate*, 129 Ky. 627, 113 S. W. 824, 19 L. R. A. (N. S.) 227, denying rehearing of 129 Ky. 627, 112 S. W. 681, 19 L. R. A. (N. S.) 227; *Loftis v. Pacific Mut. Life Ins. Co.*, 38 Utah, 532, 114 Pac. 134; *McNaughton v. Des Moines Life Ins. Co.*, 122 N. W. 764, 140 Wis. 214. A demand made by the mistake of a subordinate clerk does not operate as a waiver. *Burdick v. Modern Woodmen*, 47 Wash. 572, 92 Pac. 439.

The mere sending of notices of the amount due does not amount to a waiver of the default (*Busta v. Court of Honor*, 172 Ill. App. 71), nor by invitation to pay arrearages and be reinstated, if in good health, where insured took no steps towards reinstatement (*Hawkins v. Lone Star Ins. Union* [Tex. Civ. App.] 146 S. W. 1041). So if a letter reminding an insured of his nonpayment of a premium amounts simply to an expression of willingness to reinstate a forfeited policy upon payment, there is no waiver of default; but, if it indicates an intention to treat the policy as in force, there is a waiver (*Noem v. Equitable Life Ins. Co. of Iowa*, 37 S. D. 176, 157 N. W. 308, affirming order on rehearing 153 N. W. 652, 35 S. D. 593). But it has been held that where, after the expiration of the days of grace within which a premium on a life policy could be paid, the insurer offered to make a loan with which to pay premiums without reinstatement the forfeiture was waived (*Equitable Life Assur. Society of United States v. Ellis*, 105 Tex. 526, 152 S. W. 625, overruling motion for rehearing 105 Tex. 526, 147 S. W. 1152).

The fact that the collector of a life insurance company called on insured for the premium after it was due, and, on being told that insured was out, refused to wait, and said he would call again, did not tend to show a waiver of forfeiture, where the premium was never collected.

Coyford v. Metropolitan Life Ins. Co., 5 Cal. App. 715, 91 Pac. 266;
Cowen v. Equitable Life Assur. Soc., 37 Tex. Civ. App. 430, 84 S. W. 404.

In *Metropolitan Life Ins. Co. v. Hall*, 104 Va. 572, 52 S. E. 345, the policy provided that general agents had no authority to extend the time for the payment of premiums, but a rule of the company authorized acceptance of overdue premiums between the due date and that when the premium receipt must be returned for cancellation, unless paid, provided the superintendent can certify that the former insured is in good health. An agent authorized to accept an overdue premium went to the house of insured to collect the same, and without authority agreed to accept the premium on the succeeding day, requesting the insurer's assistant superintendent to collect the same, which he agreed, but failed, to do, and on such day insured was sick from the illness of which she died. It was held that such facts did not estop the insurer from enforcing a forfeiture of the policy for nonpayment of premium.

A life insurer can refuse a check for an overdue premium tendered while insured is fatally ill where he has not paid a renewal premium note, and had been notified that the right of forfeiture under the policy and under the note would be exercised on nonpayment of the note when due; such default not being waived by a subsequent letter requesting prompt payment (*Mercer v. South Atlantic Life Ins. Co.*, 69 S. E. 961, 111 Va. 699). A letter, requesting payment of a premium written after the premium was due, but before the right to forfeiture accrued thereon, was not a waiver of a forfeiture of nonpayment of such premium (*Security Life & Annuity Co. of America v. Underwood* [Tex. Civ. App.] 150 S. W. 293).

2725. (m) Same—Insurance of property

2725 (m). If, under the by-laws of a mutual fire insurance company, a fire policy became absolutely void and forfeited on nonpayment of an assessment within 30 days after notice, the company, by afterwards suing for the premium, did not waive the forfeiture (*Mutual Fire Co. of Portland v. Maple*, 60 Or. 359, 119 Pac. 484, 38 L. R. A. [N. S.] 726). So, where an insured under a mutual fire insurance policy failed to pay his premium within 60 days from delivery of the policy, as required by the by-laws, which also provided that the policy should become void in such case, the subsequent indorsement by the company on the policy of a gasoline permit, and the sending out of a statement of the premium due, together with a letter demanding immediate settlement, did not necessarily constitute a waiver of the default occasioned by nonpayment of the premium (*Johnson v. Retail Merchants' Mut. Fire Ins. Co.*, 112 Minn. 418, 128 N. W. 462).

Demand for payment by mutual insurance company of an assessment on a policy, after a loss under it, is not a waiver of its terms, in the absence of a plea and proof of payment (*Swett v. Antelope County Farmers' Mut. Ins. Co.*, 91 Neb. 561, 136 N. W. 347). And where the contract provides for a suspension of the risk on default, demand for the past-due assessment does not waive the suspension.

Stutzman v. Cicero Mut. Fire Ins. Co., 150 Wis. 254, 136 N. W. 604;
Continental Ins. Co. v. Peden, 145 Ky. 775, 141 S. W. 43.

2726. (n) Retention of premium note and enforcement thereof

2726 (n). Mere retention of a premium note past due does not operate as a waiver of forfeiture for nonpayment.

Farmers' & Merchants' Mutual Life Ass'n v. Mason (Ind. App.) 116 N. E. 852; *New York Life Ins. Co. v. Evans*, 136 Ky. 391, 124 S. W. 376; *Rhodes v. Royal Union Mut. Life Ins. Co.*, 56 Pa. Super. Ct. 233.

An insurer issuing a life policy stipulating for forfeiture for nonpayment at maturity of any premium does not waive a forfeiture for nonpayment of a premium note by requesting the insured to ask for an extension of time (*Parry v. Southeastern Life Ins. Co.*, 78 S. E. 441, 95 S. C. 1).

An unconditional demand for payment or an attempt to enforce collection of a past-due premium note operates as a waiver of a forfeiture based on default in payment.

Washburn v. Union Cent. Life Ins. Co., 38 South. 1011, 143 Ala. 485; *Gallihier v. State Mut. Life Ins. Co.*, 150 Ala. 543, 43 South. 833, 124 Am. St. Rep. 83; *Williams v. Empire Mut. Annuity & Life Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082; *Fidelity Mut. Life Ins. Co. v. Goza*, 13 Ga. App. 20, 78 S. E. 735; *New England Mut. Life Ins. Co. v. Springgate*, 129 Ky. 627, 112 S. W. 681, 19 L. R. A. (N. S.) 227, rehearing denied 129 Ky. 627, 113 S. W. 824, 19 L. R. A. (N. S.) 227; *New York Life Ins. Co. v. Evans*, 136 Ky. 391, 124 S. W. 376; *New York Life Ins. Co. v. Conner*, 160 S. W. 491, 155 Ky. 779.

Where a policy provided that upon failure to pay a premium note when due, the policy should become void without action by the company, the company by accepting a payment of interest after a premium note was due, and also a payment of one-half of the principal of the note, waived the provision for forfeiture (*Occidental Life Ins. Co. v. Jacobson*, 15 Ariz. 242, 137 Pac. 869). But a condition in a life policy, forfeiting the insurance for nonpayment of a note for a premium, is not waived by a demand by the insurer after

maturity for payment, where the insured refused payment (Stephen-son v. Empire Life Ins. Co., 139 Ga. 82, 76 S. E. 592).

But if the notes stipulate that, if not paid when due, the policy shall be void and the premium shall be considered as earned, demand of payment of the notes will not waive the forfeiture.

Duncan v. Missouri State Life Ins. Co., 160 Fed. 646, 87 C. C. A. 542;
Marshall v. Missouri State Life Ins. Co., 148 Mo. App. 669, 129
S. W. 40; Iles v. Mutual Reserve Life Ins. Co., 96 Pac. 522, 50
Wash. 49, 18 L. R. A. (N. S.) 902, 126 Am. St. Rep. 886.

Where a policy of insurance provided that failure to pay any of the first three years' premiums or any notes or interest on notes given for premiums before the day on which such premiums or notes become due should avoid the policy without notice, and all payments made should be deemed earned as premiums, and a note was given for the first year's premium and after default was renewed and the company accepted the renewal, and an action was brought on it by an indorsee of the company, it was a waiver of the forfeiture of the policy for nonpayment at the maturity of the first note, so it was no defense to a suit on the note that the renewal took place after maturity. Neal v. Gray, 52 S. E. 622, 124 Ga. 510.

So, where the premium note provided that, if it was unpaid at maturity, the policy should cease, and the whole amount of the note should be considered earned, without restoration of the policy, the acceptance by insured of a part payment on the note after default was insufficient to establish a waiver of the forfeiture of the policy (National Life Ins. Co. v. Manning, 86 S. W. 618, 38 Tex. Civ. App. 498).

2726-2727. (o) Same—Insurance of property

2727 (o). Where a company retains notes given for premium and endeavors to collect them in full, it waives the provision that the policy should be void if the notes were not paid at maturity (Shawnee Mut. Fire Ins. Co. v. Cannedy, 36 Okl. 733, 129 Pac. 865, 44 L. R. A. [N. S.] 376). But where the policy provided that a non-payment of a premium note at maturity should suspend the insurance pending the default, and that in case of default the full amount of the premium should be considered as earned, the premium was earned by the risk assumed during the periods when the policy was in force, so that the acceptance of payment of a premium note after destruction of the property insured by fire while the policy was suspended, did not render the insurer liable for the loss (Jefferson Mut. Ins. Co. v. Murry, 86 S. W. 813, 74 Ark. 507). And to the

same effect is *Continental Ins. Co. v. Peden*, 145 Ky. 773, 141 S. W. 43. But there is a waiver of a condition that the insurer should not be liable for loss occurring while a premium note was past due and unpaid, where it made an unconditional demand for a check in payment, by a letter which the insured received and complied with while the property was burning (*Limerick v. Home Ins. Co.*, 150 S. W. 978, 150 Ky. 827, 44 L. R. A. [N. S.] 371).

2727-2731. (p) Demand and acceptance of subsequent premiums or assessments as waiver of prior default

2727 (p). The demand and acceptance of a subsequent premium or assessment from one already in default waives the forfeiture on account of such prior default.

Knights of Maccabees of the World v. Pelton, 21 Colo. App. 185, 121 Pac. 949; *Grand Lodge A. O. U. W. of Kansas v. Smith*, 92 Pac. 710, 76 Kan. 509; *Reed v. Bankers' Union of the World*, 99 S. W. 55, 121 Mo. App. 419; *Francis v. Supreme Lodge A. O. U. W.*, 150 Mo. App. 347, 130 S. W. 500; *Patton v. Women of Woodcraft*, 65 Or. 33, 131 Pac. 521; *Shay v. Phoenix Accident & Sick Ben. Ass'n*, 28 Pa. Super. Ct. 527; *Loftis v. Pacific Mut. Life Ins. Co.*, 38 Utah, 532, 114 Pac. 134.

A provision in a certificate of a benefit association that on the failure of the holder of the certificate to pay his dues for four weeks he will become "nonfinancial in case of death, and those failing to pay their dues for three weeks will become nonfinancial in case of sickness and not entitled to any benefit for thirty days after such dues have been paid," and that when any person shall be in arrears for four weeks the certificate shall be null and void, but he may be reinstated by paying a regular initiation fee and presenting a doctor's certificate, means that a member who is four weeks in arrears in dues forfeits his certificate, but such forfeiture may be waived by the association accepting dues thereafter. *Singleton v. Progressive Ben. Ass'n*, 58 S. E. 609, 77 S. C. 531.

Failure of insurer to recall demand for installment of premium and receipt of payment out of insured's wages and retention of same is a waiver of conditions of the policy declaring forfeiture as a penalty for nonpayment of installments of premium. *McKune v. Continental Casualty Co.*, 154 Pac. 990, 28 Idaho, 22.

Where a forfeiture of a policy was incurred by nonpayment of premium at maturity, which forfeiture the insured waived, on condition that the insured was then in good health, which was broken when made, the condition was not waived by the insurer's subsequent acceptance of premiums under the policy, unless such acceptance was with notice of the breach of the condition (*Mutual Reserve*

Fund Life Ass'n v. Tuchfeld, 159 Fed. 833, 86 C. C. A. 657). In *Munch v. Albrecht*, 127 App. Div. 27, 111 N. Y. Supp. 209, it appeared that the constitution of an insurance society provided that any member in arrears for dues or assessments for eight weeks is suspended from benefit, but, if the member within two weeks from such suspension places himself within the eight-week limit, and remains within such limit for ninety days from date of suspension, he shall be restored to his previous rights. Plaintiff's intestate neglected to pay his dues from November 10, 1906, to January 19, 1907, but on the latter date paid in advance an amount sufficient to meet his dues until April 6, 1907, and on February 24, 1907, intestate died. It was held that the purpose of the provision was not to insure or require that a member should live for a period of 90 days after date of suspension in order to become in good standing, but that his dues should not fall in arrears during that period, and, when intestate made the advance payments on his suspension, the society by accepting them made it impossible for him to fall in arrears during the succeeding 90 days, and thereby waived their right to contest plaintiff's claim.

11. ESTOPPEL AND WAIVER BY REQUIRING PROOFS, PARTICIPATING IN ADJUSTMENT AND PAYMENT OF LOSS

2733-2739. (a) Requiring proofs of loss

2733 (a). It is a general rule that where the insurer with knowledge of a forfeiture requires the insured after a loss to furnish proofs of loss, or additional proofs, it is estopped to assert the forfeiture.

Hartford Fire Ins. Co. v. Enoch, 96 S. W. 393, 79 Ark. 475; *Western Ins. Co. v. Ashby*, 53 Ind. App. 518, 102 N. E. 45; *Rundell & Hough v. Anchor Fire Ins. Co.*, 105 N. W. 112, 128 Iowa, 575, 25 L. R. A. (N. S.) 20; *Oehler v. Phoenix Ins. Co.*, 159 Mo. App. 696, 139 S. W. 1173; *Pace v. American Cent. Ins. Co.*, 158 S. W. 892, 173 Mo. App. 485; *Nugent v. Rensselaer County Mut. Fire Ins. Co.*, 94 N. Y. Supp. 605, 106 App. Div. 308; *Co-operative Ins. Ass'n of San Angelo v. Ray* (Tex. Civ. App.) 138 S. W. 1122.

Life policies were involved in the following cases: *Prudential Ins. Co. v. Hummer*, 84 Pac. 61, 36 Colo. 208; *Sovereign Camp of Woodmen of the World v. Latham*, 59 Ind. App. 290, 107 N. E. 749; *Mutual Protective League v. Walker*, 163 Ky. 346, 173 S. W. 802; *Keys v. National Council Knights and Ladies of Security*, 174 Mo. App. 671, 161 S. W. 345. And see *Pacific Mut. Life Ins. Co. v. Carter*, 92 Ark. 378, 123 S. W. 384, 124 S. W. 764.

2734 (a). A mere statement by the agent as to the time when proofs of loss should be presented is not a waiver (*Tilton v. Farmers' Ins. Co. of Town of Palatine*, 82 Misc. Rep. 79, 143 N. Y. Supp. 107). Nor will furnishing blanks for proofs operate as a waiver (*Jones v. Modern Brotherhood of America*, 153 Wis. 223, 140 N. W. 1059, Ann. Cas. 1914A, 88). So, too, the mere retention of proofs of loss furnished by the insured, without previous request therefor will not operate as a waiver.

Tilton v. Farmers' Ins. Co. of Town of Palatine, 143 N. Y. Supp. 107, 82 Misc. Rep. 79; *Woodard v. German American Ins. Co. of New York*, 106 N. W. 681, 128 Wis. 1, 116 Am. St. Rep. 17; *Stutzman v. Cicero Mut. Fire Ins. Co.*, 150 Wis. 254, 136 N. W. 604.

2735 (a). Where a policy of insurance contains the iron-safe clause, and a fire occurs in which a part of the books insured are destroyed by failure to comply with the terms of such clause, the insurer does not lose the right to make defense on that ground by requesting the production of other evidence to supply that destroyed and by making an examination thereof to determine the amount of the loss, where before the insured is put to any expense in that connection he enters into a written agreement providing that such examination shall not be deemed a waiver of any rights under the policy (*Phenix Ins. Co. v. Stahl*, 83 Pac. 614, 72 Kan. 578). Under the provisions of a policy that insured should submit to examination by any person appointed by the company, and that the company should not be held to have waived any condition of the policy or any forfeiture thereof, where a policy on a stock of goods was forfeited by failure of insured to keep an account of cash sales, as required, such forfeiture was not waived by requiring insured to submit to several examinations (*Scottish Union & National Ins. Co. v. Weeks Drug Co.*, 55 Tex. Civ. App. 263, 118 S. W. 1086). And in Louisiana it has been held that under the New York standard policy, a forfeiture is not waived by any requirement or act on the part of the insurer relating to the appraisal of the loss or any examination of the insured (*Alfred Hiller Co. v. Insurance Co. of North America*, 52 South. 104, 125 La. 938, 32 L. R. A. [N. S.] 453). Where fire insurance company, when insured, after loss, appeared before meeting of directors, excused him and permitted him to send new list of property burned or damaged in place of one he had submitted, which had been questioned, company waived all defense based upon warranties and forfeiture (*Veenstra v. Farmers' Mut.*

Fire Ins. Co. of Ottawa and Allegan Counties [Mich.] 161 N. W. 824).

Though it has been held in Missouri that where a fire insurance policy on merchandise contained an iron-safe clause, the failure of the insurance company to demand insured to produce books and inventories after the fire is a waiver of the right of forfeiture on that ground (*Spickard v. Fire Ass'n of Philadelphia*, 146 S. W. 808, 164 Mo. App. 1; *Same v. Franklin Fire Ins. Co.*, 146 S. W. 811), yet it has also been held that under Rev. St. 1899, § 7976 (Ann. St. 1906, p. 3792), providing that all adjustments and examination of books and accounts shall be held in the neighborhood where the fire occurs, unless another place is agreed on after the loss, insurer making no demand for the production of insured's inventory and books in the neighborhood where the fire occurred, nor agreeing with insured for another place for such production and examination, waived the forfeiture provision in the iron-safe clause of the policy (*Culver v. Williamsburg City Fire Ins. Co.*, 124 S. W. 540, 141 Mo. App. 205).

Where, under a provision of the application, providing that, if the certificate of membership was not satisfactory, applicant might return it to the association and receive back his membership fee, the applicant refused to accept the certificate, so that the contract never took effect, the association was not estopped to deny liability because it insisted on proof of loss and did not return the membership fee (*Business Men's Accident Ass'n of Texas v. Webb* [Tex. Civ. App.] 163 S. W. 380).

2739-2742. (b) Putting insured to expense in adjustment

2740 (b). A provision in a fire policy that the company shall not be liable for any loss that may occur while any premium note remains past due and unpaid is waived where the company, with knowledge of the fact that a premium note was due and unpaid at the time of the loss, sends an adjuster to negotiate with the insured, and the adjuster discusses the loss with the insured, places valuations on various items of the list of personal property destroyed, and then, when the insured would not sign a nonwaiver agreement, refused to proceed further with the adjustment (*Cox v. American Ins. Co.*, 184 Ill. App. 419). And generally where after a loss, with knowledge of facts constituting a ground of forfeiture, the insurer through its adjuster, enters into negotiations with the insured for

an adjustment of the loss, putting the insured to trouble and expense, such acts will operate as a waiver of the forfeiture.

Reimold v. Farmers' Mut. Fire Ins. Co., 127 N. W. 17, 162 Mich. 69;
McMillan & Son v. Insurance Co. of North America, 58 S. E. 1020,
1135, 78 S. C. 433.

But it is held in some cases that the acts of the adjuster cannot operate as a waiver where there is an agreement that steps taken to determine the extent of the loss shall not waive conditions of the policy.

Shawnee Fire Ins. Co. v. Knerr, 83 Pac. 611, 72 Kan. 385, rehearing denied 83 Pac. 613, 72 Kan. 389; *Urbaniak v. Firemen's Ins. Co. of Newark, N. J.*, 227 Mass. 132, 116 N. E. 413; *Point Gratiot Sand & Gravel Co. v. Hartford Fire Ins. Co.*, 136 N. Y. Supp. 877, 77 Misc. Rep. 221.

Where insurer had no knowledge of a breach of a condition against other insurance until after loss, the fact that its general agent employed an expert adjuster to investigate the facts surrounding the fire, and that he requested the state fire marshal to investigate the fire according to his official duty and participate in such investigation only so far as to enable him to determine whether such loss was an honest one, and, not being requested to inform insured as to his conclusion, simply stated that "you will hear from me," his employment by insurer and his conduct did not amount to a waiver of a breach of such condition (*Bakhaus v. Germania Fire Ins. Co.*, 176 Fed. 879, 100 C. C. A. 349). In *Henderson v. Standard Fire Ins. Co.*, 143 Iowa, 572, 121 N. W. 714, the policy required insured to keep a set of books showing a complete record of all purchases and sales, and in case of loss to produce such books, together with an itemized inventory of the stock, etc., and provided that a failure in either respect would avoid the policy. It was held that where insured's books and inventories were burned, and the insurer's adjuster with knowledge thereof requested insured to call in assistance and inventory the remaining stock and secure duplicates of the invoices as far as possible, there was a waiver of the requirement as to the books and inventories; and it was said further that a provision that the insurer shall not be held to have waived any condition of the policy by any act or requirement on its part relating to the determination of the extent of the loss or liability of the insurer does not mean that a waiver may not be based on a requirement that the insurer has no right to make.

In *Queen of Arkansas Ins. Co. v. Forlines*, 94 Ark. 227, 126 S. W.

(1056)

719, the policy required insured to take an inventory of his stock within 30 days after the policy was issued unless one had been taken within 12 months before that date, and also required him to produce for examination as often as required all books of account, invoices, and other vouchers, or certified copies thereof if the originals were lost. After the fire, which occurred a month after insured started in business, he told the company's adjuster that the only inventory he had were entries showing the delivery of the goods to him by dray from the wholesalers, and that the original invoices showing the items delivered had been destroyed; whereupon the adjuster told him to secure the duplicate invoices and that they would serve all purposes of an inventory, which plaintiff did. It was held that the company waived any forfeiture by failure to comply with the provision requiring an inventory, having led plaintiff to believe that the policy was still in force; the provision permitting inspection of invoices, vouchers, etc., not preventing a waiver, it not referring to the original inventory, but to invoices of the goods purchased thereafter.

2741 (b). A waiver does not arise where the trouble and expense incurred by insured is voluntary and not due to requirements imposed by the company. Thus where, after the destruction of an insured building by fire, insured complied with a request of one of the directors of the insurer to attend a meeting of the board of directors, thereby being put to expense and there being examined in respect to his loss, there was not a waiver by the insurer of a condition of the policy providing that it should not be liable for any loss resulting from fire built within 50 feet of insured building (*Draper v. Oswego County Fire Relief Ass'n*, 101 N. Y. Supp. 168, 115 App. Div. 807, affirmed in 190 N. Y. 12, 82 N. E. 755).

A demand for arbitration and appraisal of the loss is equivalent to an admission of liability, and therefore operates as a waiver.

Carp v. Queens Ins. Co., 92 S. W. 1137, 116 Mo. App. 528; *St. Paul Fire & Marine Ins. Co. v. Kirkpatrick*, 129 Tenn. 55, 164 S. W. 1186; *Harowitz v. Concordia Fire Ins. Co.*, 168 S. W. 163, 129 Tenn. 691.

Since an insurer, agreeing to arbitrate the amount of a loss, thereby confesses its liability, it cannot escape from the admission by subsequently violating the arbitration agreement. *Gulf Compress Co. v. Insurance Co. of Pennsylvania*, 167 S. W. 859, 129 Tenn. 586.

Similarly, where other insurance obtained by the insured, and also his failure to furnish proofs of loss, are grounds for a forfeiture

of his policy, and after a loss by fire he informed the adjuster that he had obtained other insurance, and was told to have an estimate of the cost of building such a house, and that the company could either rebuild the house or settle for it, and the insurer paid for the estimate made, and delivered it to the adjuster, such acts constituted a waiver of the alleged forfeiture by obtaining other insurance, and a waiver of further proofs of insurance, unless demanded (*Lord v. Des Moines Fire Ins. Co.*, 99 Ark. 476, 138 S. W. 1008). So the insurer is estopped from claiming a forfeiture where the adjuster, with full knowledge of the facts giving rise to a claim of forfeiture, demands and causes the assured to incur trouble and expense in furnishing an estimate of a builder showing the value of the property insured and destroyed by fire (*Scottish Union & National Ins. Co. v. Colvard*, 135 Ga. 188, 68 S. E. 1097).

An insurance company may investigate circumstances attending loss by adjuster or other agent, even if insured is put to expense or delayed, and may have appraisals of values made without waiving rights under policy (*Wilms v. New Hampshire Fire Ins. Co.*, 194 Mich. 656, 161 N. W. 940).

The fact that after the fire the adjuster conferred with insurer's local agent as to value of building and the amount necessary to restore it, did not waive condition that other insurance without insurer's consent should avoid the policy. *Pettijohn v. St. Paul Fire & Marine Ins. Co.*, 100 Kan. 482, 164 Pac. 1096.

Insured's breach of fireproof safe clause, whereby his inventory and books were destroyed by fire, was not waived by inviting insured to meet defendant's adjuster for settlement. *Crandon v. Home Ins. Co. of New York*, 99 Kan. 785, 163 Pac. 458.

2742-2744. (c) Completed adjustment, compromise, and payment

2742 (c). A completed adjustment of the loss with a promise to pay the amount due operates as a waiver of grounds of forfeiture known to the insurer.

Arispe Mercantile Co. v. Queen Ins. Co. of America, 141 Iowa, 607, 120 N. W. 122, 133 Am. St. Rep. 180; *Rudd v. American Guarantee Fund Mut. Fire Ins. Co.*, 96 S. W. 237, 120 Mo. App. 1; *Oehler v. Phoenix Ins. Co.*, 159 Mo. App. 696, 139 S. W. 1173; *Michigan Idaho Lumber Co. v. Northern Fire & Marine Ins. Co.*, 35 N. D. 244, 160 N. W. 130; *Western Reciprocal Underwriters' Exchange v. Coon*, 38 Okl. 453, 134 Pac. 22; *Ætna Accident & Liability Co. v. White* (Tex. Civ. App.) 177 S. W. 162. But merely investigating a loss without completing the adjustment will not create a waiver. *Huff v. Century Fire Ins. Co.*, 136 Iowa, 464, 113 N. W. 1078.

The rule has been applied, though there was an agreement that any action taken in investigating the cause of the fire, and the amount of loss or damage, should not waive or invalidate any rights of either of the parties (*Rudd v. American Guarantee Fund Mut. Fire Ins. Co.*, 96 S. W. 237, 120 Mo. App. 1). And to the same effect is *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605.

Insured's breach of fireproof safe clause, whereby his inventory and books were destroyed by fire, was not waived by an offer of compromise of loss (*Crandon v. Home Ins. Co. of New York*, 99 Kan. 785, 163 Pac. 458). And a mere adjustment of the loss, unless accepted by the insurer with a promise to pay, does not estop the insurer from denying liability (*Bond v. National Fire Ins. Co.*, 77 W. Va. 736, 88 S. E. 389).

2744 (c). It has been held in some cases that the payment of a loss under the policy waives any objection as to the interest of the insured.

New Hampshire Fire Ins. Co. v. Wall, 75 N. E. 668, 36 Ind. App. 238;
Gardner v. Continental Ins. Co., 125 Ky. 464, 101 S. W. 908, 31 Ky. Law Rep. 89.

But the payment of a loss is not a waiver of a forfeiture of the policy, where the payment was procured by fraudulent representations by insured (*Palatine Ins. Co. of London v. Kehoe*, 197 Mass. 354, 83 N. E. 866, 15 L. R. A. [N. S.] 1007, 125 Am. St. Rep. 375, 14 Ann. Cas. 690). Where insured selected a rider for his automobile policy to cover loss by direct collision, and shortly thereafter, on such loss occurring, was informed by the company that the rider did not cover it, the company, by paying the loss because it was small, was not estopped to deny liability for future similar losses (*Browne v. Commercial Union Assur. Co. of London, England*, 30 Cal. App. 547, 158 Pac. 765). And where a marine policy insured a steamer against fire while "in a seaworthy condition" the payment of a small loss by fire will not waive the condition, so as to render the insurer liable for a total loss subsequently occurring (*Manheim Ins. Co. v. Tyner*, 142 Ky. 22, 133 S. W. 1000).

2745. (d) Sale of salvage—Election to restore

2745 (d). A claim by the insurer of a vessel that the policy had been avoided by its assignment after a loss is waived, where the insurer proceeded to raise and repair the vessel under the provisions of the policy and demanded contribution from the insured (*Kah-*

mann & McMurry v. Ætna Ins. Co. of Hartford, Conn., 242 Fed. 20, 154 C. C. A. 612).

2745-2747. (e) Knowledge of forfeiture

2746 (e). The taking of proofs and promise to pay a fire loss does not waive breach of covenant as to keeping accurate books and inventories, where the adjuster at the time of accepting the proofs and promising to pay the loss had no knowledge of the facts concerning the breach of covenant (*Oehler v. Phoenix Ins. Co.*, 159 Mo. App. 696, 139 S. W. 1173). So, too, it has been held that the adjustment of a loss did not constitute a waiver of breach of a condition against additional insurance, where it did not appear that the adjusters knew, at the time, of the excess of insurance on the property (*Spann v. Phoenix Ins. Co. of Hartford, Conn.*, 65 S. E. 232, 83 S. C. 262). In *Moloney v. Germania Fire Ins. Co.*, 168 Mich. 269, 134 N. W. 6, there was an undisclosed chattel mortgage upon a portion of the property insured. The insurer after a fire employed an independent adjuster, who prepared and obtained from the insured verified proofs of loss, not showing the existence of any chattel mortgage. After receiving the proofs of loss and reports of the adjuster, the state agent of the insurer asked that the matter be held for 60 days, and from a report on the insured made within that time he learned of the chattel mortgage. The proofs of loss were dated and verified November 6, 1908, and on January 4, 1909, the insured was notified that the defendant denied liability. There was no claim that the insured was prejudiced by any statement or conduct of defendant or its agents. It was held that the defendant had not waived its right to avoid the policy.

Where the insurer had no notice of a breach of the policy rendering it void, and did not learn of such breach until after the premises were totally destroyed, the fact that the insurance adjuster, while declaring the policy void and denying liability, offered a larger sum than the unearned premium for a surrender of the policy, did not constitute a waiver of the forfeiture. *Schmidt v. Williamsburgh City Fire Ins. Co. of Brooklyn, N. Y.*, 95 Neb. 43, 144 N. W. 1044, 51 L. R. A. (N. S.) 261.

2747-2748. (f) Casualty insurance

2747 (f). That the insurer, after loss under a burglary policy, continued the examination of insured as provided by the policy after her admission of a breach of warranty therein, would not of itself constitute a waiver of the breach, if nothing was done by the insurer or its agents to lead insured to suppose that it did not intend

to take advantage of the breach (*Bacouby v. United States Fidelity & Guaranty Co.*, 113 N. Y. Supp. 20, 61 Misc. Rep. 75).

2748-2751. (g) Life and accident insurance

2748 (g). The furnishing by a life insurance company to a beneficiary of forms for making proof of the death of the insured does not estop it from asserting that the policy had lapsed and was not in force at the time of the death, where such forms were furnished at the request of the beneficiary, and were accompanied by a letter stating that it was done without prejudice to or waiver of any of the company's rights, and also stating its claim that the policy had lapsed (*Roth v. Mutual Reserve Life Ins. Co.*, 162 Fed. 282, 89 C. C. A. 262). In *Elhart v. Pacific Mut. Life Ins. Co.*, 47 Wash. 659, 92 Pac. 419, the policy provided for forfeiture if the insured should become a railroad fireman without the insured's consent. Insured was killed while acting as such. In response to a request for blanks for proofs of death, the insurer sent blanks to plaintiff's attorney containing a provision that the insurer, in furnishing the blanks, did so on the express stipulation that it did not waive the right to determine any question as to its liability on the policy. These blanks were not used, but plaintiff submitted an affidavit concerning insured's death showing that it was caused by the explosion of a boiler on an engine on which insured was fireman. This was refused, the insurer requiring proofs to be made on its blank forms, and sent plaintiff a new set containing an indorsement similar to the originals, which plaintiff filled out and submitted. It was held that the sending of the second set of blanks with knowledge of insured's occupation and manner of death was not a waiver of the forfeiture, which ordinarily must consist of an intentional release of a right. So, too, in *Tuttle v. Iowa State Traveling Men's Ass'n*, 132 Iowa, 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223, it appeared that on the death of an insured an attorney for the beneficiary requested the insurer to furnish blanks for proof of death. The insurer forwarded the blanks with a distinct understanding that no rights would be waived. The attorney, before requesting the blanks, had informed insurer that the insured had committed suicide. Subsequently the insurer, on request, forwarded a copy of the application and insured's by-laws, etc. The beneficiary at considerable expense furnished proof of death. It was held that the insurer did not waive the stipulation exempting it from liability on the suicide of the insured.

Though where insurer, with knowledge of a breach of a condition of warranty, requires insured to furnish proof of loss, it will be held to have waived its right to insist on the defense arising out of such breach, yet, where a claim made by a member of an accident insurance association was voluntarily abandoned by him, the fact that before it was abandoned, in compliance with the association's demand, he incurred trouble and expense in making proof of his injury, ought not to be held to operate in favor of a claim by his beneficiary for his death as a waiver of such member's failure to pay dues (*Travelers' Protective Ass'n of America v. Roth* [Tex. Civ. App.] 108 S. W. 1039). In *Greenwaldt v. United States Health & Accident Ins. Co. of Saginaw, Mich.*, 52 Misc. Rep. 353, 102 N. Y. Supp. 157, the policy provided that, if any renewal premium should be paid after the expiration of the policy, the insurer should not be liable for any illness originating before 30 days from the date of the renewal, and a premium for a certain month was paid after it was due, and 15 days thereafter insured was taken ill and remained so for several months, during which time premiums were paid. It was held that the fact that insured had been requested to make out his proof of claims did not entitle him to recover.

A demand for proofs of death will not waive a suspension for non-payment of assessments, when neither the certificate nor the by-laws of the society require the furnishing of proofs (*Dillon v. National Council Knights & Ladies of Security*, 148 Ill. App. 121, affirmed in 244 Ill. 202, 91 N. E. 417). And, obviously, where a benefit society learned that the certificate issued to the insured was void because of misstatements as to his age, it was not estopped to claim such invalidity by its request that the beneficiary name some one with whom it could negotiate as to the claim (*Taylor v. Grand Lodge A. O. U. W. of Minnesota*, 105 N. W. 408, 96 Minn. 441, 3 L. R. A. [N. S.] 114). Just as obviously, too, there can be no waiver by merely granting the privilege of making proofs of claim, where the insurer at the same time definitely denies liability.

Ridgeway v. Modern Woodmen of America, 157 Pac. 1191, 98 Kan. 240, L. R. A. 1917A, 1062; *Showalter v. Modern Woodmen of America*, 156 Mich. 390, 120 N. W. 994; *Clark v. North American Union*, 179 Mich. 131, 146 N. W. 336.

Where life policy provided it should be void if assigned or parted with, insurer could destroy validity of assignment only by declaring policy itself void, and recognized validity of policy by accepting proofs without objection, attempting to make payment to public

administrator, and by attacking assignment only. *Foryciarz v. Prudential Ins. Co. of America*, 158 N. Y. Supp. 834, 95 Misc. Rep. 306.

12. EFFECT OF PROVISIONS DECLARING POLICY INCONTESTABLE OR NONFORFEITABLE

2755-2758. (b) Incontestable policies

2755 (b). Though there is still some difference of opinion as to the validity of the clause making a policy incontestable from its date it is generally recognized that a clause making the policy incontestable after a definite period, though including fraud, is valid and not against public policy.

Fairfield v. Union Life Ins. Co., 196 Ill. App. 7; *Indiana Nat. Life Ins. Co. v. McGinnis* (Ind. App.) 99 N. E. 751 (one year), reversed on other grounds 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192, Id. (Ind. App.) 99 N. E. 756, reversed on other grounds 180 Ind. 701, 101 N. E. 295; *Citizens' Life Ins. Co. v. McClure*, 138 Ky. 138, 127 S. W. 749, 27 L. R. A. (N. S.) 1026 (one year); *American Trust Co. v. Life Ins. Co. of Virginia*, 173 N. C. 558, 92 S. E. 706; *Central Trust Co. v. Fidelity Mut. Life Ins. Co.*, 45 Pa. Super. Ct. 313 (three years); *Lawler v. Home Life Ins. Co. of America*, 59 Pa. Super. Ct. 409; *Gaughan v. Same*, Id. 414; *Philadelphia Life Ins. Co. v. Arnold*, 97 S. C. 418, 81 S. E. 964, Ann. Cas. 1916C, 706; *American Nat. Ins. Co. v. Briggs* (Tex. Civ. App.) 156 S. W. 909 (one year).

It is not ultra vires a fraternal benefit society to provide that its certificate after a period specified shall become incontestable. *Loyal Americans of the Republic v. Mayer*, 137 Ill. App. 574.

Such provisions may fairly be regarded as in the nature of statute of limitation (*Indiana Nat. Life Ins. Co. v. McGinnis* [Ind. App.] 99 N. E. 751), and are not in contravention of Ky. St. § 2515, providing that actions to obtain relief from contracts procured by fraud shall be brought within five years (*Citizens' Life Ins. Co. v. McClure*, 138 Ky. 138, 127 S. W. 749, 27 L. R. A. [N. S.] 1026).

In accordance with the above principle it has been held in numerous cases that where the clause provides that the policy shall be incontestable after a specified definite period the insurer cannot defend on the ground of false representations in procuring the policy.

Arnold v. Equitable Life Assur. Soc. of United States (D. C.) 228 Fed. 157; *National Annuity Ass'n v. Carter*, 96 Ark. 495, 132 S. W. 633; *Dibble v. Reliance Life Ins. Co. of Pittsburgh, Pa.*, 170 Cal. 199, 149 Pac. 171, Ann. Cas. 1917E, 34; *Weil v. Federal Life Ins. Co.*, 106 N. E. 246, 264 Ill. 425, Ann. Cas. 1915D, 974, affirming judgment 182 Ill. App. 322; *Federal Life Ins. Co. v. Flanigan*, 134 Ill.

App. 595, judgment affirmed *Flanigan v. Federal Life Ins. Co.*, 83 N. E. 178, 231 Ill. 399; *Indiana Nat. Life Ins. Co. v. McGinnis*, 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192, reversing judgment (App.) 99 N. E. 751; *Id.*, 180 Ind. 701, 101 N. E. 295, reversing judgment (App.) 99 N. E. 756; *Kansas Mut. Life Ins. Co. v. Whitehead*, 93 S. W. 609, 123 Ky. 21, 29 Ky. Law Rep. 458, 13 Ann. Cas. 301; *Williams v. St. Louis Life Ins. Co.*, 87 S. W. 499, 189 Mo. 70, reversing 97 Mo. App. 449, 71 S. W. 376; *Drews v. Metropolitan Life Ins. Co.*, 79 N. J. Law, 398, 75 Atl. 167; *New York Life Ins. Co. v. Manning*, 156 App. Div. 818, 124 N. Y. Supp. 775, 142 N. Y. Supp. 1132; *American Trust Co. v. Life Ins. Co. of Virginia*, 173 N. C. 558, 92 S. E. 706; *Mutual Life Ins. Co. of New York v. Buford* (Okla.) 160 Pac. 928; *Philadelphia Life Ins. Co. of Philadelphia, Pa., v. Arnold*, 81 S. E. 964, 97 S. C. 418, Ann. Cas. 1916C, 706; *Southern Union Life Ins. Co. v. White* (Tex. Civ. App.) 188 S. W. 266. But see *Healy v. Metropolitan Life Ins. Co.*, 37 App. D. C. 240.

It has, however, been held in Massachusetts that a clause making the policy incontestable from date even for fraud is invalid as against public policy.

Reagan v. Union Mut. Life Ins. Co., 76 N. E. 217, 189 Mass. 555, 2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 659, 4 Ann. Cas. 362; *New York Life Ins. Co. v. Hardison*, 85 N. E. 410, 199 Mass. 190, 127 Am. St. Rep. 478.

So it has been held that the defense of actual fraud was open to the insurer (*Reagan v. Union Mut. Life Ins. Co.*, 207 Mass. 79, 92 N. E. 1025). And such, also, seems to be the rule in Florida (*Florida Life Ins. Co. v. Dillon*, 63 Fla. 140, 58 South. 643). But it is recognized in Massachusetts that a provision, making the policy incontestable for fraud after the expiration of a specified time, is valid and binding on the insurer (*Reagan v. Union Mut. Life Ins. Co.*, 76 N. E. 217, 189 Mass. 555, 2 L. R. A. [N. S.] 821, 109 Am. St. Rep. 659, 4 Ann. Cas. 362).

2757 (b). If the clause provides that the policy shall be incontestable from date, except for fraud it eliminates all other questions as a defense (*Independent Life Ins. Co. v. Rider*, 150 Ky. 505, 150 S. W. 649, 42 L. R. A. [N. S.] 560).

"The amount due," in provision of life insurance policy that it shall be indisputable after a year as to amount due, means the amount due in law and fact, and not an amount written therein by mistake as its cash surrender value. *Buck v. Equitable Life Assur. Soc. of the United States*, 96 Wash. 683, 165 Pac. 878.

The incontestable clause should be liberally construed in favor of the beneficiaries of the insured (*Seymour v. Mutual Protective*
(1064))

League, 155 Ill. App. 21). So, where a policy provided that it should be incontestable after three years if the payments required should have been made when due, such clause should be construed to mean that the policy was incontestable for causes other than nonpayment of premiums (*Thompson v. Fidelity Mut. Life Ins. Co.*, 92 S. W. 1098, 116 Tenn. 557, 6 L. R. A. [N. S.] 1039, 115 Am. St. Rep. 823). And generally the incontestable clause does not apply to defenses of laches, nonpayment of premiums, or abandonment of contract (*Haas v. Mutual Life Ins. Co. of New York*, 134 N. W. 937, 90 Neb. 808, Ann. Cas. 1913B, 919). In all other respects, however, a life insurance policy, which provides that it shall be incontestable after a specified time, cannot be contested after that time on any ground not excepted therein (*Harris v. Security Life Ins. Co. of America*, 154 S. W. 68, 248 Mo. 304). The insurer cannot deny its validity on the ground of matters included in the incontestable clause (*Commercial Life Ins. Co. v. McGinnis*, 50 Ind. App. 630, 97 N. E. 1018).

A clause making a policy incontestable after one year includes a prior clause that it should not take effect until the first premium was paid during insurability, and so where premiums were properly paid and insured did not die during the year, and no steps were taken to avoid it, it was no defense that insured had never been insurable (*American Nat. Ins. Co. v. Briggs* [Tex. Civ. App.] 156 S. W. 909). In *Mohr v. Prudential Ins. Co. of America*, 32 R. I. 177, 78 Atl. 554, the policy provided that it should not take effect until delivered, and the first premium paid thereon, while the health of insured was in the same condition described in his application, and that it should not be contestable after one year from its date if all premiums due had been paid. It was held that evidence that insured's health was not good when the policy was procured, was inadmissible, as his death occurred over a year after the delivery of the policy, and all premiums due thereon had been paid. If the incontestable clause provides that, if the age of insured has been misstated, the benefit will be adjusted equitably on ascertainment of that fact, and, after two years, the policy will be incontestable if the premiums have been paid, both provisions are general, and one does not control the other, and the provision as to incontestability does not affect the provision as to equitable adjustment on the basis of age (*Mutual Life Ins. Co. of New York v. New*, 51 South. 61, 125 La. 41, 27 L. R. A. [N. S.] 431, 136 Am. St. Rep. 326).

If the insured dies within the period specified, the clause does not,

of course, become operative (*Monahan v. Metropolitan Life Ins. Co.*, 180 Ill. App. 390). Moreover, the clause inures only to the benefit of insured and his beneficiary, and it may not be invoked by a stranger to the contract (*Prudential Ins. Co. of America v. Mohr* [C. C.] 185 Fed. 936).

In several cases the question has been raised as to the time when the period fixing incontestability begins to run. Where the policy by its terms provided that the period of incontestability shall be calculated "from the date" of the policy, the year of incontestability will be calculated from that date, and not from the date of its delivery to insured (*Meridian Life Ins. Co. v. Milam*, 188 S. W. 879, 172 Ky. 75, L. R. A. 1917B, 103). The language of the policy, if ambiguous, must be construed against the company, and hence where a policy provided that if the policy should remain in force two years from its date, it should, in the event of insured's death, be incontestable, except for nonpayment of premium, and also provided that the policy should not become binding on the insurer until the first payment should have been made and the policy delivered, if the provisions conflict and render the time uncertain from which the two years in which the policy might be contested should run, the first clause should control (*Monahan v. Fidelity Mut. Life Ins. Co.*, 90 N. E. 213, 242 Ill. 488, 134 Am. St. Rep. 337). A provision in a life insurance policy that, "if this policy of insurance shall have been in continuous force for three years from its date, it shall thereafter be incontestable, except for nonpayment of premiums as herein provided, or for misstatement of the age of the member in the application therefor," must be given effect in accordance with the expressed intention of the parties as covering all grounds for contest not expressly excepted therein. Where such a policy was delivered and accepted, and retained for more than three years, and until the death of the insured, during which time all premiums were paid, and it was treated by both parties as a valid and subsisting contract, it was in "continuous force" during such time, notwithstanding a further provision that it should not take effect or be in force until delivered to the insured in his lifetime and while in good health, nor unless the first payment was made while he was also in good health, which condition was not complied with; the applicant not being in fact in good health at the time of delivery and the payment of the first premium. Such a condition is of no higher effect than any warranty, which also creates a condition precedent to any obligation on the part of the company (*Mutual*

Reserve Fund Life Ass'n v. Austin, 142 Fed. 398, 73 C. C. A. 498, 6 L. R. A. [N. S.] 1064, affirming [C. C.] 132 Fed. 555).

If a certificate is issued which after two years 'is incontestable, a change of beneficiaries, followed by the issuance of a new certificate, does not start afresh the running of the limitation period.

Seymour v. Mutual Protective League, 155 Ill. App. 21; Marshall v. Modern American Fraternal Order, 184 Ill. App. 224.

But if a policy by a provision therein is incontestable after the lapse of a stipulated period, the fact that during such period a forfeiture has been incurred and waived does not toll the running of such limitation (Monahan v. Fidelity Mut. Life Ins. Co., 148 Ill. App. 171, judgment affirmed 242 Ill. 488, 90 N. E. 213, 134 Am. St. Rep. 337). On the reinstatement, in accordance with its terms, of a lapsed life policy, a clause making it incontestable after one year from date of issue became operative at least from the date of reinstatement, and where insured died more than a year thereafter precluded any defense by the company to an action thereon on the ground of misrepresentations in the certificate of reinstatement (Great Western Life Ins. Co. v. Snively, 206 Fed. 20, 124 C. C. A. 154, 46 L. R. A. [N. S.] 1056). But if insured failed to pay a premium when due, and was subsequently reinstated in reliance on fraudulent representation made by him, the insurer may take advantage of such representation at any time within two years from the reinstatement (Pacific Mut. Life Ins. Co. v. Galbraith, 91 S. W. 204, 115 Tenn. 471, 112 Am. St. Rep. 862). So, too, the renewal of a life policy, containing a clause providing that it shall be incontestable after one year, revives such clause, from the date of renewal, and the company is not barred from contesting the policy within one year after the revival, although several years have elapsed since the first issuance (State Mut. Life Ins. Co. v. Rosenberry [Tex. Civ. App.] 175 S. W. 757).

Under provision of an insurance policy that after one full year it shall be incontestable, if all payments required shall be made on or before date on which they become due, in computing year, actual date of reinstatement must be taken, and not date of renewal receipt, which was dated back. McCormack v. Security Mut. Life Ins. Co., 116 N. E. 74, 220 N. Y. 447.

A reinsurer is not entitled to contest policies which were incontestable at the time of reinsurance.

Arrowsmith v. Old Colony Life Ins. Co., 164 Ill. App. 44; Federal Life Ins. Co. v. Kerr, 173 Ind. 613, 89 N. E. 398, affirming (Ind. App.)

82 N. E. 943; *Federal Life Ins. Co. v. Petty*, 177 Ind. 256, 97 N. E. 1011.

In some states there exist statutes providing in substance for incontestability of the policy. Thus, under the South Carolina statute (Civ. Code 1902, §§ 1825, 1826) providing that a life insurance company receiving the premium for two years shall be deemed to waive any right to dispute the truth of the application, and authorizing a suit within two years to vacate a policy for falsity of representations, an insurance company receiving the premiums on a policy for more than two years without suing to vacate it, on the ground of false representations in the application, may not when sued on the policy prove the falsity of insured's statements in the application, whether such statements were representations or warranties (*Owen v. Bankers' Life Ins. Co.*, 66 S. E. 290, 84 S. C. 253, 137 Am. St. Rep. 845). A provision that life policy should be incontestable save for nonpayment of premiums or fraud does not, the insurer having received premiums for two years, entitle it, despite Civ. Code 1912, § 2722, to assert fraud in insured's application (*Beard v. North State Life Ins. Co.*, 104 S. C. 45, 88 S. E. 285). Civ. Code S. C. 1902, § 1816, provides that no fire insurance company shall issue a policy for more than the value to be stated in the policy, amount of the value of the property to be insured, the amount of the insurance to be fixed at or before issuance of the policy, and in case of total loss insured shall be entitled to recover the full amount of insurance. Section 1817 provides that no statement in the application shall prevent recovery, provided, after the expiration of 60 days, the insurer shall be estopped to deny the truth of the statement in the application which was adopted, except for fraud in making the application. It was held, in *McCarty v. Piedmont Mut. Ins. Co.*, 81 S. C. 152, 62 S. E. 1, 18 L. R. A. (N. S.) 729, that where the policy showed the parties agreed on \$5,000 as the value of the property, and \$1,500 insurance was granted, and the fire, resulting in total loss, occurred more than 60 days after issuance of the policy, the court, having submitted the question of fraud, properly instructed, notwithstanding the claim of misrepresentation by insured as to the value of the property, that if insured was entitled to recover he was entitled to recover the full amount of insurance specified in the policy.

A Texas statute (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 4948) provides that the insurer must give notice within 90 days of its intention not to be bound by the contract. On the failure of the in-

surer to exercise its election, it is barred from setting up misrepresentations in defense of the policy.

National Life Ass'n v. Hagelstein (Tex. Civ. App.) 156 S. W. 353; *American Nat. Ins. Co. v. Burnside* (Tex. Civ. App.) 175 S. W. 169; *American Nat. Life Ins. Co. v. Rowell* (Tex. Civ. App.) 175 S. W. 170.

The Idaho statute (Sess. Laws 1911, c. 228, § 42, as amended by Laws 1913, c. 97, § 22), making insurance policies incontestable after two years, subject to certain exceptions, does not prevent contracts that the period of contestability shall be less than two years, or from agreeing that the policy shall be incontestable after delivery (*Duvall v. National Ins. Co. of Montana*, 154 Pac. 632, 28 Idaho, 356, L. R. A. 1917E, 333, Ann. Cas. 1917E, 1112).

The Ohio statute (Rev. St. § 3626) providing that receipt of three annual premiums estops all defenses by reason of errors or misstatements in the application, is construed and applied in *Prudential Ins. Co. v. Gilligan*, 28 Ohio Cir. Ct. R. 609.

2758-2759. (c) Same—Effect of certificate of medical examiner

2758 (c). Under the Iowa statute (Code, § 1812), providing that a life insurer shall be estopped by its medical examiner's report, recommending a risk, from defending an action on the policy on the ground that insured was not in the condition of health required by the policy when it was delivered, a condition in a policy that it should not become operative until delivered to insured while in good health, does not defeat insurer's liability because insured was not in good health after applying for insurance, where the risk was recommended by the medical examiner.

Roe v. National Life Ins. Ass'n, 137 Iowa, 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144; *Unterharnscheidt v. Missouri State Life Ins. Co.*, 160 Iowa, 223, 138 N. W. 459, 45 L. R. A. (N. S.) 743.

The statute does not, however, apply to fraternal benefit societies (*Sargent v. Modern Brotherhood of America*, 148 Iowa, 600, 127 N. W. 52).

The Wisconsin statute (St. 1913, § 4202s), estopping insurer from setting up defense as against recommendation of its medical examiner, does not affect contract rights under a mutual benefit certificate issued in another state (*McKnelly v. Brotherhood of American Yeomen*, 160 Wis. 514, 152 N. W. 169).

2759-2761. (d) Provisions as to non-forfeiture

2759 (d). Rev. St. Mo. 1899, § 7897, providing for the nonforfeiture of life policies after payment of three annual premiums, etc., is constitutional (*Dodge v. New York Life Ins. Co.* [Mo. App.] 189 S. W. 609).

13. ESTOPPEL AND WAIVER IN GUARANTY AND INDEMNITY INSURANCE**2764-2766. (a) Fidelity insurance**

2764 (a). Where a fidelity bond, containing a condition rendering it void, is delivered to insured and the premium is collected, waiver of the condition will be presumed rather than fraud on the part of the insurer (*Fowler v. Title Guaranty & Surety Co.*, 129 Pac. 171, 88 Kan. 455). So, where the insurer, with knowledge of the capacity in which certain agents were acting, described them in a bond securing their fidelity as "brokers," the company was not entitled, in a suit on the bond, to allege that the agents were commission merchants, and not brokers (*T. M. Sinclair & Co. v. National Surety Co.*, 107 N. W. 184, 132 Iowa, 549). And if a surety company has continued its bond indemnifying a bank against dishonesty of its cashier, on representations that his accounts were found correct, the surety company is estopped to deny liability from the fact that the examinations were made at more extended periods than those provided in the original application (*United States Fidelity & Guaranty Co. v. Boley Bank & Trust Co.*, 43 Okl. 819, 144 Pac. 615). However a mere failure to act will not operate as an estoppel if the insured was not induced to alter his position, incur expense or forego a right (*Krey Packing Co. v. United States Fidelity & Guaranty Co.*, 189 Mo. App. 591, 175 S. W. 322). And in any event estoppel or waiver cannot be predicated unless the insurer had knowledge of the facts affording ground for forfeiture (*Platauer v. American Bonding Co. of Baltimore* [Sup.] 92 N. Y. Supp. 238).

Where fidelity bond provided it was essential to validity that it be signed by employé, fidelity company was entitled to have it so signed, but could waive right by delivering bond without signature and accepting premiums, treating instrument as properly executed until loss occurred. *St. Louis Police Relief Ass'n v. American Bonding Co. of Baltimore*, 197 Mo. App. 430, 196 S. W. 1148.

A surety company is not estopped to assert discharge from liability on a bond securing an employer against embezzlement by an em-

ployé, through breach of conditions binding the employer to require the employé to furnish daily reports, monthly statements, etc., by failure to tender return of the premium received for executing the bond, or by requesting the employer to procure the employé's prosecution (*Marion Iron & Brass Bed Co. v. Empire State Surety Co.*, 52 Ind. App. 480, 100 N. E. 882).

An insurer insuring against loss through dishonesty of an employé cannot first ignore the fraud, if any, of the employer, and retain the premium paid by him, and carry on negotiations for proof of amount of a loss sustained through the dishonesty of the employé, and announce for the first time in an action for the loss that the employer was guilty of fraud (*Roark v. City Trust, Safe Deposit & Surety Co.*, 110 S. W. 1, 130 Mo. App. 401). So, too, breaches of a bond against loss from defalcation of an employé, by failure to examine the employé's accounts weekly, by continuing the employé in service after defalcation, and neglect to immediately notify the obligor of the defalcation by registered letter, are waived by furnishing blanks for proof of loss, and accepting such proofs without objection (*Crystal Ice Co. v. United Surety Co.*, 123 N. W. 619, 159 Mich. 102).

2766. (b) Credit insurance

2766 (b). A policy provision that no agent of the company shall have power to waive or alter any of its provisions may be waived by the company, and was waived by its failure to repudiate the act of its agent in postdating a policy so as to create continuous insurance (*American Credit Indemnity Co. of New York v. Hecht & Co.*, 137 Ky. 261, 125 S. W. 697, rehearing denied 137 Ky. 261, 129 S. W. 340).

Where an application for credit insurance is clearly incomplete or ambiguous and the insurer issues the policy without demanding fuller information, the defects in the policy will not be available as a defense in an action on the policy (*L. Black Co. v. London Guarantee & Accident Co.*, 144 N. Y. Supp. 424, 159 App. Div. 186). So, too, where an application for a bond of credit insurance recited that it was a part of the contract, and that it was made by the applicant or his own agent, but in fact, it was prepared by the company's soliciting agent, who was without power to issue bonds, and whose name did not appear on the bond, and the questions in the application were not technical, and insured was not obliged to let the solicitor fill up the application, it was held that the agent's knowledge

(1071)

of an inaccurate statement in the application as to past business losses on which the terms of the bond were based could not be imputed to the company so as to base a claim of estoppel thereon (*Baer v. American Credit Indemnity Co. of New York*, 101 N. Y. Supp. 672, 116 App. Div. 233, affirmed in 191 N. Y. 540, 84 N. E. 1108).

That the defendant indemnity company's auditor examined plaintiff's books after he made his application does not prevent defendant from setting up that warranties contained in the application were false, where the examination was made with respect to the policy sued on, and the auditor testified that he did not examine certain matters to which the warranties related (*Edward C. Moore Co. v. American Credit Indemnity Co. of New York*, 156 N. Y. Supp. 737, 170 App. Div. 660).

An unaccepted tentative offer by an adjuster of a credit insurance company to settle the claim if insured would accept less for cash, made in ignorance of a material breach of warranty, is not a waiver thereof (*Baer v. American Credit Indemnity Co. of New York*, 101 N. Y. Supp. 672, 116 App. Div. 233, affirmed in 191 N. Y. 540, 84 N. E. 1108).

2767-2768. (d) Employers' liability insurance

2767 (d). The rules heretofore discussed relative to fire and life insurance are applicable to policies of employers' liability insurance. So a stipulation in an employer's liability policy that no claim should be paid by the insured without the written consent of the insurer could be waived by parol (*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.*, 97 Miss. 165, 52 South. 787). Similarly an insurer, by issuing a policy to indemnify insured against loss for injuries to persons while using elevators in his building with knowledge of the fact that the building was not complete, waived non-liability based on the noncompletion of the building and elevators (*Scarritt Estate Co. v. Casualty Co. of America*, 149 S. W. 1049, 166 Mo. App. 567). But a condition that the insured would use no explosives is not waived because of prior policies issued at a higher rate, in which the insured was permitted to use explosives, since they were not notice to the insurer that the insured would use explosives and rely on the policy in suit for indemnity contrary to its express terms (*Columbian Exposition Salvage Co. v. Union Casualty & Surety Co.*, 77 N. E. 128, 220 Ill. 172, affirming 123 Ill. App. 245).

(1072)

Where an indemnity insurer recognized the validity of its policy and by its conduct subjected insured to liability, it could not rely on a breach of insured's warranty (*Creem v. Fidelity & Casualty Co.*, 126 N. Y. Supp. 555, 141 App. Div. 493). So, where the execution by a servant of an employer's liability bond was not made a consideration for nor a condition of the creation of liability by the insurer, but the latter thereafter continued the bond, which was not signed by the servant, three times for a further new consideration, subject to the conditions and covenants of the bond, defendant was not entitled to object that it was not liable on the last renewal, because the bond was not originally signed by the servant as contemplated (*Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co.*, 154 Fed. 545, 83 C. C. A. 431). And an insurer, which received premiums on policy under Workmen's Compensation Law in protection of membership corporation and employes engaged in hazardous employment for gain, could not be heard to say, in proceedings for compensation of widow of deceased employé, that it should not be called upon to pay indemnity on ground membership corporation had no right to engage in occupation (*Uhl v. Hartwood Club*, 177 App. Div. 41, 163 N. Y. Supp. 744).

In *Fidelity & Casualty Co. of New York v. Southern Ry. News Co.* (Ky.) 101 S. W. 900, rehearing denied (Ky.) 103 S. W. 297, the facts were these: The insurer obligated itself to repay a news company damages incurred for the injury or death of any of its employes, and it was agreed that if the pay roll of the news company exceeded \$30,000 at any time the policy became void, unless continued by the payment and acceptance of a further premium; and the news company contracted with a railway company, which allowed the news company to sell on its trains, to protect it from all loss by reason of injury or death of any employé of the news company while on its trains. The news company's pay roll exceeded the \$30,000 limit in August, but it did not ascertain this until December, and then paid the extra premium. In October an employé of the news company was killed, and his administrator recovered \$5,000 damages from the railroad company, which in turn recovered the amount of its loss from the news company. It was held that, as the insurance company knew of the death of the employé and of its possible liability therefor when it accepted the additional premium from the news company, and refused to take any part in either the suit by his administrator against the railroad company or the suit by the railroad company against the news company, and

knew that the news company paid its employ  s partly in commissions earned, so that it was difficult to ascertain the amount of its pay roll, the insurance company was liable on its policy.

The provision, in an employer's liability policy, that insurer should not be liable for payments made by the insured unless made after a trial of the issues, or with the written consent of the company, are waived where the payments were made under instructions from the adjuster with the view of minimizing the loss (*Dunham v. Philadelphia Casualty Co.*, 179 Mo. App. 558, 162 S. W. 728). But estoppel cannot be based on the acts of an adjuster, where such acts did not injure or mislead the employer (*  tna Life Ins. Co. v. Tyler Box & Lumber Co.* [Tex. Civ. App.] 149 S. W. 283).

An absolute denial of liability for injuries caused by one of plaintiff's employ  s by an assault on S. on the ground that the assault was not within the policy is not a waiver of the defense that it was not committed on defendant's premises or land adjacent thereto where plaintiff did business (*Graustein & Co. v. Employers' Liability Assur. Corporation, Limited*, of London, 101 N. E. 1073, 214 Mass. 421). But a denial of liability is a waiver of a provision in the policy that insured should not settle a claim without the insurer's consent, and making judgment after trial a condition precedent to recovery under the policy (*Butter Bros. v. American Fidelity Co.*, 120 Minn. 157, 139 N. W. 355, 44 L. R. A. [N. S.] 609).

2768 (d). Policies of insurance against employers' liability usually contain a provision that the insurer may take charge of and defend any action brought against the insured for injuries. The effect of the acts of the insurer under this clause has been considered in many cases. As a general rule, if the insurer, with knowledge of all the facts, undertakes to control the defense to the action, it is thereafter estopped to set up against the insured breaches of the conditions of the policy.

Employers' Liability Assur. Corp. v. Chicago & Big Muddy Coal & Coke Co., 141 Fed. 962, 73 C. C. A. 278; *Empire State Surety Co. v. Pacific Nat. Lumber Co.*, 200 Fed. 224, 118 C. C. A. 410; *Columbian Three Color Co. v.   tna Life Ins. Co.*, 183 Ill. App. 384; *Royle Mining Co. v. Fidelity & Casualty Co. of New York*, 161 Mo. App. 185, 142 S. W. 438; *Rosenbloom v. Maryland Casualty Co.*, 137 N. Y. Supp. 1064, 153 App. Div. 23.

So the insurer waived the benefit of an exception in the policy providing that the policy should not cover loss from liability for injuries caused by assured's failure to observe any statute affecting

the safety of persons, by taking charge of the defense and conducting to final determination a personal injury action brought against assured for its failure to discharge a statutory duty (*Royle Min. Co. v. Fidelity & Casualty Co. of New York*, 103 S. W. 1098, 126 Mo. App. 104). This result may, however, be avoided if the insurer takes charge of the defense with a reservation of its rights under the policy.

Buffalo Steel Co. v. Aetna Life Ins. Co., 136 N. Y. Supp. 977; *United Waste Mfg. Co. v. Maryland Casualty Co.*, 148 N. Y. Supp. 852, 85 Misc. Rep. 539; *Edgefield Mfg. Co. v. Maryland Casualty Co.*, 58 S. E. 969, 78 S. C. 73.

The effect of assuming charge of the defense may be avoided by a timely withdrawal. Thus a warranty in an indemnity policy that insured used no vicious animal was not waived by the insurer in an action against insured for injuries caused by a vicious horse, where insured denied its viciousness, and the insurer informed insured that it would not be liable if the horse was vicious, and withdrew when it found that that was the only ground of insured's liability (*Hygienic Ice & Refrigerating Co. v. Philadelphia Casualty Co.*, 147 N. Y. Supp. 754, 162 App. Div. 190). Similarly, where the insurer took charge of a case against an employer, but six weeks before trial notified the employer that the policy did not cover the risk, and the employer consented to its conducting the litigation with this understanding, the employer was estopped from asserting that the insurer had waived its right to deny liability (*Mann v. Employers' Liability Assur. Corp.*, 123 Minn. 305, 143 N. W. 794). It was, however, held in *Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 195 Mo. App. 313, 190 S. W. 382, that since an insurer in an employers' liability insurance policy can refuse to defend an action for damages only at its peril, it cannot be held to have waived any defense under the policy by defending or negotiating for a compromise settlement, so long as any peril exists.

Where the insurer under an indemnity policy issued to J. & Co. as an individual defended a suit brought against J. & Co. as a corporation, it waived the defense of misrepresentation in the policy as to the status of the insured. *J. Frank & Co. v. New Amsterdam Casualty Co. (Cal.)* 165 Pac. 927.

An insurer, having refused to defend actions against an employer in accordance with the policy, is estopped to set up that provision of the policy declaring that no suit should be maintained but for ex-

pense incurred in satisfying the final judgment. *Southwestern Surety Ins. Co. v. Thompson* (Tex. Civ. App.) 180 S. W. 947.

There seems to be some difference of opinion where the employer has employed children under the permitted age. In some jurisdictions it is held that undertaking the defense of the action is not a waiver of the objection that the injured child was employed in violation of law.

Mason-Henry Press v. Aetna Life Ins. Co., 146 App. Div. 181, 130 N. Y. Supp. 961; *Buffalo Steel Co. v. Aetna Life Ins. Co.*, 141 N. Y. Supp. 1027, 156 App. Div. 453, affirming 136 N. Y. Supp. 977; *Holland Laundry v. Travelers' Ins. Co.*, 166 App. Div. 621, 152 N. Y. Supp. 92; *J. S. Stearns Lumber Co. v. Travelers' Ins. Co.*, 159 Wis. 627, 150 N. W. 991. And see *Hygienic Ice & Refrigerating Co. v. Philadelphia Casualty Co.*, 162 App. Div. 190, 147 N. Y. Supp. 754.

On the other hand, in *Tozer v. Ocean Accident & Guarantee Corp.*, 94 Minn. 478, 103 N. W. 509, the policy provided that the insurer would compensate the insured for bodily injuries suffered by his employes not to exceed \$5,000, and that the employer should give immediate notice of any accident, not interfere with negotiations for settlement by the insurer, and render it assistance in litigation, and furnish bonds on appeal, the insurer agreeing to defend at its own cost all proceedings in the name of the insured with the right to determine the right of appeal. An action was brought against the insured for injuries to a boy in his employ, and insured gave notice of the action and all the known facts, and surrendered the defense to the insurer, who took charge of the case, which resulted in a judgment against the insured which was affirmed on appeal. It was held that insurer, having been informed of all the facts and voluntarily assumed control of the litigation, was estopped from denying its liability under the indemnity contract, though it provided that there should be no liability on the part of the insurer in case of injuries to any child employed by the insured contrary to law. In *Fairbanks Canning Co. v. London Guaranty & Accident Co.*, 154 Mo. App. 327, 133 S. W. 664, the employer, insured against liability for injuries to his employes under a contract exempting the insurance company from liability for injuries to any child employed under 14 years of age, informed the company that an injured employe "said he was 16, about, when hired." The company took charge of the defense of an action for such injuries, and continued in charge of the case for nearly three months after it

learned that there was grave doubt as to the insured employé's being over 14 years of age when he was employed. It was held that the insurer could not afterwards disclaim liability to insured for a judgment obtained by the injured employé, on the ground that such employé was in fact under 14 years of age when employed; an objection that insured could not rely upon the company's conduct as an estoppel to deny liability because insured had not been prejudicially injured by such conduct being untenable, as insurer's interference with the right to control the damage action was of itself a prejudice.

In *Sargent Mfg. Co. v. Travelers' Ins. Co.*, 165 Mich. 87, 130 N. W. 211, 34 L. R. A. (N. S.) 491, it appeared that the employer, having an employer's liability policy issued by defendant, providing that if any suit, though groundless, should be brought against insured for injuries covered by the policy, the insurer would, at its own cost, defend against it in the name and on the behalf of insured, was sued for injury to an infant employé; the declaration charging acts of negligence, recovery on any of which would have made the insurer liable on his policy. After appearance was entered in such action by the insurer's attorney on behalf of insured, an amended declaration was filed, charging insured with violation of Pub. Acts 1901, No. 113, § 3, prohibiting an infant of such age being employed in a factory at work dangerous to life and limb. Thereupon the insurer's attorney wrote the insured that, if recovery was had on the ground of violation of the statute, the insurer would not be liable. Insured did not reply thereto; and its personal counsel appeared and assisted in the defense. It was held that the insurer, by continuing to participate in the defense, was not estopped to deny liability on the policy, where judgment for the employé was on the ground of violation of the statute.

Employers' liability insurer, by recognizing responsibility to employé by settlement, waived any right to avoid policy to defeat payment to insured of money received in such settlement for him to cover advances made to employé. *Griffith v. Frankfort General Ins. Co.*, 159 N. W. 19, 34 N. D. 540.

(1077)

14. PLEADING AND PRACTICE WITH REFERENCE TO ESTOPPEL AND WAIVER

2768-2771. (a) Necessity of pleading waiver or estoppel

2768 (a). The general rule seems to be approved by a majority of jurisdictions that the insured must plead a waiver or an estoppel on which he intends to rely.

Barclay v. London Guarantee & Accident Co., Limited, 105 Pac. 865, 46 Colo. 558; *Mutual Life Ins. Co. of New York v. Reid*, 21 Colo. App. 143, 121 Pac. 132; *McKune v. Continental Casualty Co.*, 154 Pac. 990, 28 Idaho, 22; *Knapp v. Brotherhood of American Yeomen*, 139 Iowa, 136, 117 N. W. 298; *Schworm v. Fraternal Bankers' Reserve Society*, 168 Iowa, 579, 150 N. W. 714, Ann. Cas. 1917B, 373; *Victors v. National Provident Union*, 99 N. Y. Supp. 299, 113 App. Div. 715; *Garlick v. Metropolitan Life Ins. Co.*, 95 N. Y. Supp. 645, 109 App. Div. 175; *Reich v. Maryland Casualty Co.*, 104 N. Y. Supp. 984, 54 Misc. Rep. 585; *Williams v. Fire Ass'n of Philadelphia*, 104 N. Y. Supp. 100, 119 App. Div. 573; *Modern Woodmen of America v. Weekley*, 42 Okl. 25, 139 Pac. 1138; *Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., v. Dean* (Okl.) 156 Pac. 304; *Wolff v. German-American Farmers' Mut. Ins. Co.* (Okl.) 159 Pac. 480; *Metropolitan Life Ins. Co. v. Wagner*, 50 Tex. Civ. App. 233, 109 S. W. 1120; *Mecca Fire Ins. Co. of Waco v. Moore* (Tex. Civ. App.) 128 S. W. 441.

Where plaintiff alleged compliance with all the conditions of the policy, she was not entitled to prove that neither she nor insured answered the questions prescribed for the medical examiner concerning insured's health, and that the agents procuring the insurance had knowledge of his noninsurability. *Gorman v. Metropolitan Life Ins. Co.*, 143 N. Y. Supp. 1063, 158 App. Div. 682; *Edwards v. Sovereign Camp, Woodmen of the World* (Okl.) 161 Pac. 170.

2769 (a). But in a few jurisdictions it has been held that a waiver, to be relied on, need not be specially pleaded.

Arnold v. American Ins. Co., 84 Pac. 182, 148 Cal. 660, 25 L. R. A. (N. S.) 6; *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570; *Wicecarver v. Mercantile Town Mut. Ins. Co.*, 137 Mo. App. 247, 117 S. W. 698; *Nichols v. Prudential Ins. Co. of America*, 155 S. W. 478, 170 Mo. App. 437.

Where the insurer set up failure of the condition of the policy relating to other insurance, the plaintiff, without replication, could show that defendant had notice, on delivering the policy and receiving the first premium, of the existence of such insurance (*Supreme Lodge K. P. v. Few*, 142 Ga. 240, 82 S. E. 627). And plaintiff need not plead waiver of a provision for forfeiture where the ques-

tion of forfeiture is raised as a defense, and is so pleaded as not to call for further pleading by plaintiff (*Ramsey v. Travelers' Protective Ass'n of America*, 133 N. W. 634, 147 Wis. 405). Generally, a waiver relied on should be pleaded in a petition and not in the reply (*Royle Mining Co. v. Fidelity & Casualty Co. of New York*, 161 Mo. App. 185, 142 S. W. 438). So, where the plaintiff has been released from the performance of any of the conditions in the policy, he should aver such facts in his petition; but matters of a purely defensive nature need not be met earlier than at the filing of the reply (*Kandar v. Ætna Indemnity Co.*, 30 Ohio Cir. Ct. R. 260). While waiver of default in payment should have been specifically pleaded instead of alleging that the policy was in full force at the death of insured, if no motion was made for more specific allegations and the cause was fully tried, it was not error to permit plaintiff to introduce evidence of waiver (*Forney v. Fidelity Mut. Life Ins. Co.*, 124 Pac. 406, 87 Kan. 397). If defendant did not plead a forfeiture, plaintiffs were not bound to specially plead the waiver (*National Mut. Fire Ins. Co. v. Sprague*, 92 Pac. 227, 40 Colo. 344).

2770 (a). Since forfeiture for breach of condition against additional insurance is a matter of defense, which will defeat a recovery, unless plaintiff proves a waiver of the forfeiture in rebuttal; the insurer is not required to negative waiver as a part of its defense (*Spann v. Phoenix Ins. Co. of Hartford, Conn.*, 65 S. E. 232, 83 S. C. 262).

2771-2773. (b) Sufficiency of pleading

2771 (b). Where an insurer in an action on the policy pleads forfeiture for violation of a restrictive clause, the insured may plead waiver or estoppel without first having the contract reformed so as to embody the waiver (*German American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. [N. S.] 77).

2772 (b). Where the plaintiff desires to plead a waiver of any condition in the policy he should set forth the facts constituting the waiver.

Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 South. 922; *Glazer v. Home Ins. Co.*, 96 N. Y. Supp. 136, 48 Misc. Rep. 515, judgment affirmed *Glazer v. Same*, 98 N. Y. Supp. 979, 113 App. Div. 235, reversed 82 N. E. 727, 190 N. Y. 6.

If the petitioner does not attempt to plead a new contract made on the removal of the insured goods to another house, but relies on a waiver by the insurer of the removal as a ground of forfeiture,

(1079)

and goes upon the theory that the removal of the property did not call for a new contract of insurance on a new consideration, but that the insurance already paid for would continue until the end of its term, if the insurer knew of the changed location and expressly or impliedly assented thereto, the petition is not insufficient for failing to allege that the defendant "agreed to insure or cover the property after removal at the place to which it was removed" (*Shutts v. Milwaukee Mechanics' Ins. Co.*, 141 S. W. 15, 159 Mo. App. 436).

Though proof that a forfeiture resulting from a violation of the laws of the order had been waived was admissible under an allegation that the member complied with all the conditions in the policy required to be performed (*Galvin v. Knights of Father Mathew*, 155 S. W. 45, 169 Mo. App. 496), a petition, which admits that insured discontinued the payment of premiums, and alleges that at the lapse of the policy more than three full annual premiums had been paid, and that insured had complied with the terms of the contract except as stated, does not allege performance of the policy so far as to the payment of premiums, and insured may not rely on waiver or estoppel of performance in that respect (*Moran v. Franklin Life Ins. Co.*, 160 Mo. App. 407, 140 S. W. 955).

Allegations of the answer that plaintiff did not at any time before the destruction of the property pay or offer to pay the premium, or any part thereof, and that the premium was unpaid at the time the property was destroyed, rendered admissible evidence of a waiver of prepayment, though the complaint alleged payment of the premium (*Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, 157 Cal. 213, 107 Pac. 292), where defendant alleged that it was not liable because a portion of the premium was unpaid at the date of the fire, and plaintiff denied that any portion was past due, and pleaded a subsequent agreement that the premium should be paid in monthly installments, such affirmative allegation did not require plaintiff to rely on it alone, nor was it a waiver of plaintiff's right to prove an estoppel under the general issue against defendant's right to rely on the defense pleaded (*Olympia Brewing Co. v. Pioneer Mut. Ins. Ass'n*, 53 Wash. 16, 101 Pac. 371). Where the complaint showed that there had been a breach of warranty as to title, and to overcome the same it was averred that the policy was issued after notice of the defect of title, the question whether waiver or estoppel might have been created by other facts was not in issue, for, if an insured relies on waiver or estoppel as to any defense otherwise

available to the insurer, the facts constituting the waiver or estoppel must be pleaded (*Goorberg v. Western Assur. Co.*, 150 Cal. 510, 89 Pac. 130, 10 L. R. A. [N. S.] 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801).

The sufficiency of the allegations as to estoppel and waiver are considered in *Traders' Ins. Co. v. Letcher*, 39 South. 271, 143 Ala. 400; *United Order of the Golden Cross v. Hooser*, 160 Ala. 334, 49 South. 354; *Supreme Tribe of Ben Hur v. Lennert*, 178 Ind. 122, 98 N. E. 115; *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605; *Webster v. State Mut. Fire Ins. Co.*, 69 Atl. 319, 81 Vt. 75.

Where an insurance company pleads a breach of condition against concurrent insurance, and the reply sets up a waiver, and the policy authorizes concurrent insurance, it is unnecessary to prove the alleged waiver (*Springfield Fire & Marine Ins. Co. v. Null*, 133 Pac. 235, 37 Okl. 665).

In *Continental Ins. Co. v. Reynolds*, 107 Md. 96, 68 Atl. 277, defendant answered alleging breach of condition as to additional insurance, to which plaintiff replied setting out that, at the time of the issuance of the policy sued on, defendant had notice that plaintiff had applied for additional insurance, and that the application therefor had been accepted. It was held that a rejoinder alleging that the terms of the policy prohibited additional insurance, unless indorsed on the policy, was bad as against a demurrer, since, if the facts in the replication were true, defendant was estopped to rely on its failure to indorse the additional insurance on the policy.

2773-2775. (c) Presumption and burden of proof

2773 (c). The burden of proving all the essential elements of a waiver is on the plaintiff.

United Order of the Golden Cross v. Hooser, 160 Ala. 334, 49 South. 354; *Supreme Tribe of Ben Hur v. Lennert*, 178 Ind. 122, 98 N. E. 115, overruling judgment (App.) 94 N. E. 889, which on rehearing affirmed 93 N. E. 869; *Franklin Life Ins. Co. of Illinois v. McAfee*, 90 S. W. 216, 28 Ky. Law Rep. 676; *Forwood v. Prudential Ins. Co. of America*, 83 Atl. 169, 117 Md. 254; *Ostmann v. Supreme Lodge, Knights and Ladies of Honor*, 85 N. J. Law, 86, 88 Atl. 949; *Estes v. Brotherhood of Railroad Trainmen*, 70 S. E. 725, 88 S. C. 221; *Security Life & Annuity Co. of America v. Underwood* (Tex. Civ. App.) 150 S. W. 293.

It must be presumed that a beneficiary association knew of the practice of its local camp in receiving and remitting assessments

after the day on which they were payable (*Dromgold v. Royal Neighbors of America*, 103 N. E. 584, 261 Ill. 60, reversing judgment 177 Ill. App. 1).

2775-2777. (d) Admissibility of evidence

2775 (d). In an action on a life policy issued on an application stipulating that the answers are to be deemed representations and not warranties, the inquiry may extend to the materiality of the answers alleged to be false, and to the good faith of defendant's agent in writing down the answers, and to whether the application was signed in good faith without having been read, and without knowledge that the answers were incorrectly written down (*Sura-vitz v. Prudential Ins. Co. of America*, 91 Atl. 495, 244 Pa. 582, L. R. A. 1915A, 273).

In the following cases the admissibility of the evidence to show a waiver generally is considered: *Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc.*, 146 Fed. 695, 77 C. C. A. 121; *Rife v. Lumber Underwriters*, 204 Fed. 32, 122 C. C. A. 346; *Zeman v. North American Union*, 105 N. E. 22, 263 Ill. 304, affirming judgment 181 Ill. App. 551; *Weinberger v. Insurance Co. of North America*, 156 S. W. 79, 170 Mo. App. 266; *Sura-vitz v. Prudential Ins. Co.*, 244 Pa. 582, 91 Atl. 495, L. R. A. 1915A, 273; *Rearden v. State Mut. Life Ins. Co.*, 60 S. E. 1106, 79 S. C. 526; *Berry v. Virginia State Ins. Co.*, 64 S. E. 859, 83 S. C. 13; *National Council of the Knights and Ladies of Security v. Sealey* (Tex. Civ. App.) 162 S. W. 455.

The admissibility of evidence to show knowledge of the insurer of the grounds of forfeiture is considered in the following cases: *United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760; *Iowa Life Ins. Co. v. Haughton*, 46 Ind. App. 467, 87 N. E. 702, reversing on rehearing 85 N. E. 127; *Provident Sav. Live Assur. Soc. v. Whayne's Adm'r*, 131 Ky. 84, 93 S. W. 1049, 29 Ky. Law Rep. 160; *Harris v. North American Ins. Co.*, 77 N. E. 493, 190 Mass. 361, 4 L. R. A. (N. S.) 1137; *Brunswick-Balke-Col-lender Co. v. Northern Assur. Co.*, 113 N. W. 1113, 150 Mich. 311; *Riley v. American Cent. Ins. Co.*, 92 S. W. 1147, 117 Mo. App. 229; *Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185.

In the following cases the admissibility of evidence to show waiver of forfeiture for nonpayment of premiums is considered: *Continental Ins. Co. of New York v. Hargrove*, 131 Ky. 837, 116 S. W. 256; *Crowder v. Continental Casualty Co.*, 91 S. W. 1016, 115 Mo. App. 535; *Keys v. National Council, Knights and Ladies of Security*, 161 S. W. 345, 174 Mo. App. 671; *Mutual Life Ins. Co. of New York v. Davis* (Tex. Civ. App.) 154 S. W. 1184.

2777-2779. (e) Sufficiency of evidence

2777 (e). A "waiver" being the voluntary relinquishment of some known right or advantage which the party would otherwise have enjoyed, and being a matter of intent, the evidence to prove it must clearly show an intent to relinquish a then known particular right, so as to exclude any other reasonable explanation (*Plumer v. Continental Casualty Co.*, 12 Ga. App. 594, 77 S. E. 917). But, slight evidence showing an intention to waive a forfeiture of a mutual benefit certificate for nonpayment of premiums will prevent a forfeiture (*Keys v. National Council, Knights and Ladies of Security*, 161 S. W. 345, 174 Mo. App. 671).

The sufficiency of the evidence to show a waiver generally is considered in the following cases: *Chamberlain v. Shawnee Fire Ins. Co.*, 177 Ala. 516, 58 South. 267; *Sandoval Zinc Co. v. New Amsterdam Casualty Co.*, 140 Ill. App. 247, judgment affirmed 85 N. E. 219, 235 Ill. 306; *Western Ins. Co. v. Ashby*, 53 Ind. App. 518, 102 N. E. 45; *Black v. Grain Shippers' Mut. Fire Ins. Ass'n*, 171 Iowa, 309, 152 N. W. 7; *Berman v. Fraternities Health & Accident Ass'n*, 107 Me. 368, 78 Atl. 462; *Continental Ins. Co. v. Reynolds*, 107 Md. 96, 68 Atl. 277; *Taylor v. Grand Lodge A. O. U. W. of Minnesota*, 105 N. W. 408, 96 Minn. 441, 3 L. R. A. (N. S.) 114; *Cranston v. West Coast Life Ins. Co.*, 72 Or. 116, 142 Pac. 762; *Gamble v. Metropolitan Life Ins. Co.*, 78 S. E. 875, 95 S. C. 196; *Security Mut. Life Ins. Co. v. Calvert* (Tex. Civ. App.) 100 S. W. 1033, judgment reversed 101 Tex. 128, 105 S. W. 320; *St. Paul Fire & Marine Ins. Co. v. Cronin*, 62 Tex. Civ. App. 440, 131 S. W. 649; *Commercial Union Assur. Co. of London v. Hill* (Tex. Civ. App.) 167 S. W. 1095; *Fireman's Fund Ins. Co. v. Lyon* (Tex. Civ. App.) 171 S. W. 801.

In the following cases the waiver was predicated on the insertion of false answers by the negligence or mistake of the agent: *Picek v. Modern Brotherhood of America*, 177 Ill. App. 113; *United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760; *General Accident, Life & Fire Assur. Corporation v. Richardson*, 163 S. W. 482, 157 Ky. 503; *Forwood v. Prudential Ins. Co. of America*, 83 Atl. 169, 117 Md. 254.

The sufficiency of the evidence to show knowledge of the insurer of the grounds of forfeiture was considered in the following cases: *Federal Union Surety Co. v. Flemister*, 95 Ark. 389, 130 S. W. 574; *Modern Woodmen v. International Trust Co.*, 25 Colo. App. 26, 136 Pac. 806; *Fire Ass'n of Philadelphia v. Yeagley*, 72 N. E. 1035, 34 Ind. App. 387; *Cochburn v. Hawkeye Commercial Men's Ass'n*, 163 Iowa, 28, 143 N. W. 1006; *Strickland v. Peerless Casualty Co.*, 90 Atl. 974, 112 Me. 100; *Moloney v. Germania Fire Ins. Co.*, 168 Mich. 269, 134 N. W. 6; *Polk v. Western Assur. Co.*, 90 S. W. 397, 114 Mo. App. 514; *Galvin v. Knights of Father Mathew*, 155 S. W. 45, 169 Mo. App. 496; *Thompson v. Modern Brotherhood of*

America, 189 Mo. App. 15, 176 S. W. 506; Whigham v. Supreme Court I. O. F., 51 Or. 489, 94 Pac. 968; Thompson v. Piedmont Mut. Ins. Co., 58 S. E. 341, 77 S. C. 486; Siemers v. Meeme Mut. Home Protection Ins. Co., 143 Wis. 114, 126 N. W. 669, 139 Am. St. Rep. 1083.

Evidence by insured alone that he had informed the insurance agent of all the facts concerning the alleged surrender of other fire policies does not establish that fact so as to require its acceptance as undisputed. Merchants' Fire Ins. Co. v. McAdams, 115 S. W. 175, 88 Ark. 550.

The sufficiency of the evidence to show waiver of default in payment of premiums was considered in the following cases: Becker v. Exchange Mut. Fire Ins. Co. (C. C.) 165 Fed. 816; National Council of Junior Order of United American Mechanics v. Caraway, 81 S. E. 243, 13 Ga. App. 819; Jones v. Supreme Lodge Knights of Honor, 86 N. E. 191, 236 Ill. 113, 127 Am. St. Rep. 277; Home Ins. Co. of New York v. Ballew, 96 S. W. 878, 29 Ky. Law Rep. 1059; New York Life Ins. Co. v. Evans, 136 Ky. 391, 124 S. W. 376; New York Life Ins. Co. v. Evans, 143 S. W. 37, 146 Ky. 600; Nichols v. Prudential Ins. Co. of America, 155 S. W. 478, 170 Mo. App. 437; Lange v. New York Life Ins. Co., 162 S. W. 589, 254 Mo. 488; Graham v. Security Mut. Life Ins. Co., 62 Atl. 681, 72 N. J. Law, 298; Munn v. Masonic Life Ass'n, 101 N. Y. Supp. 91, 115 App. Div. 855; Murphy v. Lafayette Mut. Life Ins. Co., 167 N. C. 334, 83 S. E. 461; McManus v. Prudential Ins. Co. of America, 80 S. E. 613, 96 S. C. 375; Clark v. Southeastern Life Ins. Co., 101 S. C. 249, 85 S. E. 407; North American Acc. Ins. Co. v. Bowen (Tex. Civ. App.) 102 S. W. 163; Equitable Life Assur. Society of United States v. Ellis, 105 Tex. 526, 147 S. W. 1152, 152 S. W. 625, affirming judgment (Civ. App.) 137 S. W. 184; Fugina v. Northwestern Nat. Life Ins. Co., 144 N. W. 989, 155 Wis. 480.

The evidence was regarded as insufficient in Citizens' Nat. Life Ins. Co. v. Morris, 104 Ark. 288, 148 S. W. 1019; Wallace v. Metropolitan Life Ins. Co., 73 S. E. 698, 10 Ga. App. 517; Plumer v. Continental Casualty Co., 12 Ga. App. 594, 77 S. E. 917; Mathers v. Protected Home Circle, 55 Pa. Super. Ct. 421.

The sufficiency of the evidence to show agency or the powers of agent was considered in Pennsylvania Fire Ins. Co. v. Draper, 187 Ala. 103, 65 South. 923; Queen of Arkansas Ins. Co. v. Malone, 111 Ark. 229, 163 S. W. 771; Abrahamson v. Hartford Fire Ins. Co., 181 Ill. App. 254; Dixie Fire Ins. Co. v. A. Layne & Bro., 161 S. W. 530, 156 Ky. 606.

2779-2781. (f) Questions for jury

2779 (f). The question whether there has been a waiver or an estoppel in any particular case is primarily one of fact for the jury.

Reference may be made to the following cases: Queen of Arkansas Ins. Co. v. Dumas, 113 Ark. 598, 168 S. W. 561; Gurley v. Massac

County Mut. Relief Ass'n, 186 Ill. App. 492; National Furniture Co. v. Prussian Nat. Ins. Co., 91 Atl. 785, 112 Me. 557; Macatawa Transp. Co. v. Firemen's Fund Ins. Co., 179 Mich. 443, 146 N. W. 396; Ball v. Royal Ins. Co., 107 S. W. 1097, 129 Mo. App. 34; Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota, 154 Mo. App. 394, 134 S. W. 589; Thompson v. Modern Brotherhood of America, 189 Mo. App. 15, 176 S. W. 506; Lynch v. Germania Life Ins. Co., 116 N. Y. Supp. 998, 132 App. Div. 571; Huestess v. South Atlantic Life Ins. Co., 70 S. E. 403, 88 S. C. 31; Little v. Grand Lodge K. P., 81 S. E. 152, 96 S. C. 448; Norris v. China Traders' Ins. Co., 100 Pac. 1025, 52 Wash. 554; Fisher v. Sun Ins. Co. of London, 74 W. Va. 694, 83 S. E. 729, L. R. A. 1915C, 619.

In the following cases waiver of nonpayment of premiums was involved: Villmont v. Grand Grove, U. A. O. D., 111 Minn. 201, 126 N. W. 730; Sauerwein v. Grand Lodge of Order of Sons of Hermann, 121 Minn. 229, 141 N. W. 174; Kulberg v. Supreme Ruling of Fraternal Mystic Circle, 148 N. W. 299, 126 Minn. 494; Keys v. National Council, Knights and Ladies of Security, 161 S. W. 345, 174 Mo. App. 671; Morrison v. Mutual Benev. Ass'n of Chesterfield County, 59 S. E. 27, 78 S. C. 398; Rowe v. United States Industrial Life Ins. Co. of Charleston, 72 S. E. 1018, 90 S. C. 168; Security Life & Annuity Co. of America v. Underwood (Tex. Civ. App.) 150 S. W. 293.

2781 (f). Questions whether one is in fact an agent of the company and the extent of the agent's powers, so far as such matters rest in parol, are for the jury.

Reference may be made to Belden v. Union Cent. Life Ins. Co., 141 Pac. 370, 167 Cal. 740; *Id.*, 141 Pac. 373, 167 Cal. 798; Harvick v. Modern Woodmen of America, 158 Ill. App. 570; Fireman's Fund Ins. v. Kelley (Ky.) 116 S. W. 790; Gragg v. Home Ins. Co. of New York, 107 S. W. 321, 32 Ky. Law Rep. 988.

What facts constitute a waiver of a requirement in an insurance policy is a matter of law for the court, but whether the facts existed in any given case is generally a question of fact, to be determined by the jury (*North American Acc. Ins. Co. v. Whitesides*, 134 Ill. App. 290, 294). If, however, there is no conflict of evidence, the question of waiver is for the court.

Boening v. North American Union, 155 Ill. App. 528; *Cox v. American Ins. Co.*, 184 Ill. App. 419; *Clifton v. Mutual Life Ins. Co. of New York*, 168 N. C. 499, 84 S. E. 817; *Estes v. Brotherhood of Railroad Trainmen*, 70 S. E. 725, 88 S. C. 221.

Whether the written consent of an employer's liability insurer to a settlement by the insured was waived by the insurer was a question for the jury. And so, too, is the credibility and weight of evidence to establish a custom between a railroad company and an

insurance company permitting the railroad to settle claims without giving notice to the insurance company (*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.*, 97 Miss. 165, 52 South. 787).

The sufficiency of the evidence to warraht a submission to the jury is considered in *Pennsylvania Fire Ins. Co. v. Draper*, 187 Ala. 103, 65 South. 923; *Queen of Arkansas Ins. Co. v. Cooper-Cryer Co.*, 81 Ark. 160, 98 S. W. 694; *Lord v. Des Moines Fire Ins. Co.*, 99 Ark. 476, 138 S. W. 1008; *Commercial Union Fire Ins. Co. v. King*, 108 Ark. 130, 156 S. W. 445; *Queen of Arkansas Ins. Co. v. Laster*, 108 Ark. 261, 156 S. W. 848; *Pioneer Life Ins. Co. v. Cox*, 112 Ark. 582, 166 S. W. 951; *Ætna Ins. Co. v. Johnson*, 56 S. E. 643, 127 Ga. 491, 9 L. R. A. (N. S.) 667, 9 Ann. Cas. 461; *O'Brien v. Catholic Order of Foresters*, 172 Ill. App. 638; *Bricker v. Great Western Accident Ass'n*, 161 Iowa, 61, 140 N. W. 851; *People's Nat. Fire Ins. Co. v. Jackson*, 159 S. W. 688, 155 Ky. 150; *Perry v. John Hancock Mut. Life Ins. Co.*, 106 N. W. 860, 143 Mich. 290; *Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co.*, 113 S. W. 217, 133 Mo. App. 57; *Watkins v. Brotherhood of American Yeomen*, 188 Mo. App. 626, 176 S. W. 516; *Downs v. Knights of Columbus*, 80 Atl. 227, 76 N. H. 165; *Carr v. Prudential Ins. Co.*, 101 N. Y. Supp. 158, 115 App. Div. 755; *Gish v. Insurance Co. of North America*, 87 Pac. 869, 16 Okl. 59, 13 L. R. A. (N. S.) 826; *McMillan & Son v. Insurance Co. of North America*, 58 S. E. 1020, 78 S. C. 433; *Id.*, 78 S. C. 433, 58 S. E. 1135; *Security Mut. Life Ins. Co. v. Calvert (Tex. Civ. App.)* 100 S. W. 1033, judgment reversed 101 Tex. 128, 105 S. W. 320; *Security Mut. Life Ins. Co. v. Calvert*, 101 Tex. 128, 105 S. W. 320, reversing (Tex. Civ. App.) 100 S. W. 1033; *American Cent. Ins. Co. v. Chancey*, 60 Tex. Civ. App. 61, 127 S. W. 577; *Bruger v. Princeton & St. M. Mut. Fire Ins. Co.*, 109 N. W. 95, 129 Wis. 281.

2782-2784. (g) Instructions

2782 (g). Where the issue of waiver is properly in the case, instructions which fail to submit such issue are erroneous.

Pennsylvania Fire Ins. Co. v. Draper, 187 Ala. 103, 65 South. 923; *Queen of Arkansas Ins. Co. v. Dumas*, 113 Ark. 598, 168 S. W. 561; *Home Circle Soc., No. 2, v. Shelton (Tex. Civ. App.)* 85 S. W. 320.

To properly submit the question of waiver the instruction should embody all the essential elements of waiver.

Cox v. American Ins. Co., 184 Ill. App. 419; *Northwestern Nat. Ins. Co. of Milwaukee v. Avant*, 132 Ky. 106, 116 S. W. 274.

The sufficiency of instructions was considered in *O'Brien v. Catholic Order of Foresters*, 172 Ill. App. 638; *Court of Honor v. Dinger*, 77 N. E. 557, 221 Ill. 176, affirming judgment 123 Ill. App. 406; *Schuler v. Metropolitan Life Ins. Co.*, 191 Mo. App. 52, 176 S. W. 274.

Where the policy prohibited additional insurance, an instruction that, if the insurer's agent knew of the additional insurance before the fire, the jury should find whether he "consented to such insurance and waived" the breach of the contract, is not erroneous; the use of "and," instead of "or," not operating to tell the jury that they must find both consent and waiver (*Coppoletti v. Citizens' Ins. Co. of Missouri*, 123 Minn. 325, 143 N. W. 787). In *Polk v. Western Assur. Co.*, 114 Mo. App. 514, 90 S. W. 397, the policy contained a stipulation that it should be void in case of other insurance without the consent of the original insurer. It appeared that defendant's agent had possession of the policy, and that plaintiff called on him to obtain possession of the policy to be used in procuring other insurance, and that insured obtained the policy; the agent being informed why he desired it. The court instructed that if plaintiff notified the agent of his intention to take out additional insurance on the property in question, and "at that time or afterwards" told him that he was about to do so, and that no objection was made, and no steps taken to cancel the policy, defendant would be deemed to have consented to the additional insurance. It was held that the instruction was not erroneous on the theory that it permitted the jury to find a waiver if they found that, before the issuance of the policy in question, plaintiff declared his intention of procuring other insurance.

(1087)

XVII. CANCELLATION, SURRENDER, AND RESCISSION OF CONTRACT

1. CANCELLATION BY INSURER—INSURANCE OF PROPERTY

2789-2791. (a) Right of insurer to cancel

2789 (a). The right of canceling a fire policy can only be exercised when such right is reserved in the policy (*Commercial Union Fire Ins. Co. v. King*, 108 Ark. 130, 156 S. W. 445). In the case of breach of condition, cancellation is not the only remedy, as we have seen, since the breach of condition may be pleaded as a defense to an action on the policy (*California Reclamation Co. v. New Zealand Ins. Co.*, 23 Cal. App. 611, 138 Pac. 960). But, of course, there can be no valid cancellation for failure to comply with a requirement that is not authorized by the policy or rules of the insurer (*Farmers' Milling Co. v. Mill Owners' Mut. Fire Ins. Co.*, 127 Iowa, 314, 103 N. W. 207).

In *Harrison v. Philadelphia Contributionship for Insurance of Houses from Loss by Fire* (C. C.) 171 Fed. 178, affirmed in 176 Fed. 323, 99 C. C. A. 613, it appeared that by the fundamental law of the society, which was organized in 1752, comprised in its deed of settlement and subsequent charter from the state, every person insuring therein was required to deposit a sum proportioned to the amount of his policy, and become a member of the society during the continuance of his policy, on the expiration of which without a loss his deposit, subject to certain deductions, was returned. By an amendment adopted in 1836 it was provided that all policies thereafter issued should be made to continue in force for an unlimited period, but that the society should have the right on 30 days' notice to cancel any policy and return the deposit, or the insured might on notice, surrender his policy and withdraw his deposit less 5 per cent., and such provisions were incorporated in all subsequent policies. It was held that a policy thereafter issued was subject to such provisions as a part of the contract, and that the holder had no standing to enjoin the society from canceling the policy and terminating his membership on the ground that the amendment of the deed of settlement was ultra vires. In *Commonwealth v. Philadelphia Contributionship*, 242 Pa. 209, 88 Atl. 929, it was held that under a deed of settlement of an unincorporated society for mutual insurance and a subsequent act incorporating the society

for "insurance of houses * * * apart from all views of private gains or interest," with power to make proper regulations, the society had power to amend the deed of settlement so as to authorize the cancellation of any insurance policy upon the return of the deposit money alone. And whether a risk assumed by a mutual insurance company shall be canceled for the best interest of all other policy holders upon terms that are not unjust is a question for the insurer's determination.

2790 (a). Since the New York Standard policy provides for cancellation by the insurer on observance of certain conditions, a binder which makes that form a part of the contract gives the same privilege (*British American Ins. Co. v. Wilson*, 77 Conn. 559, 60 Atl. 293).

Under Ky. St. § 712, mutual fire insurance company which had issued policy providing insurance in separate amounts on different buildings held entitled to cancel the policy as to only one of such buildings; the insurance being separable (*German Mut. Fire Ins. Co. v. Weikel*, 155 S. W. 373, 153 Ky. 288). Insurance agents having authority to select companies and determine the amount of insurance to be placed in each company on plaintiff's property have no authority to cancel a policy (*C. C. Hendee Co. v. Insurance Co. of Pennsylvania*, 149 N. W. 147, 158 Wis. 521).

2791-2792. (b) Proceedings to effect cancellation in general

2791 (b). The right to terminate by cancellation a contract of insurance fairly entered into, and which has taken effect, can be exercised only by a strict compliance with the provisions of the policy relating thereto.

Home Ins. Co. of New York v. Chattahoochee Lumber Co., 126 Ga. 334, 55 S. E. 11; *Commercial Union Fire Ins. Co. v. King*, 108 Ark. 130, 156 S. W. 445; *Scheel v. German-American Ins. Co.*, 228 Pa. 44, 76 Atl. 507; *Bard v. Fireman's Ins. Co.*, 108 Me. 506, 81 Atl. 870; *Northern Pine Crating Co. v. Liverpool & London & Globe Ins. Co.*, 143 Wis. 433, 128 N. W. 70.

Of course, strict compliance with the provisions of the policy may be waived by the insured (*Northern Pine Crating Co. v. Liverpool & London & Globe Ins. Co.*, 128 N. W. 70, 143 Wis. 433). But, in the absence of waiver, some affirmative act by the agent is necessary to effect a cancellation (*Fireman's Fund Ins. Co. v. Hellner*, 49 South. 297, 159 Ala. 447, 17 Ann. Cas. 793). Generally

no act is required beyond giving the required notice (*American Glove Co. v. Pennsylvania Fire Ins. Co.*, 15 Cal. App. 77, 113 Pac. 688).

Action of fire insurance company in denying liability because insured had effected other insurance contrary¹ to his stipulation was not a "cancellation" of the policy, calling for return of pro rata share of premium under its terms. *Ohio Farmers' Ins. Co. v. Williams* (Ind. App.) 112 N. E. 556.

A formal surrender of the policy by the insured, when notified of the insurer's election to cancel is not necessary to give effect to the cancellation (*Citizens' Ins. Co. of Mo. v. Henderson Elevator Co.*, 123 Ky. 478, 96 S. W. 601, 29 Ky. Law Rep. 976, 124 Am. St. Rep. 371, rehearing denied 123 Ky. 478, 97 S. W. 810, 30 Ky. Law Rep. 225, 124 Am. St. Rep. 371).

2792-2793. (c) Necessity of notice of cancellation

2792 (c). A policy usually provides that it may be canceled by the insurer by giving notice of cancellation and returning the unearned portion of the premium. Under such clause the giving of notice of the election to cancel is absolutely essential to the valid termination of the policy.

Farmers' Mut. Ins. Ass'n of Alabama v. Tankersley, 13 Ala. App. 524, 69 South. 410; *British American Ins. Co. v. Wilson*, 60 Atl. 293, 77 Conn. 559; *Home Ins. Co. of New York v. Chattahoochee Lumber Co.*, 126 Ga. 334, 55 S. E. 11; *Jacobs v. Atlas Ins. Co.*, 148 Ill. App. 325; *Rosen v. German Alliance Ins. Co.*, 106 Me. 229, 76 Atl. 688; *Bard v. Fireman's Ins. Co.*, 108 Me. 506, 81 Atl. 870; *Bragg v. Royal Ins. Co.*, 98 Atl. 632, 115 Me. 196; *Green v. Star Fire Ins. Co.*, 190 Mass. 586, 77 N. E. 649; *Ætna Ins. Co. of Hartford v. Renno*, 93 Miss. 594, 46 South. 947; *Walrath v. Hanover Fire Ins. Co.*, 139 App. Div. 407, 124 N. Y. Supp. 54; *Davis v. Continental Ins. Co.*, 60 Pa. Super. Ct. 341; *Homestead Fire Ins. Co. v. Ison*, 110 Va. 18, 65 S. E. 463; *Lusk v. American Cent. Ins. Co. (W. Va.)* 91 S. E. 1078.

Where an insured's agent telegraphed that the insured would not accept a change in the rate, and asked if the policies would stand, to which the reply was that the companies demanded a higher rate, whereupon the insured's agent wrote back that there was nothing to do but cancel the policies, there was an agreement for the cancellation, relieving the companies from giving notice of cancellation (*Northern Assur. Co. v. J. J. Newman Lumber Co.*, 105 Miss. 688, 63 South. 209).

2793-2796. (d) Sufficiency of notice in general

2793 (d). No attempted cancellation by the insurer will be effective until brought to the notice of the insured (*New Amsterdam Casualty Co. v. New Palestine Bank*, 59 Ind. App. 69, 107 N. E. 554). And the provision allowing the company to cancel upon five days' notice means actual, and not constructive, notice (*Hartford Fire Ins. Co. v. Tewes*, 132 Ill. App. 321). Hence a policy is not terminated by notice by publication; "notice" meaning personal notice (*Frink v. National Mut. Fire Ins. Co.*, 74 S. E. 33, 90 S. C. 544, Ann. Cas. 1913D, 221). In the absence of any stipulation in the policy as to the manner in which notice of cancellation should be given, actual personal notice must be had (*Potomac Ins. Co. v. Atwood*, 118 Ill. App. 349). A notice of cancellation, to be effective, must be brought to the personal attention of the insured, or such a situation must be brought about as to put him on inquiry which, if made, would result in actual notice. So it was held in *Fritz v. Pennsylvania Fire Ins. Co.*, 85 N. J. Law, 171, 88 Atl. 1065, 50 L. R. A. (N. S.) 35, that where notice of cancellation was inclosed in a postpaid registered envelope addressed to insured and having on its face the card of an insurance company with whom insured had no dealings, and was received by insured, but not opened by him, this was not a notice of cancellation.

Notice of the cancellation of a fire policy contained in a registered letter which was returned by the insurer's request within a less time than provided for by postal regulation (Rev. St. § 3936 [U. S. Comp. St. 1913, § 7418]) was insufficient to avoid the policy. *American Automobile Ins. Co. v. Watts*, 12 Ala. App. 518, 67 South. 758.

The burden of proving the delivery of a letter canceling the fire policy sued on is upon the company in order to defend on the ground of cancellation. *Commercial Union Fire Ins. Co. v. King*, 108 Ark. 180, 156 S. W. 445.

Mailing a proper notice of cancellation of a policy and the return premium in a letter, postpaid and addressed to the insured, a foreign corporation, at its post office address, or delivering a copy of the notice and return premium to the agent in charge of its office and business, is sufficient to effect cancellation (*Liverpool & London & Globe Ins. Co. v. Harding*, 201 Fed. 515, 119 C. C. A. 611).

The notice may be in writing, or it may be verbal (*Davidson v. German Ins. Co.*, 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. [N. S.] 884, 12 Ann. Cas. 1065).

No particular form is required, but it is only necessary that the notice shall unequivocally indicate to the insured that it is the in-

tention that the policy shall cease after the required period has elapsed.

American Glove Co. v. Pennsylvania Fire Ins. Co., 15 Cal. App. 77, 113 Pac. 688; *Wing Chung Long Co. v. Prussian Nat. Ins. Co.*, 33 Cal. App. 715, 166 Pac. 358; *Payne v. President and Directors of Ins. Co. of North America*, 156 S. W. 52, 170 Mo. App. 85; *Davidson v. German Ins. Co.*, 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884, 12 Ann. Cas. 1065.

In action on policy of burglary insurance, where insurer imposed on itself a duty by sending notice of cancellation by mail, it was incumbent upon it to show that it had complied with policy in addressing notice in language which itself had selected and adopted. *Hughes v. Royal Indemnity Co.* (Mun. Ct.) 165 N. Y. Supp. 530.

A letter by the local agents to insured, stating that the company had ordered the policy canceled and it would be impossible to re-write the policy and "we will cancel this policy to-morrow, and if you can make other arrangements * * * it will be well for you to do this before noon," is sufficient as a notice of cancellation (*Commercial Union Fire Ins. Co. v. King*, 108 Ark. 130, 156 S. W. 445).

The notice must show a present cancellation, and not a mere intention to cancel in the future. If the notice indicated a desire to terminate liability and that the policy would be canceled five days from date, this is a present exercise of the right, and not a mere expression of intention (*American Glove Co. v. Pennsylvania Fire Ins. Co.*, 15 Cal. App. 77, 113 Pac. 688). So a policy is not canceled by letter written insured, stating that the company wanted to cancel it and asking where the policy was, because it was a mere expression of an intention to cancel (*Payne v. President and Directors of Ins. Co. of North America*, 156 S. W. 52, 170 Mo. App. 85). And a notice to a holder of an insurance policy, which states that "we shall cancel the policy," is not in itself a cancellation (*McNellis v. Aetna Ins. Co.*, 176 Ill. App. 575). If insured is notified that if the premium is not paid by a certain time the policy will stand canceled without further notice, and payment not being made, the manager of the insurer's agent directed the policy to be canceled on the books of the company, there is a cancellation in fact (*Ralston v. Royal Ins. Co., Limited, of Liverpool*, 140 Pac. 552, 79 Wash. 557).

2794 (d). A notice is ineffectual until it is received by the insured (*Potomac Ins. Co. v. Atwood*, 118 Ill. App. 349); but a mistake in designating the date the notice shall take effect does not

invalidate it as a notice of cancellation as of the day when the period of notice actually expires (*American Glove Co. v. Pennsylvania Fire Ins. Co.*, 15 Cal. App. 77, 113 Pac. 688).

A notice of cancellation of a fire policy was not ineffectual because signed "R. W. Osborn, Manager," instead of in the name of the insurer by the manager, where it was given and received as a notice from the insurer (*American Glove Co. v. Pennsylvania Fire Ins. Co.*, 15 Cal. App. 77, 113 Pac. 688). So, too, a notice of cancellation, though signed only in the name of the insurance company's agents, in the same manner that the policy was signed, is sufficient, the letter accompanying it advising insured the company was demanding the cancellation (*Ralston v. Royal Ins. Co., Limited, of Liverpool*, 140 Pac. 552, 79 Wash. 557). But a notice is insufficient where the policy provides that it may be canceled by the company by giving five days' notice, and that in matters relating to the insurance no person shall be deemed the agent of the company unless duly authorized in writing, when no attempt is made to show that the alleged agent who served such notice had such written authority (*McNellis v. Ætna Ins. Co.*, 176 Ill. App. 575).

Where an insurance agent delivered a policy, and collected the premium and reported the facts to the insurer, mere notice by insurer to the agent that the rate was inadequate, and that the policy must be canceled unless a higher rate was collected, did not invalidate the policy (*Waterloo Lumber Co. v. Des Moines Ins. Co.*, 158 Iowa, 563, 138 N. W. 504, 51 L. R. A. [N. S.] 539).

2796. (e) Person to whom notice must be given

2796 (e). A notice by the company of a desire to cancel a fire insurance policy is insufficient to effect the object if not given to insured or to some one authorized by him to receive it.

Kinney v. Rochester German Ins. Co., 141 Ill. App. 543; *Kinney v. Caledonian Ins. Co.*, 148 Ill. App. 256; *Same v. Buffalo German Ins. Co.*, Id. 260.

Authority to procure insurance does not necessarily carry with it authority to receive notice of cancellation (*Hartford Fire Ins. Co. v. Tewes*, 132 Ill. App. 321).

To the same effect is *Condon v. Exton-Hall Brokerage & Vessel Agency*, 142 N. Y. Supp. 548, 80 Misc. Rep. 369, judgment reversed 144 N. Y. Supp. 760, 83 Misc. Rep. 130; *Pauley v. Sun Ins. Office (W. Va.)* 90 S. E. 552.

2796-2800. (f) Same—Notice to insurance agent or broker

2796 (f). A notice to the agent of the insurance company is not sufficient to effect a cancellation of the policy (*Waterloo Lumber Co. v. Des Moines Ins. Co.*, 158 Iowa, 563, 138 N. W. 504, 51 L. R. A. [N. S.] 539). And to the same effect is *Tacoma Lumber & Shingle Co. v. Fireman's Fund Ins. Co.*, 87 Wash. 79, 151 Pac. 91.

But if the agent agrees with insured to look after the business and keep up the insurance, the insured having no choice of companies, the agent has authority to waive, for the assured, the five days' notice of cancellation, provided for in the policy, and obtain a new policy from another company.

Allemania Fire Ins. Co. v. Zweng, 127 Ark. 141, 191 S. W. 903; *Farrar v. Western Assur. Co.*, 159 Pac. 609, 30 Cal. App. 489, application for rehearing in Supreme Court denied 159 Pac. 611, 30 Cal. App. 489; *Ætna Ins. Co. of Hartford v. Renno*, 96 Miss. 172, 50 South. 563; *Hollywood Lumber & Coal Co. v. Dubuque Fire & Marine Ins. Co.* (W. Va.) 92 S. E. 858.

2797 (f). As a general rule an insurance broker authorized by insured to obtain the insurance is not an agent for the purpose of receiving notice of the company's desire to cancel the policy.

Cheshire Brass Co. v. Wilson, 86 Atl. 26, 86 Conn. 551; *Kinney v. Rochester German Ins. Co.*, 141 Ill. App. 543; *Kinney v. Caledonian Ins. Co.*, 148 Ill. App. 256; *Same v. Buffalo German Ins. Co.*, Id. 260; *National Union Fire Ins. Co. of Pittsburgh, Pa., v. Baltimore Asbestos Co.*, 89 Atl. 408, 122 Md. 121.

2798 (f). If the agent is agent of the insured and has general powers to place insurance in various companies, with power to cancel and replace the policies with others, to keep an expiration book, and to correct the same every six months, an insurance company may serve notice of cancellation of a policy procured by such agent for his principal upon the agent.

Standard Leather Co. of Pittsburgh v. Allemania Fire Ins. Co., 224 Pa. 186, 73 Atl. 192; *Standard Leather Co. v. Insurance Co. of North America*, 73 Atl. 216, 224 Pa. 178.

In *Northern Assur. Co. v. Standard Leather Co.*, 165 Fed. 602, 91 C. C. A. 440, reversing (C. C.) 156 Fed. 689, it appeared that the plaintiff gave insurance brokers general authority to procure for it \$75,000 insurance to replace prior insurance at better rates. The brokers applied to the local agents of a number of companies, which issued policies, each in the amount of \$2,500; the premiums being charged to the brokers to whom the policies were delivered. On

receiving the report of the risk defendant instructed its agent to cancel the policy and he gave the brokers, who still retained it, notice of cancellation in five days as required by its terms, when they surrendered it, as they did other policies similarly canceled. Before they had procured the requisite amount of other insurance the property burned. It was held that, they not having reported nor delivered the policies to plaintiff, the acceptance of defendant's notice of cancellation and the surrender of its policy were within the scope of their authority and terminated the risk.

In *Insurance Co. of North America v. Wisconsin Cent. Ry. Co.*, 134 Fed. 794, 67 C. C. A. 300, the facts were these: A representative of plaintiff railroad company, having authority to attend to its insurance business and to do everything in respect thereto that could be done by its officers or directors, gave an order to a broker to place insurance to a stated amount on property of the company at a certain place. The broker applied to an agent at such place having power to issue policies for certain companies, including defendant, and he issued policies in different companies to the required amount, which he forwarded to the broker, who delivered them to plaintiff's representative, by whom they were accepted. Certain of the companies desiring to cancel their policies, the agent wrote others to take their place, and forwarded them to the broker, who presented them to plaintiff's representative, and he accepted the same and surrendered the old ones. Defendant notified its agent to cancel its policies, and he proceeded in the same manner. He noted their cancellation on his books, as also did the broker; but before he had taken the substitute policies to plaintiff's representative the property was destroyed by fire. The policies contained a provision that they might be canceled by defendant on five days' notice to the insured, but no such notice had been given. It was held that in the transaction the broker was defendant's subagent, and not an agent of plaintiff; that there was nothing in the course of dealing, which gave him implied authority to cancel policies which had been delivered to plaintiff, and substitute others, or to waive notice for plaintiff; but, on the contrary, the course of dealing showed that such power was retained by plaintiff's representative, and that, he having neither consented to the cancellation nor waived notice, defendant's policies remained in force.

2800. (g) Same—Mortgagor and mortgagee

2800 (g). Where a clause indorsed on a fire policy, stipulating that a loss should be paid to a mortgagee, provided that the policy should continue in force as to the mortgagee 10 days after notice of cancellation by the insurer, a cancellation by the insurer without giving to the mortgagee notice thereof was nugatory, and the insurance as to him remained in force (*Adams v. Farmers' Mut. Fire Ins. Co.*, 90 S. W. 747, 115 Mo. App. 21).

To the same effect is the decision in *Provident Sav. Life Assur. Soc. v. Georgia Industrial Co.*, 52 S. E. 289, 124 Ga. 399; *Rawl v. American Cent. Ins. Co.*, 77 S. E. 1013, 94 S. C. 299, 45 L. R. A. (N. S.) 463, Ann. Cas. 1915A, 1231; *Glasscock v. Liverpool, London & Globe Ins. Co.* (Tex. Civ. App.) 188 S. W. 281.

2801-2803. (h) Necessity of repayment of unearned premium

2801 (h). The policy usually provides for the refunding of a ratable proportion of the premium for the unexpired term on cancellation. The general rule is that under such provision, unless waived, the repayment of such proportion of the premium is essential to a valid cancellation, and notice without such repayment, or tender of the amount, is ineffectual.

Hartford Fire Ins. Co. v. Stephens, 18 Ariz. 339, 161 Pac. 684; *Hartford Fire Ins. Co. v. Tewes*, 132 Ill. App. 321; *Williamson v. Warfield, Pratt, Howell Co.*, 136 Ill. App. 168; *Kinney v. Rochester German Ins. Co.*, 141 Ill. App. 543; *Kinney v. Caledonian Ins. Co.*, 148 Ill. App. 256; *Same v. Buffalo German Ins. Co.*, Id. 260; *Hansell-Elcock Co. v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 177 Ill. App. 500; *National Hotel Co. v. Merchants' Fire Assur. Corp. of New York*, 183 Ill. App. 71; *Bard v. Fireman's Ins. Co.*, 108 Me. 506, 81 Atl. 870; *German Union Fire Ins. Co. of Baltimore v. Fred G. Clarke Co.*, 82 Atl. 974, 116 Md. 622, 39 L. R. A. (N. S.) 829, Ann. Cas. 1913D, 488; *Green v. Star Fire Ins. Co.*, 77 N. E. 649, 190 Mass. 586; *Payne v. President and Directors of Ins. Co. of North America*, 156 S. W. 52, 170 Mo. App. 85; *Dubinsky v. Hartford Fire Ins. Co. of Hartford, Conn.* (Mo. App.) 196 S. W. 1045; *Buckley v. Citizens' Ins. Co. of Missouri*, 98 N. Y. Supp. 622, 112 App. Div. 451; *C. A. Smith Lumber Co. v. Colonial Assurance Co.*, 158 N. Y. Supp. 198, 172 App. Div. 149; *Taylor v. Insurance Co. of North America*, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906; *St. Paul Fire & Marine Ins. Co. v. Peck*, 139 Pac. 117, 40 Okl. 396, reversing judgment on rehearing 130 Pac. 805, 37 Okl. 85; *Gosch v. Firemen's Ins. Co.*, 33 Pa. Super. Ct. 496; *Polemanakos v. Austin Fire Ins. Co.* (Tex. Civ. App.) 160 S. W. 1134; *Niagara Fire Ins. Co. v. Mitchell* (Tex. Civ. App.) 164 S. W. 919. And see *Ryder-Gougar Co. v. Garretson*, 53 Wash. 71, 101 Pac. 498, 132 Am. St. Rep. 1053.

Where an insurer alleges breach of a condition of the policy, he may rescind the contract by a statement in his answer to the insured's complaint on the policy, and such rescission is sufficient if accompanied by a tender of the premiums received. *Mendenhall v. Farmers' Ins. Co. of Kokomo*, 110 N. E. 60, 183 Ind. 694.

It is held in California that, under the provision of a fire insurance policy in the New York standard form relating to cancellation, insurer's giving of the prescribed five days' notice was sufficient to cancel the policy, without a return of or offer to return the unearned portion of the premium actually paid. *Mangrum & Otter v. Law Union & Rock Ins. Co.*, 172 Cal. 497, 157 Pac. 239, L. R. A. 1916F, 440, Ann. Cas. 1917B, 907.

The tender of return of unearned premium after a loss, cannot be relied upon under a provision entitling the insurer to cancel the policy on written notice and return of unearned premium (*Bard v. Fireman's Ins. Co.*, 108 Me. 506, 81 Atl. 870).

The right to insist on return of the unearned premium as a condition precedent to cancellation is not available to insured after the company has become insolvent and a receiver has been appointed (*Hammond v. Knox*, 125 App. Div. 9, 109 N. Y. Supp. 367, affirmed in 194 N. Y. 555, 87 N. E. 1120).

Though actual payment or tender of the unearned premium is required by the cancellation clause, it is sufficient if the agent, under the direction of the insured, applies the unearned premium to the purchase of other insurance (*Citizens' Ins. Co. v. Henderson Elevator Co.*, 84 S. W. 580, 27 Ky. Law Rep. 151, rehearing denied 123 Ky. 478, 97 S. W. 810, 30 Ky. Law Rep. 225, 124 Am. St. Rep. 371). In *Phoenix Ins. Co. of Brooklyn v. Hunter*, 95 Miss. 754, 49 South. 740, the policy provided that it could be canceled at any time by the company giving five days' notice, and soon after the company was notified of the insurance, the local agent was instructed to cancel and return the policy. The agent wrote insured, inclosing the company's letter and a check for the premium paid. Insured received this letter more than five days before the fire, and retained the check till afterwards without objection and without demanding a tender of the actual money. It was held that, if it was the company's duty to tender the actual money, insured had waived the right to object that this was not done.

On a cancellation by the insurer, a part of the premium bearing the ratio to the whole thereof that the remainder of the term bears to the whole thereof is to be returned (*Hanford v. Toledo Fire & Marine Ins. Co.*, 71 Wash. 240, 128 Pac. 235). A tender of a less

2801-2803 CANCELLATION, SURRENDER, AND RESCISSION

sum is not sufficient (*Bard v. Fireman's Ins. Co.*, 108 Me. 506, 81 Atl. 870).

A stipulation authorizing insurer to cancel the policy on tendering the pro rata unearned premium is for the benefit of insured, and he may waive the requirement of a tender; and where insured knew of the intention of insurer to cancel, and voluntarily surrendered the policy unconditionally for that purpose, the policy was canceled, though insurer did not tender the unearned premium (*Hancock v. Hartford Fire Ins. Co.*, 81 Misc. Rep. 159, 142 N. Y. Supp. 352).

2803-2804. (i) Same—Premium not paid or paid by note

2803 (i). Insurance agents, who accept individual credit of a broker, are not entitled to cancel policies issued without repayment to insured of unearned premiums paid by insured to the broker (*Leader Realty Co. v. Markham*, 143 S. W. 1104, 163 Mo. App. 314).

Where the insured gave his note for the premium to the agent, and the company charged the agent with the amount of the premium, which he thereafter paid, the premium was, as between the insured and insurer, actually paid, within a provision of the policy giving the insurer the right to cancel it on five days' notice, and providing that, in case the premium had been actually paid, the unearned portion should be returned on surrender of the policy (*Buckley v. Citizens' Ins. Co.*, 98 N. Y. Supp. 622, 112 App. Div. 451).

Where the premium on a policy of fire insurance has not been paid, return thereof is not a condition precedent to the right to cancel policy. *Hollywood Lumber & Coal Co. v. Dubuque Fire & Marine Ins. Co.* (W. Va.) 92 S. E. 858.

2804-2806. (j) Same—Necessity of surrender of policy as condition precedent to repayment

2805 (j). In Michigan and New Jersey the courts have adopted the rule of the *Swartzchild Case*, to the effect that a surrender of the policy is a condition precedent to the obligation to return the unearned premium.

Webb v. Granite State Fire Ins. Co., 164 Mich. 139, 129 N. W. 19; *Davidson v. German Ins. Co.*, 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884, 12 Ann. Cas. 1065. And see *Kazarian Bros. v. Providence-Washington Ins. Co.* (R. I.) 101 Atl. 221.

2806-2808. (k) Ratification and waiver of invalid or defective cancellation

2807 (k). The silence of the insured upon receipt of notice of cancellation, which silence was for but a short period, does not operate as a recognition of the cancellation where the same is not made pursuant to the terms of the policy. Nor is acquiescence in a cancellation, not in conformity with the terms of the policy, shown by virtue of his commencing action upon other policies, obtained for him by one acting initially without authority, as substitutes for the policy so sought to be canceled (*Hartford Fire Ins. Co. v. Tewes*, 132 Ill. App. 321).

A provision of an insurance policy providing that authority to cancel must be in writing may be waived by the insured. *Helbig v. Citizens' Ins. Co.*, 120 Ill. App. 58.

The substitution by agents, of one insurance policy on property of the plaintiff for another with his consent released the first insurer from liability, although its policy had not been formally canceled at the time of a loss (*Finley v. New Brunswick Fire Ins. Co.* [C. C.] 193 Fed. 195). And where insurer ordered cancellation of policy requiring five days' written notice of cancellation, and the agent verbally notified the insured, who requested that the risk be written in another company, the first policy was canceled when the new policy issued (*Violette v. Insurance Co. of the State of Pennsylvania*, 159 Pac. 896, 92 Wash. 685, rehearing denied 161 Pac. 343, 92 Wash. 685). So, too, a provision in a policy in accordance with Code Supp. 1907, § 1758b, that a fire policy shall be subject to cancellation by the insurer on five days' notice, is waived where insured's agent, on receiving notice of cancellation, immediately obtained a substituted policy in another company (*Warren v. Franklin Fire Ins. Co.*, 161 Iowa, 440, 143 N. W. 554). But the act of the local agent of an insurance company in possession of a policy as bailee of insured, in marking the same "Canceled" and returning it to the insurer, without the consent of insured, does not amount either to a waiver, estoppel, consent, or acquiescence (*Taylor v. Insurance Co. of North America*, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906).

The requirement as to notice may of course be waived by the insured.

Phoenix Ins. Co. v. State, 88 S. W. 917, 76 Ark. 180, 6 Ann. Cas. 440;
Allemania Fire Ins. Co. v. Zweng, 127 Ark. 141, 191 S. W. 903;

(1099)

Home Ins. Co. v. Chattahoochee Lumber Co., 126 Ga. 334, 55 S. E. 11; Kelsea v. Phoenix Ins. Co., 78 N. H. 422, 101 Atl. 362; Finley v. Western Empire Ins. Co., 69 Wash. 673, 125 Pac. 1012; Violette v. Insurance Co. of the State of Pennsylvania, 159 Pac. 896, 92 Wash. 685, rehearing denied 161 Pac. 343, 92 Wash. 685.

Where insured signed a cancellation of the policy, he waived a provision allowing five days' notice of cancellation (Globe Fire Ins. Co. v. Limburger [Tex. Civ. App.] 193 S. W. 222). And where insured took credit for the unearned premium as of the day that he surrendered his policy, he thereby waived for a sufficient consideration his right to five days' notice of cancellation, and could not recover though loss occurred during the five days (Kelley v. Ætna Ins. Co., 75 W. Va. 637, 84 S. E. 502). But insured, by procuring other policy, did not acquiesce in the cancellation of his policy, unless he had knowledge thereof (Dubinsky v. Hartford Fire Ins. Co., of Hartford, Conn. [Mo. App.] 196 S. W. 1045).

An agent who has agreed to look after the insurance and keep it up has authority to waive the notice (Ætna Ins. Co. v. Renno, 96 Miss. 172, 50 South. 563). A waiver may be shown by the acts and conduct of the parties (Home Ins. Co. v. Chattahoochee Lumber Co., 126 Ga. 334, 55 S. E. 11).

Where defendant alleged as a defense that insured waived a five day notice of cancellation, or that he replaced the policy by another policy thereby relieving defendant from liability, it must aver in its affidavit of defense and prove, not only that it was insured's intent to waive the notice, but that his intent was carried out with his consent and by his agreement with defendant. Scheel v. German-American Ins. Co., 76 Atl. 507, 228 Pa. 44.

The right to insist on repayment of the unearned premium may of course be waived by the insured; but the fact that insured does not protest against the attempt to cancel does not waive the tender of the unearned premium (Taylor v. Insurance Co. of North America, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906). A voluntary surrender of the policy without a return of the premium will, however, be regarded as waiving the requirement.

Buckley v. Citizens' Ins. Co., 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N. S.) 889, reversing 112 App. Div. 451, 98 N. Y. Supp. 622; Gorge Hotel Co. v. Liverpool & London & Globe Ins. Co., 122 App. Div. 152, 106 N. Y. Supp. 732. And see Berton v. Atlas Assur. Co., 203 Mass. 134, 89 N. E. 244. See, also, Wygal v. Georgia Home Ins. Co., 148 Ky. 674, 147 S. W. 394.

But there is no waiver of the provision requiring notice and tender of premium, where the insured, in ignorance of the provision requiring notice, surrendered the policy at the request of the agent, on his assurance that the policy was already canceled and that he would substitute other insurance (*Bard v. Firemen's Ins. Co.*, 108 Me. 506, 81 Atl. 870).

In *Ragley Lumber Co. v. Insurance Co. of North America*, 42 Tex. Civ. App. 511, 94 S. W. 185, the insured, desiring to have the policy canceled, arranged with the agent, who procured the policy, that the agent should cancel it without the name of the insured appearing in the transaction, in order that only the pro rata premium should be retained by the company. The agent canceled the policy, signed the name of insured to the receipt for unearned premium, and sent the policy to the insurer from whom it was obtained. Before the unearned premium was sent to insured the property which had been covered by the policy was burned. It was held that insured could not be heard to claim that the cancellation was unauthorized and without effect because the unearned premium was not returned to him at the time of the cancellation, but that insured had waived the payment of the unearned premium as a prerequisite to cancellation.

2808-2810. (1) Operation and effect of cancellation

2808 (1). The effect of a valid cancellation is to relieve the insurer from all liability on the policy.

Smith v. Hartford Fire Ins. Co., 157 Ill. App. 57; *Phenix Ins. Co. of Brooklyn v. Hunter*, 95 Miss. 754, 49 South. 740.

An insurer, having the right to cancel a policy issued by its agent under an agreement that on the cancellation of the policy the premium should be returned, may make the cancellation effective by making a return of the premium immediately (*Ryder-Gougar Co. v. Garretson*, 53 Wash. 71, 101 Pac. 498, 132 Am. St. Rep. 1053). But a mere effort to cancel a policy is an implied recognition of the existence and enforceability of the policy (*Citizens' Ins. Co. v. Helbig*, 138 Ill. App. 115, affirmed 84 N. E. 897, 234 Ill. 251). However, even a defective cancellation may become effective if the insured agrees thereto (*Citizens' Ins. Co. v. Henderson Elevator Co.*, 84 S. W. 580, 27 Ky. Law Rep. 151, rehearing denied 123 Ky. 478, 97 S. W. 810, 30 Ky. Law Rep. 225, 124 Am. St. Rep. 371).

Withdrawal of a policy by the insurer before it goes into effect is not a cancellation within the law that cancellation must be on no-

tice to insured. *Walrath v. Hanover Fire Ins. Co.*, 124 N. Y. Supp. 54, 139 App. Div. 407.

A cancellation on notice does not take effect until the period specified in the policy has expired.

American Glove Co. v. Pennsylvania Fire Ins. Co., 15 Cal. App. 77, 113 Pac. 688; *Home Ins. Co. of New York v. Chattahoochee Lumber Co.*, 55 S. E. 11, 126 Ga. 334; *Rosen v. German Alliance Ins. Co.*, 106 Me. 229, 76 Atl. 688; *Scheel v. German-American Ins. Co.*, 228 Pa. 44, 76 Atl. 507.

Pending the expiration of the period, the insurer is liable for a loss (*Smith v. Columbia Ins. Co.*, 145 App. Div. 889, 129 N. Y. Supp. 775). The period begins to run from the receipt of the notice by the insured, and not from its date.

Hartford Fire Ins. Co. v. Tewes, 132 Ill. App. 321; *German Union Fire Ins. Co. of Baltimore v. Fred G. Clarke Co.*, 82 Atl. 974, 116 Md. 622, 39 L. R. A. (N. S.) 829, Ann. Cas. 1913D, 488.

Where a fire policy permitted insured to cancel it on five days' notice, and the company gave notice on November 7th, and insured immediately took out a policy in another company without notice to the first company, and the property was destroyed by fire on November 11th, the cancellation had not taken effect, and the first company was bound to pay its ratable share of the loss. *Scheel v. German-American Ins. Co.*, 228 Pa. 44, 76 Atl. 507.

In *Joyner & Long v. Scottish Fire Ins. Co.*, 155 N. C. 255, 71 S. E. 434, it appeared that plaintiffs, having noticed a mistake in a fire policy written by the V. Company, notified its agent to make the correction. The agent wrote plaintiffs that he had been directed to cancel the policy by the V. Company, and inclosed a policy of the same tenor and amount in defendant company. The letter with policy inclosed was mailed on Saturday, and was received by plaintiffs on Monday morning following; but late Saturday night the property was destroyed by fire. The policy in the V. Company provided that it could not be canceled without five days notice to insured. It was held that defendant's policy had not taken effect at the time of the fire, and that plaintiff could not recover thereon.

An attempt to cancel by notice on the day a loss occurs is not effectual (*Jacobs v. Atlas Ins. Co.*, 148 Ill. App. 325). And where the policy provides for cancellation at any time by the giving of five days' notice, a cancellation is not deemed to have been effected where the mailed notice of cancellation was not actually received by the insured five days previous to the loss (*Potomac Ins. Co. v.*

Atwood, 118 Ill. App. 349). If there is a mistake in designating the date when the notice shall take effect, it will nevertheless be operative as notice of cancellation as of the day when the period, running from the day it was received, actually expires (American Glove Co. v. Pennsylvania Fire Ins. Co., 15 Cal. App. 77, 113 Pac. 688).

2809 (1). Generally, a surrender of the policy, and the acceptance of another policy as a substitute for the canceled insurance, will give effect to the cancellation at once, though the requisite period after notice has not expired.

Waterloo Lumber Co. v. Des Moines Ins. Co., 150 Iowa, 607, 130 N. W. 147; Finley v. Western Empire Ins. Co. of Washington, 125 Pac. 1012, 69 Wash. 673. Voluntary surrender as a waiver of return of unearned premium, see Gorge Hotel Co. v. Liverpool & London & Globe Ins. Co., 106 N. Y. Supp. 732, 122 App. Div. 152; Buckley v. Citizens' Ins. Co. of Missouri, 81 N. E. 165, 188 N. Y. 399, 13 L. R. A. (N. S.) 889, reversing 112 App. Div. 451, 98 N. Y. Supp. 622. And see Berton v. Atlas Assur. Co., 89 N. E. 244, 203 Mass. 134.

Insurance policies were canceled prior to loss, where insured having obtained other insurance mailed them to the agent with the accrued premium in response to his request for their surrender for cancellation. Wygal v. Georgia Home Ins. Co., 147 S. W. 394, 148 Ky. 674.

An insurer may not, however, relieve itself from liability for loss already incurred by inducing insured to receive the policy of another company issued without authority, and affording no indemnity; and since an agent has no authority to insure property already destroyed, a policy then issued and intended as a substitute for a subsisting policy by another insurer, but not delivered or brought to the notice of insured, is not valid, and does not cancel the first policy (Waterloo Lumber Co. v. Des Moines Ins. Co., 158 Iowa, 563, 138 N. W. 504, 51 L. R. A. [N. S.] 539). And in the same case it was held that, where an insurance agent issued and delivered a policy at the solicitation of the insured, he could not, on notice from insurer to cancel the policy, place the risk with another insurer, without notice to insured. Moreover, the mere procurement of another policy on the same property or for the same amount after notice of cancellation, and within the five-day limit required thereafter before the cancellation is to take effect, does not show an intent of insured to cancel the former policy nor relieve the insurer from liability thereon, but, to have such effect, insured must have consented to the cancellation and the substitution of the

later for the earlier policy (*Scheel v. German-American Ins. Co.*, 76 Atl. 507, 228 Pa. 44). Similarly, where there was evidence tending to show that an insurance company had no authority to cancel policies for other companies, it was error to instruct that the mailing, on demand, to such insurance company, of policies issued by such other companies, constituted a surrender and cancellation of the policies (*Merchants' Fire Ins. Co. v. McAdams*, 115 S. W. 175, 88 Ark. 550).

Where defendant directed its agent to cancel a policy which provided for cancellation after five days' notice, there was a substitution of the policy written by defendant for that of a second company within the five days. *Paterson v. St. Paul Fire & Marine Ins. Co. of St. Paul, Minn.*, 164 App. Div. 902, 148 N. Y. Supp. 506.

Where an insurance broker procures insurance for plaintiff, but by his fraud causes the insurers to cancel the policies, and replaces them with others so as to get the rebate of premiums paid, the fraud was practiced on the insurance companies, and his relations with plaintiff were not affected. *Cheshire Brass Co. v. Wilson*, 86 Atl. 26, 86 Conn. 551.

In *Lee v. New Hampshire Fire Ins. Co.*, 154 N. C. 446, 70 S. E. 819; *Id.*, 155 N. C. 425, 70 S. E. 1004, the facts were these: An insurance agent, who was agent for each of the three defendant insurance companies, the S. Co., the R. Co., and the N. Co., insured a hotel, owned by plaintiff L. and mortgaged to plaintiff G., placing \$1,000 with each company; the policies providing that any loss should be payable to "G., trustee, as interest may appear." Thereafter the special agent of the S. Co. offered to carry the entire \$3,000, and a policy for that amount was issued by it, and the agent who had written the original policies notified the other two companies of that fact, stating that they had been relieved of all liability under their policies, and sent the new policy to L., who received it without objection, but did not return the old policies as requested; they being retained by G. The general agent of the S. Co. was informed of the issuance of the new policy, and that company reinsured the risk and retained the profit, and after a fire claimed the premium on the new policy. G. was not notified of the substitution of the policies, nor was the new policy made payable to him as his loss might appear. It was held that both the S. Co. and L. were estopped by their conduct from denying the cancellation of the original policies and the validity of the \$3,000 policy substituted therefor, so that the company was liable to L. on the latter policy.

Plaintiff reinsured part of its risk with defendant, and then, on defendant's request, placed such reinsurance with another, com-

mencing on a certain day, on which day it returned to defendant its written obligation. On the day previous, unknown to them, the insured property was burned. It was held that the release, not being made in contemplation of a prior loss, was made under a mistake of fact, against which relief would be granted. *Traders' Ins. Co. of Chicago, Ill., v. Aachen & M. Fire Ins. Co.*, 150 Cal. 370, 89 Pac. 109, 8 L. R. A. (N. S.) 844.

2810 (1). Where a fire policy provided that it might be canceled by the insurer on five days' notice, and the insurer wrote a local agent having authority to write and issue policies instructing him to take up the policy, and the agent thereupon told insured that the policy should hold good until the agent procured insured a policy in another company, insured not knowing that the agent had been instructed to cancel the policy immediately, the agreement of the agent was binding on the company for a reasonable time (*Citizens' Ins. Co. v. Henderson Elevator Co.*, 123 Ky. 478, 96 S. W. 601, 29 Ky. Law Rep. 976, 124 Am. St. Rep. 371, rehearing denied 123 Ky. 478, 97 S. W. 810, 30 Ky. Law Rep. 225, 124 Am. St. Rep. 371).

A mutual fire insurance policy is canceled as to one building under Ky. St. § 712, although entry was not made on the books of the company for more than 30 days after notice of the cancellation, where the assessment on that building was omitted from a premium assessment sent to the member before the fire (*German Mut. Fire Ins. Co. v. Weikel*, 155 S. W. 373, 153 Ky. 288).

A cancellation of a fire policy upon mortgaged property is ineffective as to the mortgagee, who consented to the cancellation solely on faith of the unintentional misrepresentation by the agent of the insurer that the policy was avoided by the institution of foreclosure proceedings, under a clause which he incorrectly stated was in the policy (*Glens Falls Ins. Co. v. Walker* [Tex. Civ. App.] 166 S. W. 122).

2810-2811. (m) Cancellation by insolvency and dissolution of company

2810 (m). The rule seems to be settled that an adjudication of insolvency and the appointment of a receiver for an insolvent company operates as a cancellation of all outstanding policies.

In addition to the cases cited in the original text, reference may be made to the following cases: *Mutual Companies: Hill v. Baker*, 205 Mass. 303, 91 N. E. 380, 137 Am. St. Rep. 440; *Gleason v. Prudential Fire Ins. Co.*, 127 Tenn. 8, 151 S. W. 1030. And see

Parris v. Carolina Mut. Ins. Co., 91 S. C. 344, 74 S. E. 1010. Stock companies: Todd v. German-American Ins. Co., 2 Ga. App. 789, 59 S. E. 94; Michel v. Southern Ins. Co., 128 La. 562, 54 South. 1010, Ann. Cas. 1912C, 810; Id., 128 La. 569, 54 South. 1012; Boston & A. R. Co. v. Mercantile Trust & Deposit Co., 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Smith v. National Credit Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511; Relfe v. Commercial Ins. Co., 10 Mo. App. 393; Gray v. Reynolds, 55 N. J. Eq. 501, 37 Atl. 461. And see T. T. Hay & Bro. v. Union Fire Ins. Co., 167 N. C. 82, 83 S. E. 241, Ann. Cas. 1916A, 1129.

In the Todd Case, cited above, it was necessary to determine the effect of the insolvency of the Traders' Insurance Company, a stock company which failed at the time of the San Francisco fire. The court held that the policies issued by that company were canceled by insolvency.

In the Michel Case, cited above, the question as to the effect of insolvency to cancel the policy was thoroughly discussed, and the statement in the original text was specifically cited and approved. A statement apparently contrary to the rule laid down above is to be found in Insurance Commissioner v. People's Fire Ins. Co., 68 N. H. 51, 44 Atl. 82. It is said in that case that the contracts were not terminated by the appointment of a receiver. But the question was not really in issue, and the remark is in the nature of dictum. The case came up on a petition for winding up the company, and apparently the question was not litigated; the court expressing its opinion merely in answer to the receiver's request for advice. The court did attempt to draw a distinction between mutual and stock companies—a distinction which is not supported by the cases—basing its distinction on People v. Security Life Ins. Co., 78 N. Y. 114, 34 Am. Rep. 522, overlooking the fact that this case involves a life insurance company, and that the rights of policy holders on cancellation of life policies differ materially from those of policy holders in fire policies. A failure to recognize the essential difference between fire insurance and life insurance in this regard has caused some confusion in other minds. Some confusion has also arisen through a tendency of some minds to regard cancellation in insurance as equivalent to cancellation in a legal sense, that is, as completely abrogating the contract, whereas in fact cancellation in insurance is used in a technical sense, and is simply a termination of liability for the future. Rights already accrued are not affected.

2811 (m). The rights of the parties become fixed as of the date when insolvency is adjudicated and a receiver appointed.

Hill v. Baker, 205 Mass. 303, 91 N. E. 380, 137 Am. St. Rep. 440;
Parris v. Carolina Mut. Fire Ins. Co., 74 S. E. 1010, 91 S. C. 344.

The insured is entitled to the unearned portion of the premium he has paid, and to that extent is a creditor of the company.

Federal Union Surety Co. v. Flemister, 95 Ark. 389, 130 S. W. 574;
Michel v. Southern Ins. Co., 54 South. 1010, 128 La. 562, Ann.
Cas. 1912C, 810; Id., 54 South. 1012, 128 La. 569; Ely v. Oak-
land Circuit Judge, 162 Mich. 466, 127 N. W. 769, modifying
order 162 Mich. 466, 125 N. W. 375, on rehearing.

But his right is subject to the claims of creditors generally (Glea-
son v. Prudential Fire Ins. Co., 127 Tenn. 8, 151 S. W. 1030).

The right of insured in a mutual fire insurance policy stipulating that it may be canceled at any time at the request of the insured, and, if canceled, the unearned premium shall be returned, is not available to insured after the company has become insolvent and a receiver has been appointed. Hammond v. Knox, 109 N. Y. Supp. 367, 125 App. Div. 9, affirmed in 194 N. Y. 555, 87 N. E. 1120.

2811-2812. (n) Questions of practice

2811 (n). A plea in an action on a fire policy, which alleges that by the terms of the policy described in the complaint the policy may be canceled, and that in accordance with its terms the insurer canceled it before the loss, is bad for failing to set out the terms of the policy and the manner of canceling it, so as to enable the court to determine the right of the insurer to cancel and whether the right had been exercised in accordance with its terms (Continental Ins. Co. v. Parkes, 39 South. 204, 142 Ala. 650).

The burden of proof to show a cancellation is on the insurer.

National Fire Ins. Co. v. Three States Lumber Co., 119 Ill. App. 67, judgment affirmed 75 N. E. 450, 217 Ill. 115, 108 Am. St. Rep. 239; Rosen v. German Alliance Ins. Co., 106 Me. 229, 76 Atl. 688; Kelley v. Aetna Ins. Co., 75 W. Va. 637, 84 S. E. 502.

Notwithstanding the acknowledgment of payment in the policy, proof of nonpayment of premium may be competent in an action on the policy in connection with other evidence as tending to prove its cancellation (Helbig v. Citizens' Ins. Co., 120 Ill. App. 58).

The sufficiency of the evidence to show a cancellation is considered in Globe & Rutgers Fire Ins. Co. v. Emil Willbrandt Surgical Mfg. Co., 128 Ill. App. 262; Cohn v. Mechanics' & Traders' Ins. Co., 175 Ill. App. 594; Same v. North British & Mercantile Ins. Co.,

2811-2812 CANCELLATION, SURRENDER, AND RESCISSION

Id. 612; *Continental Ins. Co. of New York v. Buchanan*, 108 S. W. 355, 32 Ky. Law Rep. 1298; *Rosen v. German Alliance Ins. Co.*, 106 Me. 229, 76 Atl. 688.

Whether there has been a proper cancellation is a question for the jury.

Firemen's Fund Ins. Co. v. Hellner, 49 South. 297, 159 Ala. 447, 17 Ann. Cas. 793; *Black v. Grain Shippers' Mut. Fire Ins. Ass'n*, 171 Iowa, 309, 152 N. W. 7; *Naslund v. Svea Ins. Co.*, 64 Wash. 520, 117 Pac. 264.

2812-2813. (o) Actions for cancellation

2812 (o). In *Phoenix Ins. Co. v. Smith*, 95 Miss. 347, 48 South. 1020, which was an action by the company to cancel a policy as obtained by fraud, and because the agent was not permitted to insure property at that place, defendant answered, denying any knowledge of the limitations, and averred that the policy was taken out in good faith, and that there was an error in the policy in describing the property. The suit was begun after the property was destroyed and defendant by leave of court amended his answer, making it a cross-bill, and prayed "that the policy be reformed and paid." It was held that the cross-bill contained sufficient averments to be good as against a demurrer.

2813-2814. (p) Guaranty and indemnity insurance

2813 (p). Where complainant, with knowledge of the fraud of defendant's president by which complainant had been induced to subscribe for certain of defendant's stock and to enter into a re-insurance contract with it, agreed to waive its right to rescind on condition that the unsubscribed portion of defendant's stock be subscribed and paid in immediately, whereupon those interested in defendant company present at the directors' meeting subscribed and paid for the stock, complainant was thereafter precluded from rescinding its reinsurance contract in equity (*Munich Reinsurance Co. v. United Surety Co.*, 113 Md. 200, 77 Atl. 579).

Notice of the cancellation of a liability policy, to be effectual, must be according to the provisions of the policy, and must be peremptory, explicit, and unconditional (*American Fidelity Co. v. R. L. Ginsburg Sons' Co.*, 187 Mich. 264, 153 N. W. 709).

2814 (p). Where an application for indemnity insurance contained an agreement to pay a stated amount "per annum" as premium, the mere fact that a bill for a renewal premium sent to the insured 11 days before the expiration of the contract was returned

by insured to the insurer with the word "canceled" written across the face of the bill was not sufficient evidence of cancellation of the policy to defeat an action for the renewal premium, brought after the commencement of the renewal term (*Illinois Surety Co. v. Paoli*, 121 N. Y. Supp. 340, 66 Misc. Rep. 160).

Sufficiency of the evidence to show cancellation of a liability policy, see *Empire State Surety Co. v. Cameron*, 124 N. W. 442, 110 Minn. 92.

Cancellation of an indemnity policy as question for the jury, see *Currie v. Continental Casualty Co.*, 147 Iowa, 281, 126 N. W. 164, 140 Am. St. Rep. 300.

2. CANCELLATION AND RESCISSION OF CONTRACT OF PROPERTY INSURANCE BY THE INSURED OR BY MUTUAL CONSENT

2815-2818. (a) Right to cancel in general

2815 (a). Regardless of the provisions of a policy as to cancellation, the policy may be canceled by mutual consent.

Nelson v. Farm Property Mut. Ins. Ass'n, 127 Iowa, 603, 103 N. W. 966; *Polemanakos v. Austin Fire Ins. Co. (Tex. Civ. App.)* 160 S. W. 1134; *Westchester Fire Ins. Co. v. McMinn (Tex. Civ. App.)* 188 S. W. 25.

A fire insurance policy, providing that it may be canceled at any time at the request of the insured or by the company by giving five days' notice, may be canceled by the insured or by the company as provided by the policy, or by agreement of the parties. *Cohn v. Mechanics' & Traders' Ins. Co.*, 175 Ill. App. 594; *Same v. North British & Mercantile Ins. Co.*, Id. 612.

Where policy had become effective between parties, neither could cancel or terminate it without the other's consent, except upon strict compliance with conditions provided there for its cancellation. *Continental Ins. Co. of New York v. Phipps (Mo. App.)* 190 S. W. 994.

In an action on a fire policy, where the insurer refused payment on the ground of mutual cancellation, it has the burden of proving the same. *Bragg v. Royal Ins. Co.*, 98 Atl. 632, 115 Me. 196.

A fire insurance policy provided that the assured might cancel the policy when the premium or note or obligation given for such premium has been actually and fully paid in cash, in which case the company might retain the usual short rate from the date of the policy to the time of cancellation. A policy was issued for a term of five years; the premium being payable in five annual install-

ments of \$19 each, and the first installment being paid on the issuance of the policy. The usual rate for insurance for the term of one year was \$28.50. It was held in *Home Ins. Co. v. Hamilton*, 143 Mo. App. 237, 128 S. W. 273, that insured was not entitled to cancel the policy at the termination of the first year without paying either the remaining installments or the rate for a one-year policy.

And see *Farmers' Mut. Ins. Ass'n of Alabama v. Tankersley*, 13 Ala. App. 524, 69 South. 410; *Farmers' & Breeders' Mut. Reserve Fund Live Stock Ins. Co. v. Derr*, 59 Pa. Super. Ct. 600.

Under a policy of employers' liability insurance, there is no contractual relation between the insurer and an injured employé; and hence the employer and insurer are not restricted by any rights of the employé from agreeing upon the surrender and cancellation of the policy on such terms as they see fit (*Maahs v. Antigo Lumber Co.*, 145 N. W. 222, 156 Wis. 1).

That part of the subscribers to an interindemnity insurance contract surrendered their policies does not vitiate the policies of the remaining members, though the withdrawals reduced the membership below the number required by the agreement of association. *Isaac H. Blanchard Co. v. Hamblin*, 144 S. W. 880, 162 Mo. App. 242; *Christie Lithograph & Printing Co. v. Same* (Mo. App.) 144 S. W. 882.

2818-2820. (b) Who can exercise right

2818 (b). One who is authorized or employed to procure insurance does not thereby acquire any authority to cancel the policies after being procured.

Stevenson v. Sun Ins. Office, 17 Cal. App. 280, 119 Pac. 529; *Kinney v. Rochester German Ins. Co.*, 141 Ill. App. 543; *Kinney v. Caledonian Ins. Co.*, 148 Ill. App. 256; *Same v. Buffalo German Ins. Co.*, Id. 260; *Horn v. Dorchester Mut. Fire Ins. Co.*, 199 Mass. 534, 85 N. E. 853; *Interstate Fire Ins. Co. v. Nelson*, 105 Miss. 437, 62 South. 425; *Southern States Fire & Casualty Ins. Co. v. Same* (Miss.) 62 South. 426; *Westchester Fire Ins. Co. v. Gurian*, 101 N. Y. Supp. 50, 115 App. Div. 610; *American Fire Ins. Co. of Newark v. Minsker Realty Co.*, 144 N. Y. Supp. 305, 83 Misc. Rep. 1; *Hanford v. Toledo Fire & Marine Ins. Co.*, 71 Wash. 240, 128 Pac. 235.

2819 (b). Authority to cancel a policy may be shown to have been conferred on an insurance broker, and, when shown, his acts or agreements in that behalf will be imputed to, and will be binding on, the insured. Thus brokers, employed by an insured to keep all its property insured in such companies as they might select,

with authority to cancel any policy, provided they kept the property insured, were general agents, and authorized to accept and agree upon a cancellation (*Northern Assur. Co. v. J. J. Newman Lumber Co.*, 105 Miss. 688, 63 South. 209). So, where the insured modified an order given to an insurance broker for insurance, so as to reduce the amount from \$30,000 to \$25,000, the broker was authorized to cancel a policy for \$3,000, so as to effect the reduction (*Stevenson v. Sun Ins. Office*, 17 Cal. App. 280, 119 Pac. 529). Where plaintiff engaged a Virginia insurance broker to place a certain amount of insurance upon property located in that state, knowing that it was the custom of insurance agents there to replace policies which were canceled, the broker, upon the cancellation of one of the policies which he had secured, had authority to replace it by securing another, and so had authority to consent to the cancellation (*Benedict v. Security Ins. Co.*, 133 N. Y. Supp. 165, 147 App. Div. 810). In *O'Neill v. Northern Assur. Co.*, 145 Mich. 516, 108 N. W. 996, it appeared that a contract for the sale of land bound the purchaser to keep the buildings on the premises insured for the benefit of the vendor. The vendor understood that a third person was acting for the purchaser in procuring and maintaining insurance. A policy was procured and the vendor took the same to an agent for the purpose of procuring a change in the clauses therein, so as to make the same uniform with another policy. The agent was under the instructions of the purchaser through the third person. It was held that the facts warranted a finding that the subject of procuring and maintaining insurance was committed to the purchaser by the vendor, and unless the third person, as agent of the purchaser, consented to the cancellation of the policy, it remained in force.

The doctrine that general authority to insurance agent to insure one's property and keep it insured carries with it authority to cancel without notice insurance once effected and the policy for which has been delivered to the assured does not apply in the case in which no course of dealing is shown justifying the inference that the authority to cancel was intended to be conferred and the testimony shows that the instructions to the agent were not so interpreted by either of the parties (*Nabors v. Commercial Union Assur. Co., Limited*, 51 South. 429, 125 La. 378). In *Phoenix Ins. Co. v. State*, 76 Ark. 180, 88 S. W. 917, 6 Ann. Cas. 440, the proof showed that a previous agreement existed between the president of the insured corporation and an insurance agent that the corporation's

property should be kept insured. No particular insurance company or companies were mentioned, and the corporation's president gave no concern to that matter. He made the insurance agent his agent for the purpose of selecting the company or companies, and, pursuant to the arrangement, the agent, without notice to the president, canceled a policy in one company and substituted therefor a policy in the defendant, and mailed it to the president of insured before the fire occurred. It was held that the agent, though the agent of the insurance companies, was made the agent of the insured for the purposes of procuring and canceling policies, and defendant's policy was in force.

A policy, naming the owner of the property insured as the assured, and providing that a loss shall be payable to a mortgagee as his interest may appear, cannot be surrendered by the mortgagee without the consent of the assured, though the mortgagee has possession of the policy (*Continental Ins. Co. v. Parkes*, 39 South. 204, 142 Ala. 650). On the other hand, it has been held in New York that the "insured," under Insurance Law, § 122, providing that fire insurance companies shall cancel any policy upon the request of the insured, includes the mortgagee, for whose benefit a mortgage clause has been inserted (*Lewis v. London & Lancashire Fire Ins. Co.*, 137 N. Y. Supp. 887, 78 Misc. Rep. 176).

2820-2823. (c) What constitutes cancellation—Intent of parties.

2820 (c). Though an insurance policy provides that either party may at any time be released on 30 days' notice, the parties may agree on an immediate cancellation (*Cox v. Farmers' Mut. Fire Ins. Co.*, 65 S. E. 409, 133 Ga. 175). In the case of cancellation by the insured it is not incumbent on the insurer to give notice of cancellation (*Jefferson Fire Ins. Co. v. Greenwood* [Tex. Civ. App.] 141 S. W. 319), or to tender a return of the unearned premium (*Parsons & Arbaugh v. Northwestern Nat. Ins. Co.*, 133 Iowa, 532, 110 N. W. 907). On cancellation by agreement between the parties, independent of the terms of the policy, immediate payment of the unearned premium may not be required in order to make cancellation valid (*Westchester Fire Ins. Co. v. McMinn* [Tex. Civ. App.] 188 S. W. 25). But where insured requests it there is cancellation, without action on the part of the insurer (*Roberta Mfg. Co. v. Royal Exchange Assur. Co.*, 161 N. C. 88, 76 S. E. 865). So a letter from insured to insurer, stating that he wished policy canceled at once, is a sufficient notice of cancellation, within Insurance

Law, § 122 (*Gately-Haire Co. v. Niagara Fire Ins. Co. of City of New York*, 116 N. E. 1015, 221 N. Y. 162).

It is, however, essential that there should be manifested by the parties an intent to terminate the contract, and that their minds have met on the proposition to cancel.

Home Ins. Co. of New York v. Chattahoochee Lumber Co., 55 S. E. 11, 126 Ga. 334; *Ohio Farmers' Ins. Co. v. Hunter*, 77 N. E. 951, 38 Ind. App. 11; *Boutwell v. Globe & Rutgers Fire Ins. Co. of City of New York*, 85 N. E. 1087, 193 N. Y. 323, reversing 117 App. Div. 904, 102 N. Y. Supp. 1127.

So, where insured directed the cancellation of a policy containing cancellation clause, and the agents wrote that the policy would be canceled if he would send certain increased premium but not otherwise, it cannot be held, as a matter of law, that insured's letter operated as a cancellation (*National Union Fire Ins. Co. v. Akin* [Tex. Civ. App.] 160 S. W. 669). But where insured agreed with insurance company to renew policies of indemnity insurance issued for one year December 15, 1913, for two consecutive terms of 12 months, and insured refused to renew such policies at the end of first year, the company's denial of liability under policies after December 15, 1914, is a consent to cancellation (*Fidelity & Deposit Co. of Maryland v. J. G. McCrory Co.* [Sup.] 164 N. Y. Supp. 561).

In *Boutwell v. Globe & Rutgers Fire Ins. Co.*, 193 N. Y. 323, 85 N. E. 1087, reversing 117 App. Div. 904, 102 N. Y. Supp. 1127, it was said that under the Insurance Law (Laws 1892, p. 1930, c. 690), requiring insurance companies to cancel policies upon request of the insured, and return to him the amount of premium paid less the short-rate premium for the expired time, a request to mark the policy from the books without paying the short-rate premium is different from one to cancel the policy under the terms of the contract and as provided by the statute, as in the first case the insurer can accept or reject the request to mark off, but in the latter case the request cancels the contract ipso facto. In this case the plaintiff's agent was authorized to carry a certain amount of insurance, and, on finding that he was carrying more than that amount, returned the policy to the insurance agents and indorsed on the binding slip of the company, "Mark this off." The agents wrote in reply that they would not mark the policy off, but would cancel it at short rates and charge the agent for the earned premium. Shortly thereafter, there was a fire, and plaintiff claimed that the policy was then in force, and that his agent's request was not

an absolute request for cancellation, but merely a request to treat it as if it had never been issued, so that plaintiff would not have to pay premiums thereon, thus making it a conditional request. It was held that, the insurance agents having so interpreted the request by their refusal to mark off the policy without paying the short-rate premium, the rejection of the conditional request for cancellation left the policy in force at the time of the fire.

Where insured notifies his insurance broker to cancel a policy and he fails to do so, the policy remains in effect, as the insurance company must be notified of the cancellation to make it effective (*Morris McGraw Wooden Ware Co. v. German Fire Ins. Co.*, 52 South. 183, 126 La. 32, 38 L. R. A. [N. S.] 614, 20 Ann. Cas. 1229). If a proposition for cancellation of an insurance policy by agreement was made by letter and a reply by letter was relied on as an acceptance, the reply would take effect from the time it was sent (*Home Ins. Co. of New York v. Chattahoochee Lumber Co.*, 55 S. E. 11, 126 Ga. 334).

The sufficiency of the evidence to show a cancellation by request of the insured or by mutual consent is considered in *Ætna Ins. Co. v. Robards Tobacco Co.'s Trustee*, 109 S. W. 1185, 33 Ky. Law Rep. 257; *Smith v. Scottish Union & National Ins. Co.*, 85 N. E. 841, 200 Mass. 50; *National Union Fire Ins. Co. v. Akin* (Tex. Civ. App.) 160 S. W. 669; *Kelley v. Ætna Ins. Co.*, 75 W. Va. 637, 84 S. E. 502; *Northern Pine Crating Co. v. Liverpool & London & Globe Ins. Co.*, 128 N. W. 70, 143 Wis. 433. And see *Shipmah v. National Live Stock Ins. Co.*, 187 Mo. App. 400, 173 S. W. 735.

Whether an insurance policy was canceled by mutual consent is a question for the jury. *Polemanakos v. Austin Fire Ins. Co.* (Tex. Civ. App.) 160 S. W. 1134.

That insured did not understand he was signing a cancellation of his policy, and did not know the insurer's agent had been instructed to secure such cancellation, is insufficient to invalidate the instrument in absence of fraud (*Globe Fire Ins. Co. v. Limburger* [Tex. Civ. App.] 193 S. W. 222).

2823-2825. (d) Same—Notice to insurer of surrender of policy

2823 (d). Where a policy of burglary insurance provides that assured may require its cancellation at any time, but does not prescribe the manner in which notice must be given, it must appear that notice of cancellation was received by the company (*Bankers' Mut. Casualty Co. v. People's Bank of Talbotton*, 56 S. E. 429, 127 Ga. 326). If notice of cancellation is duly given to the insurer, the

policy is canceled from the date of the notice, though the policy is not formally and physically surrendered until after a fire had occurred (*Stevenson v. Sun Ins. Office*, 17 Cal. App. 280, 119 Pac. 529). While mere return of policy by mail to insurer's agent is not a cancellation under the insured's right to cancel, yet, if returned with the obvious purpose of cancellation, receipt by the insurer's agent would be a cancellation (*York v. Sun Ins. Office* [Ind. App.] 113 N. E. 1021). If, however, the insured gave notice of the cancellation of fire insurance policies, but did not surrender the policies, and the company did not acknowledge receipt of the notice, or offer to return the unearned premium, before the building was burned, the policies were still in force (*Gately-Haire Co. v. Niagara Fire Ins. Co.*, 176 App. Div. 921, 162 N. Y. Supp. 473).

In *Nelson v. Farm Property Mut. Ins. Ass'n*, 127 Iowa, 603, 103 N. W. 966, it appeared that the by-laws of defendant association provided that failure of a member to pay an assessment within 30 days should subject him to a penalty of 25 cents on the assessment, and on failure to pay within 60 days to an additional penalty of 25 cents; that delinquency of 60 days should work suspension of insurance until full payment with costs, and that suit might be brought to collect the assessment; and that any member wishing to withdraw should advise the secretary in person or by registered letter, who should then inform him as to any amount due to the association, and that on return of the policy and the payment of amount due he should cease to be a member. Plaintiffs refused to pay an assessment until over 60 days after it became delinquent, when they sent the amount thereof, together with 50 cents penalty, and also the policy, indorsed by them "We hereby cancel the policy," to defendant, which accepted and retained the money and the policy. It was held that there was a cancellation and surrender of the policy.

2825-2826. (e) Same—Mutual companies

2825 (e). In *Warfield-Pratt-Howell Co. v. Williamson*, 233 Ill. 487, 84 N. E. 706, the mutual insurance agreement provided that, if any subscriber so requests in writing, the manager shall at once discontinue further underwriting for him, and within 30 days thereafter all unexpired insurance granted for him shall be canceled or reinsured, and he shall be paid by the committee his portion of all funds in their hands, etc. On December 13, 1904, plaintiff's secretary notified the manager of the association of plaintiff's election

to withdraw from the subscribership on receiving a policy in renewal of one expiring at that time, nothing being said about other policies unexpired on property which was destroyed by fire on December 23d following. It was held that the notice of withdrawal did not effect a cancellation of such unexpired policies, and that they were in force at the time of the fire.

A member of a mutual fire insurance company who delivered his policy to the local agent and asked to withdraw, but failed to pay an assessment which had been previously made against him, was not relieved from liability under subsequent assessments (*Nichol v. Murphy*, 108 N. W. 704, 145 Mich. 424).

Withdrawal from an unincorporated association of underwriters organized to write insurance for its subscribers does not ipso facto cancel a policy of insurance issued to the party withdrawing. *Williamson v. Warfield, Pratt, Howell Co.*, 136 Ill. App. 168.

2826. (f) Cancellation and revival of policy after loss

2826 (f). Where a proposition for a cancellation of a policy by agreement was made by the insurance company by letter, and a reply by letter was relied on as an acceptance completing the agreement, but the reply was not sent until after the fire, an officer of the insured would not then have implied authority to send it and thereby defeat any right of indemnity which had accrued to the insured (*Home Ins. Co. of New York v. Chattahoochee Lumber Co.*, 55 S. E. 11, 126 Ga. 334).

2827-2828. (g) Amount of premiums to be returned

2827 (g). The "usual short rate," referred to in a policy giving the insurer the right to retain the usual short rate premium on cancellation by the insured, is the customary rate charged for insuring like property in a like amount for original short term insurance (*Home Ins. Co. v. Hamilton*, 143 Mo. App. 237, 128 S. W. 273). An insurance policy for 12 months, which contained a special written provision under the head "Monthly Adjustment of Premium, \$50 deposit," providing that each month the assured should state to the company the amount of wages paid, and pay the premium due at the rates named was a contract for a year, and the special provision did not authorize the assured to cancel the policy without paying the short rates provided in the policy (*Ætna Life Ins. Co. v. American Zinc, Lead & Smelting Co.*, 154 S. W. 827, 169 Mo. App. 550).

Where a certificate of insurance requiring insured to make a deposit equal to one year's premium in addition to the premium

paid entitled the insured to recover such deposit on surrender of the certificate unless properly expended, the burden was on defendant, having reinsured the insurance company's contracts, when sued for the recovery of such deposit, to show that the fund had been properly expended. *Petite v. Atlas Ins. Co.*, 142 Iowa, 265, 120 N. W. 642.

2828. (h) Rescission for fraud

2828 (h). Proof of fraud alone is not sufficient to require cancellation of policy issued by a mutual hail insurance company to plaintiff, but it must appear that fraudulent representations were inducement to and brought about acceptance of the policy (*Mohler v. Guarantee Hail Ass'n* [Iowa] 161 N. W. 451). Where a five-year policy differed from oral representations of insurer's agent that it would be for one year, and insured, having right to cancel policy at any time upon terms provided therein, retained it without objection from spring to fall, it was too late to refuse it on ground of such misrepresentations (*Continental Ins. Co. of New York v. Phipps* [Mo. App.] 190 S. W. 994).

Where a soliciting agent for an insurance company agreed with applicant that he should have until April 23d to cancel the policy if he wished and have premium note returned, but fraudulently inserted in the application April 1st, the insured could show such facts in discharge of the note. *Phipps v. Union Mut. Ins. Co.* (Okla.) 150 Pac. 1083.

3. CANCELLATION AND RESCISSION OF LIFE AND ACCIDENT POLICIES AND ACTIONS THEREFOR

2830-2832. (b) Cancellation and rescission by company—Consent of insured

2830 (b). As a general rule, a life or accident insurer, in the absence of contractual or statutory provisions, or breach of condition by the insured, has no power to cancel the policy without the consent of the insured. Although two parties are necessary to make an insurance contract and one may cause a breach, the consent of both is necessary to rescind or cancel it unless a contrary provision exists in the contract (*American Trust Co. v. Life Ins. Co. of Virginia*, 173 N. C. 558, 92 S. E. 706). Hence no action of a mutual benefit society without the consent of insured, he having fully performed his part of the contract, will terminate or relieve the society from liability thereon (*Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185). Reliance on a certificate issued in

lieu of a prior certificate tends to show an election to treat the prior certificate as canceled (*Wood v. Brotherhood of American Yeomen* [Iowa] 113 N. W. 825).

The father and mother of a minor, as guardians by nature, are not entitled to consent to its cancellation, before forfeiture for non-payment of premiums. *Burke v. Prudential Ins. Co. of America*, 221 Mass. 253, 108 N. E. 1069, Ann. Cas. 1917E, 641.

Where an accident insurer wished to terminate liability and called in the policy which the insured voluntarily brought in and surrendered, it was in fact canceled and not surrendered. *Wells v. Great Eastern Casualty Co. (R. I.)* 100 Atl. 395.

Sufficiency of the evidence to require submission to the jury of the question whether insured was in such mental condition as to be incapable of agreeing to cancellation of policy is considered in *Jones v. New York Life Ins. Co.*, 32 Okl. 339, 122 Pac. 702.

2831 (b). Some contracts reserve to the insurer the right to cancel the policy. Notwithstanding such a reservation in the policy, the insurer cannot cancel after a loss has occurred.

Pennsylvania Casualty Co. v. Perdue, 164 Ala. 508, 51 South. 352; *Jones v. Commercial Travelers' Mut. Accident Ass'n of America* (Sup.) 114 N. Y. Supp. 589, affirmed in 134 App. Div. 936, 118 N. Y. Supp. 1116; *Oplinger v. New York Life Ins. Co.*, 98 Atl. 568, 253 Pa. 328.

So, too, where a policy of life insurance provides that "the company may cancel this policy by mailing notice of cancellation * * * with its check for the unearned part, if any, of the premium but not during any disability for which the insured may be entitled to indemnity," the company cannot arbitrarily cancel the policy by payment of the amount of indemnity due to a particular time, when a disability exists which results in the death of the insured (*O'Neil v. American Assur. Co.*, 52 Pa. Super. Ct. 577). And notwithstanding provision in policy for cancellation, insurer is estopped from canceling policy merely because of bad health of insured, when on account of such bad health he will be unable to obtain other insurance (*National Life Ins. Co. v. Jackson*, 89 S. E. 633, 18 Ga. App. 494).

A renewal of the policy may be canceled without return of any premium, none having been paid for the renewal, though the policy provides for return, on cancellation, of the unearned portion of the premium (*Gruen v. Standard Life & Accident Ins. Co. of Detroit, Mich.*, 169 Mo. App. 161, 152 S. W. 407).

Where the complaint on a policy of health insurance averred that the sickness and disability began July 5th, a plea setting out a provi-

sion of the policy authorizing its cancellation by the insurer, and alleging a cancellation on July 8th, is bad in failing to deny liability for the period from July 5th to July 8th, and so failing to answer the complaint in its entirety, as it professes to do. *Pennsylvania Casualty Co. v. Perdue*, 164 Ala. 508, 51 South. 352.

Admissibility of evidence to show cancellation, see *Everson v. Casualty Co. of America*, 94 N. E. 459, 208 Mass. 214.

In *Gilroy v. Supreme Court Independent Order of Foresters*, 75 N. J. Law, 584, 67 Atl. 1037, 14 L. R. A. (N. S.) 632, the benefit certificate provided that the secretary of the medical board of the order shall have power to reconsider any medical examination within six months after passing the same, and if there be sufficient cause which existed at the time of the examination to have rejected it, he may reject it, whereupon assured shall cease to be a member. It was held that the society, to sustain a defense that the medical examination was reconsidered and rejected, must show that it was for a sufficient cause.

Some policies providing for a loan to the insured on the policy contain provisions giving the insurer power to cancel the policy if a default occurs in payment of the loan. In *Frese v. Mutual Life Ins. Co.*, 11 Cal. App. 387, 105 Pac. 265, the loan agreement between insurer in a \$5,000 life policy and insured and the beneficiary, stipulated that the policy should be pledged to secure a loan of \$1,930, and that, in the event of default of payment at maturity, insurer might at its option, without notice and without demand for payment, cancel the policy and apply the cash surrender value, stated to be \$1,932.15, to payment of the loan and pay the balance to the parties entitled thereto. It was held that this agreement was valid, notwithstanding Civ. Code, § 2889, providing that contracts for forfeiture of property subject to a lien shall be void, etc., and where insurer, on the nonpayment of the loan at the time fixed, pursuant to an agreement extending time of payment, canceled the policy and applied its then cash surrender value to payment of the debt, and offered to pay the balance to the beneficiary, the latter could not complain. It was also held in the same case that the fact that the insurer gave notice to insured of its intention to cancel the policy unless the loan was repaid, did not prejudice the rights of the beneficiary, who did not receive any notice, as insurer was not required to give notice to either, and as insurer might apply the cash surrender value to the loan as to both insured and the beneficiary. In *Sherman v. Mutual Life Ins. Co.*, 53 Wash. 523, 102 Pac. 419, it

was held that the stipulation as to cancellation is not waived by an extension of the date of payment of the loan.

In *New York Life Ins. Co. v. Mills*, 51 Fla. 256, 41 South. 603, it appeared that, on making a loan to the insured, the company reserved the option to cancel the policy, if the loan were not repaid, on returning the cash surrender value, and instead of so canceling the company opened up negotiations looking to a new loan, pending which the insured died. It was held that the beneficiary under the policy is entitled to a verdict. Where a note, evidencing a policy loan, was conditioned that, if the payment of premium or the principal or interest on the note became delinquent, the policy holder elected to take the cash surrender value of the policy, and empowered the company to cancel the same on its books, the company was not required to notify the policy holder of the cancellation of the policy when the contingency which created the election of the insured had happened (*Wilson v. Royal Union Mut. Life Ins. Co.*, 137 Iowa, 184, 114 N. W. 1051).

It is within the rights of the insurer to rescind the contract for fraud or false representation on the part of the insured. A rescission on this ground must be within a reasonable time.

American Cent. Life Ins. Co. v. Rosenstein, 46 Ind. App. 537, 92 N. E. 380, affirming on rehearing (Ind. App.) 88 N. E. 97; *Supreme Tribe of Ben Hur v. Lennert* (Ind. App.) 93 N. E. 869, rehearing denied 94 N. E. 889.

An insurer failing to give prompt notice of its election to rescind a life policy and to tender a return of premiums loses its right to rescind. *Mutual Life Ins. Co. of New York v. Finkelstein*, 58 Ind. App. 27, 107 N. E. 557.

The insurer must also return or tender the premium paid by the insured.

Iowa Life Ins. Co. v. Haughton (Ind. App.) 85 N. E. 127; *American Cent. Life Ins. Co. v. Rosenstein*, 46 Ind. App. 537, 92 N. E. 380, affirming judgment 88 N. E. 97, on rehearing; *Supreme Tribe of Ben Hur v. Lennert* (Ind. App.) 93 N. E. 869, rehearing denied 94 N. E. 889; *Commercial Casualty Co. of Newark, N. J., v. Rice*, 157 N. Y. Supp. 1, 93 Misc. Rep. 567.

But a beneficiary who has paid none of the dues or assessments cannot insist on a return thereof as condition precedent to rescission (*Waltz v. Workmen's Sick & Death Benefit Fund* [Sup.] 141 N. Y. Supp. 578; *Id.*, 78 Misc. Rep. 499, 139 N. Y. Supp. 1016).

The tender of a bill of exchange for the amount of premiums received is insufficient as a return of such premiums, or as an offer to

return them on which to base a valid rescission of the contract of insurance (*United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760).

In *Metropolitan Life Ins. Co. v. Freedman*, 159 Mich. 114, 123 N. W. 547, 32 L. R. A. (N. S.) 298, the facts were these: A son induced his father to apply for life insurance, designating the son as beneficiary. A policy was issued on an application containing false representations as to age and rejection by other companies. An agent of another company aided the son to procure insurance, and, in furtherance thereof, notified soliciting agents that policies might be written on the father's life. He communicated the fact of the rejections of the applications to the son, who thereafter caused further applications and procured the policy. It was held that the son was guilty of fraud, justifying cancellation of the policy at the suit of the insurer.

The Kansas statute (Laws 1913, c. 212), prohibiting cancellation of life policies without notice, is prospective and does not affect policies issued before the act took effect. *Priest v. Bankers' Life Ass'n of Des Moines, Iowa*, 161 Pac. 631, 99 Kan. 295.

Where a life insurance company had a right to declare and enforce a forfeiture of the policy, and did declare it, there could be no recovery thereon, even though the company obtained possession of the policy through fraudulent misrepresentation (*Pioneer Life Ins. Co. v. Cox*, 112 Ark. 582, 166 S. W. 951).

2832-2833. (c) Repudiation of the contract by the company

2832 (c). A mutual benefit society, by unlawfully amending its constitution so as to increase the rate of assessment of a member and reduce, without his consent, the amount payable under the certificate, repudiated the contract so as to justify rescission by the member, without tendering assessments under the old rate (*Fort v. Iowa Legion of Honor*, 146 Iowa, 183, 123 N. W. 224). In *Supreme Council A. L. H. v. Lippincott*, 134 Fed. 824, 67 C. C. A. 650, 69 L. R. A. 803, reversing (C. C.) 130 Fed. 483, the society, having issued to plaintiff a certificate for \$5,000, passed a by-law reducing insurance certificates of \$5,000 to \$2,000, and thereafter refused to consider plaintiff's certificate in force for more than that sum. Plaintiff protested against such attempted reduction, offered to pay assessments on the full face of his certificate, and thereafter paid assessments based on the reduced amount under protest for a period of two years and five months, when he notified defendant of his in-

tention to cancel the insurance, and demanded repayment of assessments paid. It was held that, though plaintiff was entitled to such relief on defendant's breach of its contract in the first instance, he, having elected to treat the contract as continuing, notwithstanding defendant's breach, by payment of assessments during such time, was not entitled to make a second election to rescind. In *Supreme Council A. L. H. v. Garrett* (Tex. Civ. App.) 85 S. W. 27, the member believing that the by-law was binding on him, surrendered his original certificate, which was for more than \$2,000, and accepted a new certificate for \$2,000, and thereafter and until his death reduced assessments were paid on the new certificate. It was held that, though such by-law was not binding on deceased, his mistake was one of law, and, in the absence of evidence of misrepresentations, his beneficiary was not entitled to recover on the surrendered certificate. On the other hand, in *Attorney General v. Supreme Council A. L. H.*, 206 Mass. 183, 92 N. E. 147, it was held that surrendering the certificate for cancellation did not operate to cancel the certificate, and the beneficiary could recover the balance due, less the difference between the assessments due on a \$5,000 basis, without interest, when tender was made and the assessments paid, with interest.

Upon notice by benefit society to local lodge that it and its members would not be recognized unless certain unauthorized conditions were complied with, a member is entitled to treat the contract as rescinded, keep it alive by tendering performance, or bring suit in equity to compel the society to receive his assessments (*Makman v. Independent Order Free Sons of Judah*, 148 N. Y. Supp. 141, 86 Misc. Rep. 13).

The insolvency of the company and appointment of a receiver has been regarded as a repudiation or breach of the contract in several cases.

Robinson v. Mutual Reserve Life Ins. Co. (C. C.) 162 Fed. 794; *Ensworth v. National Life Ass'n*, 81 Conn. 592, 71 Atl. 791; *Wolfe v. Washington Life Ins. Co.*, 118 N. Y. Supp. 599, 63 Misc. Rep. 571. And see *Commonwealth v. Richardson*, 94 S. W. 639, 29 Ky. Law Rep. 622.

2833 (c). Where insurer transferred all of its assets to another company, a holder of one of its policies was not bound to continue his insurance in the new company, but was entitled to treat his policy as at an end, and demand whatever damages he had sustained thereby (*Vette & Hoffman v. Evans*, 86 S. W. 504, 111 Mo. App.

588). Though a life insurance company cannot transfer its policy holders to another company without their consent; but, if such transfer is attempted, a policy holder must elect whether he will treat it as an abandonment of the contract and sue to recover the amount then due him, continue to pay premiums under protest, and keep alive his claim against the original insurer, or acquiesce in the transfer, and if, in the absence of fraud, he accepts the assumption certificate and continues to pay to the new insurer without objection he cannot thereafter maintain a suit based on a repudiation of the new contract (*Watson v. National Life & Trust Co.*, 189 Fed. 872, 111 C. C. A. 134). But it has been held in Texas that the consolidation of defendant insurance company with the P. Company, without surrender of defendant's corporate existence, etc., does not show defendant's repudiation of a policy with plaintiff so as to entitle plaintiff to recover damages therefor (*Provident Savings Life Assur. Society of New York v. Ellinger* [Tex. Civ. App.] 164 S. W. 1024).

A provision in a life insurance policy giving the insured the right to borrow money from the insurer on the security of the policy in progressive sums as the policy aged is not an indivisible part of the contract, but creates a subsidiary or collateral contract, a breach of which can be compensated in damages; and such a breach by the insurer is not a repudiation of the contract for insurance, which entitles the insured to rescind and recover the premiums paid (*Lewis v. New York Life Ins. Co.*, 181 Fed. 433, 104 C. C. A. 181, 30 L. R. A. [N. S.] 1202, affirming judgment [C. C.] 173 Fed. 1009).

Where a fraternal order rightfully increased the assessments, there was no breach of the contract, and a member is not entitled to rescind his contract and recover back the sums already paid in (*Thomas v. Knights of Maccabees of the World*, 85 Wash. 665, 149 Pac. 7, L. R. A. 1916A, 750, Ann. Cas. 1917B, 804). On the other hand, in *Voss v. Northwestern Nat. Life Ins. Co.*, 137 Wis. 492, 118 N. W. 212, it appeared that a mutual insurance company, with power to amend its by-laws and to readjust rates of premiums, adopted a by-law increasing premiums. The by-law was passed in good faith, to maintain the solvency of the company. Four-fifths of the policy holders complied with it. Insured and the beneficiary in a policy knew that the company was operating on the theory that the by-law was valid, and made payments without objection for four years. It was held that, though the passage of the by-law was a repudiation of the contract assumed by the company, insured and

the beneficiary kept the contract alive by paying the premiums, and they could not thereafter claim the benefit of the breach. In *Blake-ly v. Fidelity Mut. Life Ins. Co.*, 154 Fed. 43, 83 C. C. A. 155, affirming (C. C.) 143 Fed. 619, it was held that an assessment life insurance company commits an anticipatory breach of its contract with a policy holder by making a higher assessment against his policy than is authorized by the contract, and by announcing its intention to continue to do so. But it was also held that the insured has his election to accept such action as a rescission of the contract and sue for the breach or to refuse to rescind, and continue to treat the contract as in force; but such election, when once made, is final, and where he elects to keep the contract in force by tendering payment of the amount lawfully due thereon, he is concluded thereby, and cannot thereafter rescind on account of such breach.

The burden is on the insurer to prove, otherwise than by introduction of notice of repudiation, that its repudiation of its contract was rightful. *Marcus v. National Council of Knights and Ladies of Security*, 127 Minn. 196, 149 N. W. 197.

Under the law of New York the wrongful refusal of a life insurance company to receive premiums on a policy which are due by its terms and to continue the policy in force is a breach of the contract which entitles the policy holder to maintain an action to recover damages therefor (*Michaelsen v. Security Mut. Life Ins. Co.*, 154 Fed. 356, 83 C. C. A. 334, 12 Ann. Cas. 37, reversing [C. C.] 150 Fed. 224).

2833-2840. (d) Abandonment and rescission of contract by mutual consent

2834 (d). The test of an abandonment of rights under a life insurance policy is the existence of an intent to abandon, and the presumption is against such intent (*Wayland v. Western Life Indemnity Co.*, 166 Mo. App. 221, 148 S. W. 626). An abandonment may, however, be inferred from the acts or conduct of the insured. Thus, where insured, after being expelled conditionally from a fraternal insurance order, remained passive and stated that he would pay no further assessments and would drop his insurance, this constituted an abandonment, and those claiming under him were thereby estopped from recovering the insurance (*Marcus v. National Council of Knights and Ladies of Security*, 123 Minn. 145, 143 N. W. 265). So, too, an insured, wrongfully suspended, who, after a compromise

(1124)

agreement for a settlement of the dispute has been reached, abandons the negotiations with the company will be held to have abandoned his policy and acquiesced in its cancellation (*Clow v. Western Life Indemnity Co.*, 182 Ill. App. 251). If the insured, with knowledge of the facts, discontinues the payment of assessments or premiums and persists in his refusal to pay this amounts to an abandonment of the contract.

Roth v. Mutual Reserve Life Ins. Co., 162 Fed. 282, 89 C. C. A. 262;
Price v. Mutual Reserve Life Ins. Co., 107 Md. 374, 68 Atl. 689;
Price v. Mutual Reserve Life Ins. Co., 62 Atl. 1040, 102 Md. 683,
4 L. R. A. (N. S.) 870; *McGeehan v. Mutual Life Ins. Co.*, 111 S.
W. 604, 131 Mo. App. 417; *Keeton v. National Union (Mo. App.)*
182 S. W. 798.

The rule has been applied where the refusal to pay was based on the claim that the assessments were excessive (*Robinson v. Mutual Reserve Fund Life Ins. Co.* [C. C.] 182 Fed. 850). But a statement by an insured that he did not intend to pay a premium on his policy, which was due, but not then demandable, made to an agent who had no authority to change the contract on behalf of the company, did not have the effect of terminating the policy (*Taylor v. Provident Sav. Life Assur. Soc.* [C. C.] 134 Fed. 932, affirmed in 142 Fed. 709, 74 C. C. A. 41).

Whether there was a rescission of an insurance contract, or an accord and satisfaction of a claim under it, by the return of the policy and all premiums depended on whether the minds of the parties met in intending that such result should follow (*Reliance Life Ins. Co. of Pittsburgh, Pa., v. Garth*, 192 Ala. 91, 68 South. 871). Where the right to forfeit a life insurance policy for nonpayment of the premium had been waived by the acceptance of a note for the amount of the premium, the voluntary surrender of the policy by the insured before maturity of the note at the insistence of the company constituted, in the absence of fraud, an abandonment of the policy by mutual consent (*Pioneer Life Ins. Co. v. Cox*, 112 Ark. 582, 166 S. W. 951).

Abandonment of a contract of insurance is an affirmative defense which is waived if not pleaded. *Keeton v. National Union (Mo. App.)* 182 S. W. 798; *Johnson v. Hartford Life Ins. Co.*, 271 Mo. 582, 197 S. W. 132.

Whether an insurance contract was abandoned is a question of fact for the jury. *Haas v. Mutual Life Ins. Co. of New York*, 134 N. W. 937, 90 Neb. 808, Ann. Cas. 1913B, 919.

2837 (d). Though insured is not bound to continue payments on an ordinary policy payable to another, yet where he has taken out such a policy he cannot definitely abandon it, while still an existing contract, so as to cut off the rights of the beneficiary.

Mutual Ben. Life Ins. Co. v. Willoughby, 99 Miss. 98, 54 South. 834, Ann. Cas. 1913D, 836; Ferguson v. Phoenix Mut. Life Ins. Co., 84 Vt. 350, 79 Atl. 997.

However, a beneficiary in a life insurance policy is estopped from asserting any rights under the policy, where, with full knowledge, she had acquiesced in acts and conduct of the insured and the insurer amounting to an agreement for its cancellation (Missouri State Life Ins. Co. v. Hill, 109 Ark. 17, 159 S. W. 31). And it has been held in Florida that where policy of life insurance is issued and a premium note given, and insured states that he does not intend to pay note or to take policy, and it is agreed between himself and insurer that contract and note be discharged, the beneficiary cannot recover on policy (Peacock v. Our Home Life Ins. Co. [Fla.] 75 South. 799).

But where the policy contains a power to change the beneficiary may be surrendered by mutual agreement so as to terminate the rights of the beneficiary.

Equitable Life Assur. Society of United States v. Stough, 45 Ind. App. 411, 89 N. E. 612; Indiana Nat. Life Ins. Co. v. McGinnis (Ind. App.) 99 N. E. 751, judgment reversed 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192; Id. (Ind. App.) 99 N. E. 756, judgment reversed 180 Ind. 701, 101 N. E. 295; Crice v. Illinois Life Ins. Co., 92 S. W. 560, 29 Ky. Law Rep. 91, 122 Ky. 572, 121 Am. St. Rep. 489; Blinn v. Dame, 93 N. E. 601, 207 Mass. 159, 20 Ann. Cas. 1184. And see Klee v. Klee, 47 Misc. Rep. 101, 93 N. Y. Supp. 588, involving a mutual benefit certificate. But see Holder v. Prudential Ins. Co., 77 S. C. 299, 57 S. E. 853, holding that the right to change beneficiaries in a life insurance policy does not include a power to surrender and cancel, without the consent of the beneficiaries.

A beneficiary, who had knowledge of the surrender of the policy at the time or immediately thereafter, cannot, after the death of the member assert the invalidity of the surrender on the ground of lack of capacity (Franklin Life Ins. Co. v. Morrell, 84 Ark. 511, 106 S. W. 680).

Admissibility and sufficiency of evidence to show lack of mental capacity to make a valid surrender, see Wightman v. Grand Lodge of A. O. U. W. of Missouri, 98 S. W. 829, 121 Mo. App. 252.

2839 (d). Where one party to a contract of reinsurance directs that the reinsurance policy be cancelled, and such direction is concurred in, a revival of liability cannot be had without the concurrence of both parties to the contract of reinsurance (*Metropolitan Life Ins. Co. v. National Life Ins. Co.*, 127 Ill. App. 665, judgment affirmed 80 N. E. 747, 226 Ill. 102).

Notice to the assured of the lapse of a policy for nonpayment of premium is not necessary when the evidence shows an intentional abandonment of the policies on his part. *Weston v. State Mut. Life Assur. Co. of Worcester, Mass.*, 137 Ill. App. 319, judgment affirmed 84 N. E. 1073, 234 Ill. 492.

In *Hopkins v. Northwestern Nat. Life Ins. Co.*, 41 Wash. 592, 83 Pac. 1019, the certificate of insurance provided for payment of \$2,000 at death of insured, or that if he should keep it good for 10 years he could then surrender it, and receive \$1,000 from the endowment fund, to be supplied by assessments as provided in the certificate. At the end of 10 years insured surrendered it, and demanded the \$1,000; but the insurance company immediately returned it, and requested insured to keep it till notified by the company that the proper assessment had been made on certificate holders, and a sufficient sum raised thereby to pay insured's certificate. Several times during the succeeding two years insured demanded payment of the \$1,000, and each time the insurer represented that the funds had not been raised, but that steps were being taken therefor, and that it would notify insured when the funds had been raised. Insured relied on such representations, and therefore delayed action, but the company never gave notice that it was ready. The company also thereafter demanded payments of premiums from insured, stating that they were necessary to keep the policy from becoming void, and insured, who was old and inexperienced in business, and did not understand the policy, made the payments relying on such representations. It was held that insured had not waived his right to payment of the endowment.

Where a contract of life insurance on the assessment plan gives insured a reasonable remedy to redress wrongs inflicted on him, he must exhaust that remedy before resorting to the courts, and his failure so to do is an abandonment of the policy. *Easter v. Brotherhood of American Yeomen*, 157 S. W. 992, 172 Mo. App. 292.

2840-2841. (e) Wrongful cancellation by company—Right to reinstatement

2840 (e). Upon a wrongful cancellation or declaration of forfeiture by the company the insured or his beneficiary may, nevertheless, treat the policy as still subsisting and recover on the original contract.

Michaelsen v. Security Mut. Life Ins. Co. (C. C.) 150 Fed. 224; *Pilgrims' Health & Life Ins. Co. v. Scott*, 78 S. E. 469, 12 Ga. App. 749; *Smoot v. Bankers' Life Ass'n*, 120 S. W. 719, 138 Mo. App. 438. And see *Smith v. Northwestern Nat. Life Ins. Co.*, 123 Wis. 586, 102 N. W. 57.

In case of an unauthorized attempt to cancel, the parties interested may also maintain a suit in equity for reinstatement.

Michaelsen v. Security Mut. Life Ins. Co. (C. C.) 150 Fed. 224. And see *Smith v. Northwestern Nat. Life Ins. Co.*, 123 Wis. 586, 102 N. W. 57.

2841 (e). The beneficiary in a life policy which the insurer has attempted to forfeit is not a necessary party to an action by the insured to restore it (*Prichard v. Security Mut. Life Ins. Co.*, 140 App. Div. 879, 124 N. Y. Supp. 650).

Under the New York Code Civ. Proc. § 481, requiring a complaint to contain a plain and concise statement of facts constituting the cause of action, a complaint alleging that plaintiff made written application to defendant for life insurance, that defendant issued to him a policy and setting out in substance the contract, and alleging that plaintiff complied with all the terms thereof on his part to be performed, and that defendant unlawfully attempted to forfeit it, and asking to have it restored, is sufficient without setting out the application, the policy, and defendant's by-laws (*Prichard v. Security Mut. Life Ins. Co.*, 124 N. Y. Supp. 650, 140 App. Div. 879).

In an action against an insurance company to restore a policy which it had attempted to cancel, on the ground of plaintiff's fraud in procuring the same, an answer setting up plaintiff's fraud, but without indicating a willingness to restore the premium paid, if it be determined that defendant was not entitled to retain the same, was insufficient on demurrer (*Mincho v. Bankers' Life Ins. Co.*, 109 N. Y. Supp. 179, 124 App. Div. 578). And in *Mincho v. Bankers' Life Ins. Co.*, 129 App. Div. 332, 113 N. Y. Supp. 346, it was held that a separate defense that plaintiff had falsely and fraudulently represented and warranted that he had never applied for insurance on which a policy was not issued, or on which a policy was issued on a

different plan from the one for which he had applied when he had been repeatedly declined insurance, and that as soon as defendant learned that the representations were false, and before the first anniversary of the policy, it notified plaintiff of its election to cancel, and that it was willing to return such part of the premiums paid as it was not entitled to retain, and prayed judgment for damages, etc., was not demurrable. And it was held, further, in that case that where defendant insurance company sustained provable damages in consequence of plaintiff's fraud in inducing it to issue a policy which it thereafter canceled, it was entitled to offset such damages against the premium received, and was therefore entitled to rescind, as against a suit in equity to compel a reinstatement of the policy, without restoring the entire premium.

2841-2843. (f) Same—Actions for damages

2841 (f). The insured is not confined to his remedy in equity, but on an unauthorized cancellation of the policy may maintain an action for damages as for breach of contract.

Griesa v. Mutual Life Ins. Co., 169 Fed. 509, 94 C. C. A. 635, reversing (C. C.) 156 Fed. 398; *Fort v. Iowa Legion of Honor*, 146 Iowa, 183, 123 N. W. 224; *Raymond v. Supreme Lodge, Knights of Pythias of the World*, 148 N. Y. Supp. 76, 85 Misc. Rep. 141, judgment affirmed 165 App. Div. 944, 149 N. Y. Supp. 1108; *Supreme Lodge Knights of Pythias v. Neeley* (Tex. Civ. App.) 135 S. W. 1046; *Washington Life Ins. Co. v. Lovejoy* (Tex. Civ. App.) 149 S. W. 398; *Jones v. Supreme Court Independent Order of Foresters*, 141 Wis. 667, 124 N. W. 1027. But see *Robinson v. Mutual Reserve Life Ins. Co.* (C. C.) 182 Fed. 850.

Where an assessment policy holder voluntarily ceased payment of assessments and abandoned his policy, he could not thereafter recover damages for its cancellation. *Green v. Hartford Life Ins. Co.*, 51 S. E. 887, 139 N. C. 309, 1 L. R. A. (N. S.) 623, 4 Ann. Cas. 360.

2842 (f). Where, however, the executive officers of a mutual benefit society attempt to enforce an unauthorized resolution, such act is not a breach of a member's contract with the society, the member's remedy being to enjoin the enforcement of the resolution, or, in case he was suspended for refusal to comply therewith, to compel his restoration by mandamus (*Supreme Ruling of Fraternal Mystic Circle v. Ericson* [Tex. Civ. App.] 131 S. W. 92). While a beneficiary's right under a policy is a vested one, it is in the nature of a mere expectancy of an unascertainable value, subject to be defeated by the act of the insured, and hence cannot be absolute until

the death of the insured, and cannot be the basis of a claim for damages upon rescission of the contract by the insurer; the insured being the one entitled to the damages (*Slocum v. Northwestern Nat. Life Ins. Co.*, 135 Wis. 288, 115 N. W. 796, 14 L. R. A. [N. S.] 1110, 128 Am. St. Rep. 1028). Where the only promise made by insurer in a policy was to pay a sum of money on the death of plaintiff, the fact that insurer wrongfully declared the contract "void and forfeited," and denied that plaintiff had any rights thereunder, and refused to continue the policy in force, did not constitute a breach of the contract contained in the policy during plaintiff's lifetime, nor justify a recovery by him of damages "at law" (*Kelly v. Security Mut. Life Ins. Co.*, 78 N. E. 584, 186 N. Y. 16, 9 Ann. Cas. 661, reversing 106 App. Div. 352, 94 N. Y. Supp. 601).

Under the Wisconsin statute (Rev. St. 1898, § 2347), declaring that every life insurance policy assigned or payable to a married woman shall be her separate property, etc., a married woman made beneficiary in a policy procured by her husband on his life need not join him in an action against the insurer for damages resulting from its wrongful act in declaring the policy forfeited (*Merrick v. Northwestern Nat. Life Ins. Co.*, 102 N. W. 593, 124 Wis. 221, 109 Am. St. Rep. 931).

Sufficiency of the complaint in an action for damages, see *Barrows v. Mutual Reserve Life Ins. Co.*, 151 Fed. 461, 81 C. C. A. 71; *Wolfe v. Washington Life Ins. Co.*, 118 N. Y. Supp. 599, 63 Misc. Rep. 571; *Jones v. Supreme Court of Independent Order of Foresters*, 124 N. W. 1027, 141 Wis. 667.

Admissibility of evidence see *Green v. Hartford Life Ins. Co.*, 51 S. E. 887, 139 N. C. 309, 1 L. R. A. (N. S.) 623, 4 Ann. Cas. 360.

2845-2848. (h) Same—Measure of damages—Value of policy

2846 (h). If insurer refuses to perform life insurance contract, insured may recover value of policy or sue in equity to have policy declared in force or tender premiums, and recover amount payable at maturity (*American Trust Co. v. Life Ins. Co. of Virginia*, 173 N. C. 558, 92 S. E. 706).

And to the same effect, see *Indiana Life Endowment Co. v. Carnithan*, 62 Ind. App. 567, 109 N. E. 851; *Merrick v. Northwestern Nat. Life Ins. Co.*, 102 N. W. 593, 124 Wis. 221, 109 Am. St. Rep. 931.

The present value of a life policy, not paid-up, is the sum which, at reasonable compound interest, will equal the face of the policy at the end of the period of life expectancy of insured, less the premiums becoming due during that period, with similar interest there-
(1130)

on, provided insured is insurable; and if he is not insurable that fact may be shown, so that a greater premium would be required than that shown by the tables of life insurance (*Supreme Lodge Knights of Pythias v. Neeley* [Tex. Civ. App.] 135 S. W. 1046). That the present value of a paid-up insurance policy was uncertain, and could not be ascertained without difficulty, could not prevent the courts from determining such value in an action for damages for its wrongful cancellation by the insurer (*Palmer v. Mutual Life Ins. Co. of New York*, 121 Minn. 395, 141 N. W. 518, Ann. Cas. 1914D, 160). If the policy holder is in a state of health to enable him to procure other insurance of like nature and kind, his measure of damages is the difference between carrying the insurance which he has and the cost of new insurance for the same amount and term, with the addition, in case his policy has an investment feature or entitles him to accumulations and profits, of all such profits or accumulations (*Krebs v. Security Trust & Life Ins. Co.* [C. C.] 156 Fed. 294).

In *Mutual Reserve Fund Life Ass'n v. Ferrenbach*, 75 C. C. A. 304, 144 Fed. 342, 7 L. R. A. (N. S.) 1163, the action was brought by the insured to recover damages for the wrongful cancellation of a life insurance policy for alleged nonpayment of a premium after the policy had been in force for a number of years. The premiums were in the form of assessments covering only the current death losses of the company, with an added sum for expenses. At the time of the cancellation plaintiff was an invalid and incapable of obtaining other insurance. He died pending the action, and it was revived by his executor. It was held that the measure of damages was the amount of the policy, less the cost of carrying it to maturity had it remained in force, all the amounts entering into the calculation to be valued on a 6 per cent. basis as of the date of cancellation.

2847 (h). Where a life and accident policy provided that, if payment of dues was continued by the beneficiary during insured's disability, the beneficiary would be entitled to payment at death, she would not be divested of her interest in the policy by any renunciation of the contract by the company, and hence, in an action by insured for damages for renunciation upon refusal to pay disability benefits, recovery could not be had for the full value of the policy (*Indiana Life Endowment Co. v. Reed*, 54 Ind. App. 450, 103 N. E. 77).

Where there is a mere refusal, not amounting to total repudiation of the contract, to pay sick benefits to which insured is entitled under

a policy of health insurance, his measure of damages is the amount of the payments to which he is entitled. *American Nat. Ins. Co. v. Wilson* (Tex. Civ. App.) 176 S. W. 623.

2849-2852. (j) Rescission by insured for fraud or mistake—Right to maintain action for premium

2849 (j). A policy holder, who through fraud or mistake has been induced to take out a policy, may rescind the contract and recover the premiums paid.

Robinson v. Mutual Reserve Life Ins. Co. (C. C.) 182 Fed. 850; *Central Life Assur. Society of United States v. Mulford*, 45 Colo. 240, 100 Pac. 423; *Lierheimer v. Minnesota Mut. Life Ins. Co.*, 99 S. W. 525, 122 Mo. App. 374; *Green v. Security Mut. Life Ins. Co.*, 159 Mo. App. 277, 140 S. W. 325; *Moore v. Mutual Reserve Fund Life Ass'n*, 106 N. Y. Supp. 255, 121 App. Div. 335.

In *Waters v. Security Life & Annuity Co.*, 144 N. C. 663, 57 S. E. 437, 13 L. R. A. (N. S.) 805, it appeared that decedent applied for certain life insurance, and a policy was issued in exact accord with the application and delivered to him. Shortly after such delivery, decedent, believing that the policy did not conform to his application, returned it for cancellation; but the insurer insisted that the policy was correct, and referred the matter to its local agent for adjustment, to whom the policy was also sent for redelivery. The insurer never signified its acceptance of decedent's proposition to return the policy, nor was there any offer to return decedent's notes given for the premium, and while the transaction was in this condition, decedent was accidentally killed. It was held that if the policy complied with decedent's application in the first instance, and there was a valid contract of insurance, there was no rescission relieving the insurer from liability. In *Clements v. Life Ins. Co. of Virginia*, 155 N. C. 57, 70 S. E. 1076, the plaintiff took out life policies on the representation of defendant's agent that they would contain a provision that, if plaintiff lived and paid premiums for 10 years, he might then withdraw the total amount of premiums paid, with 4 per cent. interest. The policies, containing no such provision, were delivered to him, and he put them away without reading, though he could read, and made no effort to ascertain whether the policies were as represented. He paid premiums regularly for a number of years and continued to pay after receiving information sufficient to charge him with notice that the policies were not as represented. It was held that, there being nothing to indicate that the agent took advantage of plaintiff's ignorance, or

did anything to prevent plaintiff from ascertaining the contents of the policies when they were delivered, plaintiff could not rescind and recover the premiums paid.

The right to rescind must be exercised promptly on discovery of the fraud or mistake, and will be denied if the insured has been guilty of laches. To entitle insured to a rescission of the contract of insurance he must notify the company within a reasonable time of his election to disaffirm the contract, and when the facts are undisputed the question of reasonable time is one of law for the court (*Heinz v. Peoria Life Ins. Co.*, 183 Ill. App. 35). In *Lierheimer v. Minnesota Mut. Life Ins. Co.*, 122 Mo. App. 374, 99 S. W. 525, an applicant for life insurance received his policy September 23d. He read it on that day and discovered that it was not the policy he had contracted for. He took no action until October 19th following, when his attorney, by his direction, wrote to the insurer's state agent to the effect that he repudiated the contract on the ground of the fraudulent representations of the agent soliciting the insurance. It was held that the insured, as a matter of law, did not exercise his right to rescind the contract with sufficient promptness, and was precluded from so doing. So, too, it has been held that where plaintiff, having applied for a certain life insurance policy and executed his notes for a premium, was tendered a different policy, which he accepted and for which he signed a receipt, he having retained the policy without objection for four months, and having paid the first premium note, was not entitled then to rescind the contract, and recover the amount of the note paid, and restrain the collection of the one unpaid (*Smith v. Smith*, 110 S. W. 1038, 86 Ark. 284). In *Glassner v. Johnston*, 133 Wis. 485, 113 N. W. 977, it was held that insured is entitled to the repayment of money paid on the policy, and to a cancellation of it and a premium note, where he was induced to make the payment and place the note beyond his control through insurer's agent's misrepresentation that the policy complied with the contract therefor, the misrepresentation being made in connection with the agent's plea for hasty action by insured and through a misleading indorsement upon and prominent headlines in the policy, and where, within an hour or two after receiving the policy, insured procured a construction of the complicated phraseology of the policy, notified the agent of his objections, tendered the policy back, and demanded a return of his payment and note, and notified the insurer of his election to rescind, though he did not sue to rescind for 12 days, and though insurer might have

an independent cause of action against insured for some amount promised to be paid by an application for insurance made before the policy issued.

One applying for a life policy, relying upon the representations of a soliciting agent, is not estopped from complaining of the falsity of the representations unless inexcusably negligent in not informing himself, though he could have done so, by the information at hand. *Mutual Life Ins. Co. v. Hargus* (Tex. Civ. App.) 99 S. W. 580.

Sufficiency of pleadings in actions to rescind, see *Lewis v. New York Life Ins. Co.*, 181 Fed. 433, 104 C. C. A. 181, 30 L. R. A. (N. S.) 1202, affirming judgment (C. C.) 173 Fed. 1009; *Mutual Life Ins. Co. v. Hargus* (Tex. Civ. App.) 99 S. W. 580.

Admissibility and sufficiency of evidence, see *Green v. Security Mut. Life Ins. Co.*, 140 S. W. 325, 159 Mo. App. 277; *Mutual Life Ins. Co. of New York v. Chambliss*, 61 S. E. 1034, 131 Ga. 60.

2852-2856. (k) Same—Prerequisites to maintenance of action

2853 (k). Where an agent was only a soliciting agent, under appointment of the state agent of insurer, and his agency as to a policy terminated when the application was made, and the policy was issued to the applicant, a subsequent tender of the policy to him by the applicant, seeking to rescind on the ground of fraud, was not a tender to insurer (*Allen v. Smith*, 165 Ala. 247, 51 South. 724). In *State Life Ins. Co. v. Nelson*, 46 Ind. App. 137, 92 N. E. 2, the agent offered an insurance policy and two shares of stock in an agency company for \$190, but the insured insisted on four shares. In order to get round this, the insured made an application for the two extra shares; the consideration being stated as services to be rendered, and paid the \$190, receiving a receipt therefor and for \$80 on account of the extra two shares. When the agency company failed, insured filed his claim for \$80 and was paid \$50 thereon. It was held that he could not rescind the whole transaction and recover the \$190 without restoring or offering to restore the \$50 received.

2856-2860. (l) Action for cancellation by company—Federal rule

2856 (l). After the death of assured, a suit in equity will not lie for the surrender and cancellation of the policy because obtained by fraud; the insurer having a plain, speedy, and adequate remedy by interposing the fraud as a defense to an action at law on the policy (*Griesa v. Mutual Life Ins. Co. of New York*, 169 Fed. 509, 94 C. C. A. 635, reversing [C. C.] 156 Fed. 398).

2860-2861. (m) Same—Doctrine of state courts

2860 (m). Cancellation of a life policy may be had in a suit in equity on the ground of mistake, as to a fact material to the risk, for breach of assured's warranty that he had not been refused insurance by any other company, though he had made this statement in good faith (*Pacific Mut. Life Ins. Co. of California v. Glaser*, 150 S. W. 549, 245 Mo. 377, 45 L. R. A. [N. S.] 222). A life insurance company may institute action to cancel policy within time limited by incontestable clause, where policy has been improperly procured (*American Trust Co. v. Life Ins. Co. of Virginia*, 173 N. C. 558, 92 S. E. 706).

In action to cancel life insurance policy, evidence considered, and held to support a finding that insured willfully misrepresented his age in the application. *Home Life Ins. Co. v. Zuribowitz* (R. I.) 87 Atl. 25.

2861-2862. (n) Same—Return of premiums

2861 (n). An insurance company suing to cancel a policy for fraud must restore or tender the premiums received as a condition of relief.

American Central Life Ins. Co. v. Rosenstein (Ind. App.) 88 N. E. 97; *Metropolitan Life Ins. Co. v. Freedman*, 123 N. W. 547, 159 Mich. 114, 32 L. R. A. (N. S.) 298; *National Council of Knights and Ladies of Security v. Garber*, 154 N. W. 512, 131 Minn. 16.

What is a reasonable time within which an insurer may rescind and restore or offer to restore, the insured to statu quo is ordinarily a question of fact, unless the facts have been ascertained or are undisputed, when it is a question of law (*American Cent. Life Ins. Co. v. Rosenstein*, 46 Ind. App. 537, 92 N. E. 380, affirming [Ind. App.] 88 N. E. 97, on rehearing).

4. SURRENDER OF LIFE OR ACCIDENT POLICY—BY THE INSURED UNDER THE TERMS OF THE CONTRACT

2863-2865. (b) Rights of beneficiaries

2863 (b). The right of an insured to change the beneficiary does not include the power to surrender and cancel the policy (*Roberts v. Northwestern Nat. Life Ins. Co.*, 85 S. E. 1043, 143 Ga. 780). No person other than the persons designated in a policy can assign or surrender it. And where all persons designated in a policy do not concur in an assignment or surrender thereof, the interest of those not concurring is not affected (*Breard v. New York Life Ins. Co.*,

70 South. 799, 138 La. 774). The taking or delivery of a life policy from the insurer by insured, father of the infant beneficiaries, constituted an acceptance for them; and in subsequently holding it he made himself a naked depositary, without any interest, for them, and consequently he had no power to surrender the policy so as to affect their rights (*Ferguson v. Phoenix Mut. Life Ins. Co.*, 84 Vt. 350, 79 Atl. 997, 35 L. R. A. [N. S.] 844).

Under Rev. St. Mo. 1899, § 7900, providing for the surrender of life policies for an adequate consideration, the insured could, after default in premiums, surrender the policy on cancellation of a personal indebtedness. *Gillen v. New York Life Ins. Co.*, 178 Mo. App. 89, 161 S. W. 667.

Where a certificate in an Illinois mutual benefit society authorized the holder to surrender his certificate by paying the association all claims thereunder and returning the certificate to the secretary, the term "certificate holder" being used to represent the member and not the beneficiary, the latter had no vested interest in the certificate under the Illinois law (*Franklin Life Ins. Co. v. Morrell*, 106 S. W. 680, 84 Ark. 511).

A policy of life insurance on the life of a married man, payable at its maturity to his wife, is governed by St. 1898, § 2347, providing that a life policy expressly for the benefit of a wife is her property on maturity during her lifetime; but one so made payable, but conditioned that in the specified event it shall have a surrender value in which the beneficiary shall have no interest, is not as to such feature controlled by such statute (*Hilliard v. Wisconsin Life Ins. Co.*, 137 Wis. 208, 117 N. W. 999).

Where a life policy reserved to the insured the right to change the beneficiary, the beneficiary acquires no vested interest before the death of the insured which she could surrender to the insurer. *Hicks v. Northwestern Mut. Life Ins. Co. of Milwaukee*, 166 Iowa, 532, 147 N. W. 883, L. R. A. 1915A, 872.

2865 (b). An action by a beneficiary, where insured has surrendered his policy when not mentally capable of understanding his rights thereunder, is maintainable without first bringing an independent action to set aside the surrender (*Nutter v. Des Moines Life Ins. Co.*, 156 Iowa, 539, 136 N. W. 891).

Where, in an action on a life insurance policy, plaintiff proved that the policy was duly issued for her benefit; that the premiums were promptly paid, that she kept the policy in her trunk, and repeatedly refused to surrender it to defendant's agents, who endeav-

ored to induce her to do so during insured's last illness, and after his death the insurer denied liability, claiming that the policy had been surrendered without plaintiff's knowledge, and tendered an issue whether defendant fraudulently, by improper or unlawful means, obtained the policy from plaintiff or from the insured, plaintiff was not required to establish the affirmative of such issue in order to recover (*Lanier v. Eastern Life Ins. Co. of America*, 54 S. E. 786, 142 N. C. 14).

Sufficiency of evidence to take case to the jury, see *Hicks v. Northwestern Mut. Life Ins. Co. of Milwaukee*, 166 Iowa, 532, 147 N. W. 883, L. R. A. 1915A, 872.

2866-2868. (d) What constitutes a surrender

2866 (d). A pledge of a life policy by the insured to the company to secure a loan is not a surrender of the policy, under Rev. St. Mo. 1899, § 7900 (*Gillen v. New York Life Ins. Co.*, 178 Mo. App. 89, 161 S. W. 667). Where a life insurance company having foreclosed its lien as pledgee of a policy, and applied part of its surrender value to the payment of the debt for which the policy stood as security, sent the residue of such surrender value to the beneficiary and the insured by its check, which was never received by either, the policy was not surrendered to the company by the transaction "for a consideration adequate in the judgment of the holder," within Rev. St. Mo. 1899, § 7900 (*Ann. St. 1906*, p. 3755), providing that where a policy shall be surrendered to the company for a consideration adequate in the judgment of the holder, the article of which that section is a part shall not be applicable (*Burridge v. New York Life Ins. Co.*, 109 S. W. 560, 211 Mo. 158).

Where one insured under a tontine form of life insurance policy, upon the maturity of the tontine period, elected which one of the several options in his contract he would accept, and sent his acceptance to the company by mail, the contract was completed when his acceptance was mailed, and his death before the letter was received by the company did not revoke it (*Northwestern Mut. Life Ins. Co. v. Joseph*, 103 S. W. 317, 31 Ky. Law Rep. 714, 12 L. R. A. [N. S.] 439).

Where insured, though knowing the effect of his act, was induced, by an insane delusion that his children were about to murder him for his insurance, to surrender his policies in consideration of payment of the surrender value, such surrender was voidable after his death at the instance of his personal representatives. *New York Life Ins. Co. v. Hagler* (Tex. Civ. App.) 169 S. W. 1064.

2868-2871. (e) Right to paid-up policy

2868 (e). In *Dawson v. Equitable Life Assur. Soc.*, 105 S. W. 422, 32 Ky. Law Rep. 86, it was held that after default in payment of premiums, an assured is entitled to a paid-up policy, though he failed to demand one within the time mentioned in the contract of insurance, provided the demand is made within a reasonable time, since time is not of the essence of such a contract. And where, six months after the insured's default in paying his premiums, the company marked the policies "Void," and reported them as forfeited to the insurance commissioner of New York, such action did not render the insured's demand for paid-up policies a useless formality, since at any time within five years from the time of such default he could have demanded, under the uniform decisions of the Court of Appeals, paid-up policies, and forced the company to issue them. But the laches of an insured in not making demand or bringing suit for a paid-up policy within five years after he becomes entitled to such policy will bar his right of recovery.

Under a life policy providing for paid-up insurance or cash value if the old policy should be surrendered within six months after lapse in payment of premiums, held that the right to such paid-up insurance or surrender value was conditioned upon the surrender of the old policy within the six months (*Blume v. Pittsburg Life & Trust Co.*, 104 N. E. 1031, 263 Ill. 160, 51 L. R. A. [N. S.] 1044, Ann. Cas. 1915C, 505, affirming judgment 183 Ill. App. 295).

2872-2873. (f) Same—Amount of paid-up policy

2872 (f). *Carroll's Ky. St.* 1903, § 659, provides, in relation to life insurance, that in case of default of any premium on a life policy, after three years' premiums have been paid, the policy shall be binding on the company for the amount of paid-up insurance which, according to the company's published tables of single premiums, the net value of the policy on such anniversary and the dividends thereon computed by the rule pointed out by the statute will purchase as a net single premium for insurance maturing and terminating at the time and in the manner provided in the original policy, provided that the reserve of such paid-up insurance shall not be less than two-thirds of the reserve of the original policy. It was held in *Penn Mut. Life Ins. Co. v. Barnett's Adm'r*, 124 Ky. 266, 99 S. W. 228, denying rehearing of 124 Ky. 266, 96 S. W. 1120, that the statutes do not warrant an insurer charging a surrender charge in issuing paid-up insurance on a defaulted policy; a contention that

one-third of the reserve is not to be applied to the purchase of paid-up insurance being untenable.

Where insured's bill asserted the right to a paid-up policy of \$5,490, and repudiated the insurer's offer to issue a paid-up policy for about \$4,000, it was error for the court, where the only paid-up policy to which the insured was entitled was dependent upon the reserve on the policy, including dividends and surplus, to decree that the insurer should issue a paid-up policy for the amount offered (*Truly v. Mutual Life Ins. Co. of New York*, 108 Miss. 453, 66 South. 970).

2875-2876. (h) Right to surrender value

2875 (h). In *Mutual Reserve Fund Life Ass'n v. Green* (Tex. Civ. App.) 109 S. W. 1131, defendant insurance company bought out the business of another company. The contract between the companies expressly stipulated that the reinsurer did not assume and should not be liable for any of the liabilities of the other company to members or beneficiaries then existing or thereafter accruing for any cause, except claims arising by reason of death upon policies or certificates of membership occurring subsequent to the ratification of the agreement, etc. Plaintiff held a policy in the old company which contained a provision for a cash surrender value. It was held that there was no privity of contract between the parties as to the cash surrender value feature of the policy, and defendant was not liable thereon.

In *Sweetland v. Bankers' Life Ins. Co.* (Sup.) 105 N. Y. Supp. 627, the first condition of the policy provided that after three annual payments the insured, on surrender of the policy while still in force, might "withdraw in cash the full amount of the surrender value." The first page of the policy contained a provision that all the conditions on the back were a part of the contract, and on the fourth page was a table over which was printed: "Illustration of the value calculated under this policy, based on the assumption that the experience of the company will be according to the Actuaries' Rate of Mortality, with interest at 4 per cent." Under this was a column headed, "Cash Surrender and Loans, as Provided for in the First Paragraph of Conditions," and a sequence of years, with the figures "\$331.08" against the eighth year. Below the table was a further statement that, in addition to the above, it was "estimated" that at the end of the accumulation there would be a considerable dividend realized under the policy. It was held that the policy should be

construed as a definite contract to pay the sum stated on the surrender of the policy at the end of the eighth year, and that the "illustration" of values was not a mere estimate.

In *Davis v. National Casualty Co.*, 115 Minn. 125, 131 N. W. 1013, the policy contained a clause entitling the insured to a cash benefit of \$120 on legal surrender of the policy after it had been in continuous force without delinquency for 10 years from date. The policy required payments of \$1 within 10 days after the 1st day of each month, and provided that, if such payment was not made when due, the policy should be void. Insured made all payments promptly, except one, which was made after the time limited, but was received by the company without objection. It was held that the policy had been in continuous force without delinquency, within the meaning of the clause.

If pleaded, it would be a defense, in a suit to have the cash surrender value of unmatured life policies, issued by a company of another state, applied to indebtedness of insured to the assignee of the policies, that the policies contain no provision for a settlement till death of insured, and that the bill does not allege that by force of some statute of such other state the policies were given a surrender value. *Wilde v. Wilde*, 95 N. E. 295, 209 Mass. 205.

On the surrender of a policy payable to deceased wife, the administrator properly paid the cash surrender value to the husband to reimburse him for premiums paid after wife's death (*Montgomery v. Mutual Life Ins. Co. of New York*, 111 Miss. 6, 71 South. 162).

(1140)

XVIII. RISK AND CAUSE OF LOSS—MARINE INSURANCE

1. PLACE AND CAUSE OF LOSS IN GENERAL

2877-2879. (a) Place and circumstances of loss

2878 (a). Where a vessel is insured to navigate in certain waters and is lost while navigating elsewhere without insurer's consent, there can be no recovery (*Norris v. China Traders' Ins. Co.*, 100 Pac. 1025, 52 Wash. 554).

2879-2881. (b) Same—Loss within permitted waters

2880 (b). A policy upon a vessel while in the waters of the Mexican gulf is in force, where the vessel was in a river where the gulf tide ebbed and flowed (*Mannheim Ins. Co. v. Charles Clarke & Co.* [Tex. Civ. App.] 157 S. W. 291). A time policy covering shipments by rail within the United States and Canada, and shipments by steamers navigating coastwise and inland waters of the United States, covers a shipment by vessel from San Francisco to Bellingham and Seattle, lost by perils of the sea while the ship was plying coastwise and inland waters of the United States, though it intended to stop at the foreign port of Victoria (*Stone v. Insurance Co. of North America*, 105 Pac. 856, 56 Wash. 427).

Where a houseboat insured was lost while within the "natural" boundary of the inland waters of New York Harbor, as well as within the statutory lines dividing such inland waters from the high seas, fixed by the Secretary of the Treasury, the craft was covered by a policy containing a warranty that the boat should be confined to the inland waters of New York, New Jersey, and Long Island, and that no liability should exist for a loss during a deviation of the limits so named, though such deviation should not avoid the policy, which should reattach on the return of the vessel within such limits (*Fulton v. Insurance Co. of North America*, 136 Fed. 182, 69 C. C. A. 198, reversing [D. C.] 127 Fed. 413).

Where the undisputed evidence showed that the vessel was lost in a river in which the tide from the Mexican gulf ebbed and flowed, the question whether the vessel was in gulf waters was one of law for the court. *Mannheim Ins. Co. v. Charles Clarke & Co.* (Tex. Civ. App.) 157 S. W. 291.

2881-2882. (c) Risks covered in general

2882 (c). If the loss of a cargo is caused by a peril insured against, the fact that the vessel containing the cargo was permitted to drift through negligence does not prevent a recovery (*Western Assur. Co. v. Chesapeake Lighterage & Towing Co.*, 105 Md. 232, 65 Atl. 637, 11 Ann. Cas. 956).

And see, as involving the question of negligence, also, *Symmers v. Carroll*, 149 App. Div. 641, 134 N. Y. Supp. 170, affirmed in 207 N. Y. 632, 101 N. E. 698, 47 L. R. A. (N. S.) 196, Ann. Cas. 1914C, 685; *New York & P. R. S. S. Co. v. Ætna Ins. Co.* (D. C.) 192 Fed. 212.

An insurer, accepting the balance of the premium due on a marine policy after a disaster to the vessel insured, does not thereby forfeit its defense that no such loss has occurred as that sued for by the insured (*Searles v. Western Assur. Co.*, 40 South. 866, 88 Miss. 260, 117 Am. St. Rep. 741).

The burden is on plaintiff to show that insurer contracted to indemnify against the particular loss that occurred. *California Canneries Co. v. Canton Ins. Office*, 25 Cal. App. 303, 143 Pac. 549.

Under the evidence it was held a question for the jury whether a barge insured received its injuries in the manner claimed. *Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co.*, 93 S. W. 358, 118 Mo. App. 85.

2882-2886. (d) Perils of sea, lake, or river

2883 (d). The unexpected striking and stranding of a vessel in tidal waters is due to a peril of the sea (*American-Hawaiian S. S. Co. v. Bennett & Goodall*, 207 Fed. 510, 125 C. C. A. 172). So, too, the breaking of the propeller blades of an ocean steamer on a voyage is a loss through perils of the seas, where it is shown that the propeller was new and no latent defects were found therein (*New York & P. R. S. S. Co. v. Ætna Ins. Co.*, 204 Fed. 255, 122 C. C. A. 523, affirming [D. C.] 192 Fed. 212). But the sinking of the vessel, caused by the negligence of the watchman in failing to close the sea valve, is not a loss through a peril of the sea (*Mannheim Ins. Co. v. Charles Clarke & Co.* [Tex. Civ. App.] 157 S. W. 291).

2884 (d). Damage to a lighter caused by the explosion of dynamite which was being loaded on another vessel from a pier is not a peril of the harbor within a marine policy insuring her against such risk (*Listers Agricultural Chemical Works v. Home Ins. Co.* [D. C.] 202 Fed. 1011).

2885 (d). In an action on a policy on a cargo of lumber, an allegation in the complaint that the lumber was shipped on a certain vessel, and that on the voyage such vessel "was by the perils of the sea wrecked and totally lost," is a sufficient allegation that the lumber was lost (*Richmond Cedar Works v. Buckner* [C. C.] 181 Fed. 424).

Where it appears that the vessel was seaworthy at the commencement of the voyage, but that it sank from an unknown cause, it is to be presumed that the loss was occasioned by an unavoidable peril of the sea (*Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co.*, 93 S. W. 358, 118 Mo. App. 85).

2889-2891. (f) Capture—Pirates and assailing thieves

2889 (f). In a policy insuring a vessel on a voyage from Seattle to Vladivostok, during the war between Japan and Russia, against war risks only, a provision that it should cover only "those risks excluded by the 'warranted free of capture, seizure or detention' clause in marine policy or policies," must be construed as referring to marine policies generally, and not to any particular policy on the vessel, and the policy to cover the risk of the vessel's capture and confiscation by the Japanese (*Northwestern S. S. Co. v. Maritime Ins. Co.* [C. C.] 161 Fed. 166).

2892-2893. (h) Fire—Stranding—Collision

2892 (h). A policy insuring a yacht for a year from July 3d, which stipulates that the vessel shall be laid up from November 1st to May 1st, continues in force during the period the vessel is laid up, and the destruction of the yacht by fire on the dock to which the vessel has been fastened is a risk covered by the policy (*Robinson v. Insurance Co. of North America*, 198 N. Y. 523, 91 N. E. 373, reversing 129 App. Div. 1, 113 N. Y. Supp. 105).

Under a policy of marine insurance providing that no claim shall be made for loss or expense resulting from grounding unless caused by stress of weather, the wind, causing stranding of a steamboat insured, comes under the term "stress of weather," though such wind is not a tornado or unusual in the section where the stranding occurs (*Huntington, A. & B. S. Transp. Co. v. Western Assur. Co.*, 57 S. E. 140, 61 W. Va. 324). But a policy insuring against loss for which a tug may become liable to any vessel or cargo by stranding while they shall be in tow alongside or at the end of a hawser does not cover a stranding resulting from a negligent cutting of the

hawser and a negligent abandoning of the tow (*Cahill v. Standard Marine Ins. Co.*, 139 App. Div. 780, 124 N. Y. Supp. 496, affirmed in 204 N. Y. 190, 97 N. E. 486).

Conclusiveness of decree of federal court as to cause of stranding, see *Cahill v. Standard Marine Ins. Co.*, 139 App. Div. 780, 124 N. Y. Supp. 496.

2893 (h). Policies insuring a vessel against "the risk of collision sustained" and against "loss sustained by collision with another vessel" insure against collision with another vessel. But a vessel which struck a wrecked vessel, sunk several hours before and never raised, though practicable to do so at a cost exceeding her value when raised, did not come into collision with another vessel, within the meaning of a policy insuring her against collision with another vessel (*Burnham v. China Mut. Ins. Co.*, 75 N. E. 74, 189 Mass. 100, 109 Am. St. Rep. 627). In *Ferguson v. Providence-Washington Ins. Co.*, 137 Fed. 1018, 70 C. C. A. 62, affirming (D. C.) 125 Fed. 141, the policy insured the owner of a tug against "loss and damage arising from or growing out of any accident caused by collision or stranding resulting from any cause whatever to any other vessel or vessels * * * for which said steamer or its owners may be legally liable." The tug found a scow adrift in the harbor in the night, and towed her to a slip, where she soon after sank at her mooring place. The master of the tug, although having knowledge of the sinking, took no steps to mark the place, and the scow was struck by other vessels entering the slip, and injured so that she became a total loss, and the tug was subjected to liability therefor. It was held that it was immaterial to the liability of the insurer under the policy whether the loss or damage to which the tug was subjected arose out of a towage or a salvage service, or that it was occasioned by the negligence of the master, after the service had terminated, since the tug was adjudged liable therefor, and that the loss was within the terms of the policy.

The word "collision," as used in marine insurance, is no longer strictly limited to that fortuitous injurious contact of navigating vessels which is its obvious and natural signification (*Western Transit Co. v. Brown* [D. C.] 152 Fed. 476). And it was said further in the same case that where two vessels are under the same physical control, as in case of a tug with a tow alongside, so that an impulse given to the tug must necessarily be communicated to the tow, and negligence in the tug's navigation causes an injurious contact between the tow and a third vessel, for which the tug is

held liable, she should be regarded as having been in collision with- in the meaning of the ordinary collision or running-down clause of a marine policy of insurance; but, if the control is only intellectually exercised, or if there is no control at all of one vessel over another, there can be no collision within the meaning of such clause without an actual injurious contact between the vessel insured and some other object. So, applying the rule a running-down clause of a policy of marine insurance, providing that the insured will reimburse the owner for damages paid "if the ship hereby insured shall come into collision with any other ship or vessel," is intended to protect the insured only in case his ship actually herself comes into contact with the injured ship, and there is no liability thereunder where the insured ship by her suction caused another to sheer and come into collision with a third, although she was held liable in damages therefor in a suit for the collision.

Western Transit Co. v. Brown, 161 Fed. 869, 88 C. C. A. 617, affirming (D. C.) 152 Fed. 476; *Coastwise S. S. Co. v. Ætna Ins. Co.* (D. C.) 161 Fed. 871.

2. EXCEPTED RISKS AND PROXIMATE CAUSE OF LOSS

2896-2900. (b) Inherent defects—Unseaworthiness

2898 (b). There is no implied warranty in a policy on cargo that the goods are seaworthy for the voyage, and, where the vessel was seaworthy when the voyage commenced and the cargo was in good condition when received, the insurer is liable for a loss during the voyage from external causes. So in an action on a marine policy on cargo which covered "the risk of craft ^{and}/or raft to and from the vessel," it is not a defense that a lighter employed to land the cargo on which a loss occurred was not seaworthy (*Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co.* [D. C.] 210 Fed. 958). Under a charter of a vessel to carry a cargo of live stock, the fodder to be provided by the charterer, the fodder was an appurtenance of the cargo, and not of the vessel; and the fact that it was not of proper kind, by reason of which there was an excessive mortality among the animals on the voyage, did not render the ship unseaworthy for the voyage, nor affect the right of the owner to recover on policies insuring the freight, including the risk of mortality (*Tweedie Trading Co. v. Western Assur. Co. of Toronto*, 179 Fed. 103, 102 C. C. A. 397, affirming [D. C.] 168 Fed. 962).

Where a vessel used for the Yukon voyage was seaworthy when

(1145)

such voyage commenced, the fact that her boilers afterward developed leaks owing to her frequently stranding, by reason of which she was somewhat delayed, did not invalidate the policy, if but for the delays caused by stranding, which was a peril insured against, she would have completed the voyage in safety (*St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co.*, 157 Fed. 625, 87 C. C. A. 14, 14 L. R. A. [N. S.] 1161).

The burden of proving that a loss of insured cargo by the capsizing of a lighter on which it was loaded was due to unseaworthiness of the lighter rests upon the insured, who relies upon it as a defense. *Thames & Mersey Marine Ins. Co. v. Pacific Creosoting Co.*, 223 Fed. 561, 139 C. C. A. 101, affirming decree *Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co.* (D. C.) 210 Fed. 958.

2903-2908. (d) Negligence

2904 (d). Negligence of the master or crew to relieve the insurer, must be the proximate cause of the loss, rather than the occasion for it. So a policy against perils of the sea covers a loss by stranding or collision although arising from the negligence of the insured or of the master or crew (*American-Hawaiian S. S. Co. v. Bennett & Goodall*, 207 Fed. 510, 125 C. C. A. 172). And where the loss of a cargo was caused by a peril insured against, the fact that the scow in which the cargo was loaded was permitted to drift by reason of the negligence of the crew, did not prevent recovery by the insured (*Western Assur. Co. v. Chesapeake Lighterage & Towing Co.*, 105 Md. 232, 65 Atl. 637, 11 Ann. Cas. 956). That the vessel left port on the return voyage with two blades of the propeller partly broken off was held not to show negligence, relieving the insurer in *New York & P. R. S. S. Co. v. Aetna Ins. Co.*, 204 Fed. 255, 122 C. C. A. 523, affirming (D. C.) 192 Fed. 212.

On the other hand, a policy, insuring against loss for which a tug may become liable to any vessels or cargoes by stranding while they shall be in tow of the tug either alongside or at the end of a hawser, does not cover a stranding of a vessel resulting from the negligent cutting of the hawser and a negligent abandonment of the tow (*Cahill v. Standard Marine Ins. Co., Limited*, of Liverpool, 139 App. Div. 780, 124 N. Y. Supp. 496, affirmed in 204 N. Y. 190, 97 N. E. 486).

Conclusiveness of decree of the federal court as to cause of loss, see *Cahill v. Standard Marine Ins. Co.*, 139 App. Div. 780, 124 N. Y. Supp. 496.

The owner of a vessel may insure himself against his own negligence and against the necessity of entering into any inquiry as to his negligence, where shippers have relieved him from liability for loss by fire; but he remains liable for his negligence. *Symmers v. Carroll*, 101 N. E. 698, 207 N. Y. 632, 47 L. R. A. (N. S.) 196, Ann. Cas. 1914C, 685, affirming 134 N. Y. Supp. 170, 149 App. Div. 611.

Evidence, in an action on a policy for damage to plaintiff's steam yacht from filling while moored, considered, and regarded sufficient to show plaintiff's negligence in not examining her appliances and in not having an anchor watch aboard until she was found seaworthy. *Plummer v. Insurance Co. of North America*, 95 Atl. 605, 114 Me. 128.

2913-2914. (h) Explosions and breakage of machinery

2913 (h). The "external violence" intended by a marine policy, exempting the insurer from liability for loss occasioned by the bursting of the boilers, unless caused by unavoidable external violence, is violence external to the vessel, and not merely external to the boilers (*Quackenboss v. Insurance Co. of North America*, 95 Miss. 872, 50 South. 444). And in the same case it was said, further, that if there was no evidence on which an expert could base his opinion that a boiler explosion was due to violence external to the vessel, the opinion of the expert as to the cause of the explosion was immaterial.

(1147)

XIX. EXTENT OF LOSS AND LIABILITY OF INSURER— MARINE INSURANCE

1. EXTENT OF LOSS IN GENERAL

2920-2922. (a) Actual total loss of vessel

2920 (a). Under marine insurance there is an actual total loss where the subject-matter is wholly destroyed, or lost to the assured, or where there remains nothing of value to be abandoned (St. Paul Fire & Marine Ins. Co. v. Beacham, 97 Atl. 708, 128 Md. 414, L. R. A. 1916F, 1168). A vessel, waterlogged and abandoned by her crew at sea, is not an actual total loss, where the hull and parts of equipment and apparel were saved and brought into port by salvors in a condition capable of being repaired at some cost (Fireman's Fund Ins. Co. v. Globe Nav. Co., 236 Fed. 618, 149 C. C. A. 614).

2921 (a). A finding that there was an actual total loss of steamers, within maritime policies issued thereon just before they were to be towed to Alaska to be used for transportation on a river there, is warranted by evidence that they were so injured that they could not be repaired so as to be safely towed to Alaska (Progresso S. S. Co. v. St. Paul Fire & Marine Ins. Co., 79 Pac. 967, 146 Cal. 279).

2924-2926. (d) Actual total loss of freight

2925 (d). To warrant a recovery on a policy insuring freight, it must appear that because of perils insured against the vessel could not with reasonable repairs and within a reasonable time complete the voyage and earn the freight. Hence an insurer of freight on a voyage of a schooner from Philadelphia to Charleston should be held not liable, on the ground that the vessel was unseaworthy, and also that the owners procured her condemnation and sale at a port of refuge when by reasonable repairs she might have completed the voyage (Stetson v. Insurance Co. of North America [D. C.] 215 Fed. 186).

2926-2928. (e) Partial loss

2927 (e). In Kuh v. British American Ins. Co., 130 App. Div. 38, 114 N. Y. Supp. 268, reversing 59 Misc. Rep. 589, 112 N. Y. (1148)

Supp. 410, the printed part of a marine policy set forth the risks insured against, and provided that no particular average should be paid unless amounting to 5 per cent. A typewritten rider stated the goods insured, and that the insurer would pay particular average if amounting to 3 per cent., each package to be separately insured, the original sworn weights to be taken as a basis of settlement, and insurer to pay for loss of weight in excess of 1 per cent. on the entire shipment. It was held that the insurer was liable for damages amounting to 3 per cent. on each package, and, if there was loss of weight in excess of 1 per cent. on the entire shipment, the insurer was liable for that, whether the loss for any particular package were 3 per cent. or not, but the liability for the 1 per cent. loss was only for the particular risks insured against and was not absolute, irrespective of the cause of the loss. This judgment was affirmed in 195 N. Y. 571, 88 N. E. 1122.

2. CONSTRUCTIVE TOTAL LOSS AND RIGHT TO ABANDON THEREFOR

2928-2931. (a) Right to abandon for constructive total loss

2929 (a). The right to abandon does not depend on the certainty of loss, but upon the high probability of a constructive total loss (*Royal Exch. Assur. Co. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66). And it was said, further, in this case that, though the insured cannot be required to abandon, yet his right depends upon the fact of loss or high probability of loss and not upon what he may deem to be most to his advantage. But an insured is not entitled to abandon a vessel as for a constructive total loss under the "high probability" rule, where the policies contain a provision fixing the right to abandon on certain specified terms. The right of an insured to abandon a vessel as for a constructive total loss must be determined by the situation of the vessel and the conditions existing at the time notice of abandonment is given (*Fireman's Fund Ins. Co. v. Globe Nav. Co.*, 236 Fed. 618, 149 C. C. A. 614).

2930 (a). The insured, where the policy provides that there should be no abandonment as for a constructive total loss unless the cost of the necessary repairs should be equivalent to 75 per cent. of the agreed value, is not compelled to make an effort to save the vessel before he can abandon and sue, but he must prove that the conditions warranting him in abandoning her existed (*Searles v.*

Western Assur. Co., 40 South. 866, 88 Miss. 260, 117 Am. St. Rep. 741).

The right of the insured to abandon must be determined as of the date of the abandonment, without regard to subsequent events, though such may be shown so far as they bear on the pre-existing state of the vessel (*Royal Exch. Assur. Co. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66).

Evidence considered, and held to sustain a finding that there was a constructive total loss, warranting abandonment. *Royal Exch. Assur. Co. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66.

2932-2936. (c) Constructive total loss in general

2933 (c). In *Searles v. Western Assur. Co.*, 88 Miss. 260, 40 South. 866, 117 Am. St. Rep. 741, a policy insuring a barge against unavoidable dangers of rivers, etc., stipulated that there should be no abandonment as for a constructive total loss unless the cost of the necessary repairs required solely by the disaster, exclusive of costs of rescuing the vessel and taking her to a dock, etc., should be equivalent to 75 per cent. of the agreed value. It was held that the insured could not justify an abandonment of the vessel as for a constructive total loss by showing that there were no facilities at the place where the vessel was sunk for raising her and making the expense of bringing the vessel to a dock an element of damage, showing as to him that the vessel was worthless, so as to entitle him to abandon her and sue for a constructive total loss.

In a policy of so-called "disbursement" insurance "against the risk of total or constructive total loss of the vessel only," a provision that "a total ^{and/or} constructive total loss paid by insurers on hull to be a total loss under this policy" is not a limitation of liability, but merely a provision for simplification of proof in the case stated, and payment of a total loss by the hull insurers is not a condition precedent to a recovery on such policy (*Royal Exch. Assur. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66).

2939-2941. (f) Effect of repairs, recovery, or recapture

2941 (f). The tender of a tug by the insurer to the insured after notice of abandonment as a constructive total loss, and after it had been raised and repaired by the insurer, is ineffectual if made subject to conditions which the insured were not bound to accept (*Kahmann & McMurry v. Ætna Ins. Co. of Hartford, Conn.*, 242 Fed. 20, 154 C. C. A. 612).

2941-2944. (g) Amount of damage—Fifty per cent. rule

2941 (g). Under the American rule there is constructive total loss, giving the insured the right to abandon the vessel, where the cost of saving and repairing the vessel exceeds one-half her value (*St. Paul Fire & Marine Ins. Co. v. Beacham*, 97 Atl. 708, 128 Md. 414, L. R. A. 1916F, 1168). And, moreover, a provision in the printed form of a marine policy, adapted to a different kind of risk, that there should be no right of abandonment for a constructive total loss unless the loss should exceed 75 per cent. of the insured value, is controlled by a rider which plainly, by reference to other policies, gave the right of abandonment if the loss exceeded one-half such valuation (*Royal Exch. Assur. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66).

2943 (g). In *Searles v. Western Assur. Co.*, 88 Miss. 260, 40 South. 866, 117 Am. St. Rep. 741, a policy insuring a barge stipulated that there should be no abandonment as for a constructive total loss unless the cost of the necessary repairs required by reason of the disaster should be equivalent to 75 per cent. of the agreed value of the barge. The barge was damaged by a storm. To repair the damage caused solely by the storm would cost less than 25 per cent. of the value of the vessel. It was held that assured could not abandon the barge and recover for constructive total loss. The court held that the words "constructive total loss," in such policy, mean, when applied to damages by a storm, one of the perils insured against, to be such a loss as that the repairs made necessary thereby, exclusive of rescuing the vessel and taking her to the dock, will be equivalent to 75 per cent. of her value.

2944 (g). Under the California statute (Civ. Code, §§ 2703, 2705, 2717), defining constructive total loss, an insurer of freightage under a covering agreement free from partial loss is liable, if the freight on the goods jettisoned to save the vessel together with the costs of salvage and transshipment chargeable to the freight amount to more than one-half the amount of the freight (*Victoria S. S. Co. v. Western Assur. Co. of Toronto*, 167 Cal. 348, 139 Pac. 807).

Evidence considered, and held to sustain a finding that there was a high probability that the loss, present and prospective, incident to the stranding of a vessel, would exceed half her insured value. *Royal Exch. Assur. Co. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66.

2944-2948. (h) Same—Determination of amount

2945 (h). On the question whether there was a high probability of a constructive total loss of a stranded vessel, the customary value of well-directed wrecking services performed in her attempted rescue may be considered, though by reason of the conditional contract under which they were rendered they were not required to be paid for (*Royal Exch. Assur. Co. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66).

3. ABANDONMENT AND EFFECT THEREOF

2950-2952. (b) Time when abandonment must be made

2952 (b). The right to abandon must be exercised promptly (*Royal Exch. Assur. Co. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66). The unexcused failure of the owners of a vessel to give notice of abandonment until four months after she sank, and two months after she had been raised and put in condition for a survey, waives the right to abandon (*Independent Transp. Co. v. Canton Ins. Office* [D. C.] 173 Fed. 564).

2952-2954. (c) Form and sufficiency of abandonment

2953 (c). Notice of abandonment of a vessel to the insurers, reciting the acts done by the owners in raising the vessel after she sank and that they considered her a constructive total loss, specifies a valid ground for abandonment (*Independent Transp. Co. v. Canton Ins. Office* [D. C.] 173 Fed. 564).

Where a portion of the cargo of a stranded vessel was salvaged by strangers, under directions, however, of an agent of the insurer which had written a valued policy on the cargo, and with the consent of the agent of the vessel owners, while the master stood by and gave advice, but exercised no control, the operation was equivalent to an abandonment to the insurer as effecting a surrender of the vessel's lien for freight which could not thereafter be resumed as to the salvaged cargo or its proceeds (*Portland Flouring Mills Co. v. Portland & Asiatic S. S. Co.* [D. C.] 158 Fed. 113).

2955-2956. (e) Acceptance of abandonment

2955 (e). An offered abandonment may be accepted, though the insured has no right to abandon (*Alliance Ins. Co. v. Producers' Cotton Oil Co.*, 108 Miss. 589, 67 South. 58).

2956 (e). The action of the insurers of a stranded vessel in sending an agent to take charge, and to save her, if possible, can-

not be construed against them, on the question whether or not they accepted an abandonment, where it was expressly agreed between them and the owners that such agent should go as the representative of all parties in interest (*Hume v. Frenz*, 150 Fed. 502, 80 C. C. A. 320, reversing [D. C.] 141 Fed. 481).

2957-2959. (f) Same—Taking possession for purpose of repairs

2957 (f). In *Hume v. Frenz*, 150 Fed. 502, 80 C. C. A. 320, reversing (D. C.) 141 Fed. 481, the insurers of a stranded schooner, under policies which provided that no acts in recovering, saving, and preserving the property insured, in case of disaster, should be considered a waiver or an acceptance of an abandonment, sent an agent to take charge of the vessel, under an agreement with the owner that he should represent all interests. By direction of the insurers, in which the owner refused to take part, the agent contracted for the salving of the vessel, and after her release the insurers had her temporarily repaired, and she loaded a cargo and carried the same to San Francisco; her master having remained with her at request of the agent in charge. The owner refused to give any direction respecting her employment, and on her arrival in San Francisco refused to receive her or accept her freight, claiming that she had been abandoned to the insurers, which they at all times denied. They afterward had her permanently repaired, but permitted her to be sold for the cost of such repairs. This was five months or more after the stranding. It was held that their action, in retaining possession for such length of time without permanently repairing, and in finally permitting the vessel to be sold, was not authorized by such clause of the policies, and under the circumstances amounted to a constructive acceptance of the abandonment, whether or not the owner originally had the right to abandon.

2958 (f). An insurer, who raises a sunken vessel and tenders her to the owner in her damaged condition, constructively accepts the abandonment (*Alliance Ins. Co. v. Producers' Cotton Oil Co.*, 108 Miss. 589, 67 South. 58).

2960-2962. (h) Operation and effect of abandonment

2960 (h). The insurer's acceptance, express or implied, of abandonment, precludes a claim that the vessel was not damaged by a peril insured against, or was not a total loss (*Alliance Ins. Co. v. Producers' Cotton Oil Co.*, 108 Miss. 589, 67 South. 58).

2961 (h). An abandonment, rightfully made and accepted, relates back to the time of the loss (*Hume v. Frenz*, 150 Fed. 502, 80 C. C. A. 320, reversing [D. C.] 141 Fed. 481).

The master of a stranded vessel, who remains with her, does so as the agent of whoever may be ultimately determined to be her owner in consequence of that event, and, where an abandonment is subsequently accepted by the insurers, although it may be months afterward, it relates back to the date of the stranding, and the master is from that time their agent, for whose wages they are responsible (*Hume v. Frenz*, 150 Fed. 502, 80 C. C. A. 320, reversing [D. C.] 141 Fed. 481).

2964-2967. (j) Rights and liabilities of insurer after abandonment

2964 (j). A provision in a marine insurance policy, giving the insurer the right to recover and repair the vessel insured on it believing that its interests demanded it at any time, does not defeat the right of the insurer to any defense that it may have to any claim for damage interposed by the insured (*Searles v. Western Assur. Co.*, 40 South. 866, 88 Miss. 260, 117 Am. St. Rep. 741).

The fact that respondent dealt with libellant with knowledge that it was the owner of both the cargo and vessel did not warrant the claim that it was its duty to deliver the goods at their destination at its own expense, which could not have been required of it as carrier after the continuance of the voyage became impossible (*St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co.*, 157 Fed. 625, 87 C. C. A. 14, 14 L. R. A. [N. S.] 1161).

2967 (j). Where the master of a stranded vessel remains with her, he does so as agent of whoever may ultimately be determined to be her owner, and if abandonment is subsequently accepted by the insurer, it becomes liable for the master's wages from the time of the stranding (*Hume v. Frenz*, 150 Fed. 502, 80 C. C. A. 320, reversing [D. C.] 141 Fed. 481).

4. LIMITATION OF LIABILITY BY MEMORANDUM CLAUSE AND EXCEPTION OF PARTICULAR AVERAGE

2968-2969. (a) Nature and purpose of memorandum clause

2969 (a). General average is a contribution by the several interests engaged in a maritime venture to make good the loss of one of them for voluntary sacrifice of a part of the ship or cargo to save the residue of the property and the lives of those on board, or for extraordinary expenses, necessarily incurred for the common bene-

fit and safety of all (California Canneries Co. v. Canton Ins. Office, 25 Cal. App. 303, 143 Pac. 549). It refers to the amount lost to the owner of ship, cargo, freight or other interest by any voluntary sacrifice made or extraordinary expense incurred for the benefit of all (St. Paul Fire & Marine Ins. Co. v. Beacham, 97 Atl. 708, 128 Md. 414, L. R. A. 1916F, 1168). By the term "particular average" in marine insurance is meant a partial loss as distinguished from total loss or general average loss (St. Paul Fire & Marine Ins. Co. v. Beacham, 97 Atl. 708, 128 Md. 414, L. R. A. 1916F, 1168).

A clause in a marine policy, "Warranted free from particular average unless the vessel or craft or interest insured be stranded, sunk, or on fire," means that the insurer does not assume liability for a partial loss, in the absence of the occurrence of the casualties mentioned (Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co. [D. C.] 184 Fed. 947).

2973-2975. (d) Total loss of portion of subject-matter

2974 (d). In California Canneries Co. v. Canton Ins. Office, 25 Cal. App. 303, 143 Pac. 549, it was held that where part of goods covered by marine insurance contract, subject to conditions of standard policy containing warranty against particular average, were damaged by leakage so that they were thrown away, there was only a particular average loss, and not a total or general average loss. And, moreover, there could be no recovery for the total loss of a part of the goods, unless the various lots of goods were separately insured, and there was a total loss of one of such lots.

Liability of a marine insurer for a partial loss considered under a policy limiting liability to a loss amounting to 3 per cent. of insured value. Bull v. Insurance Co. of North America, 218 Fed. 616, 134 C. C. A. 374.

The burden is on plaintiff to show that defendant had contracted to indemnify against the particular loss for which suit was brought. And the burden is on plaintiff to show that goods lost constituted all of one of the lots of goods separately insured (California Canneries Co. v. Canton Ins. Office, 25 Cal. App. 303, 143 Pac. 549).

2975-2977. (e) Restrictions as to cause of loss

2975 (e). The words "on fire," in an exception in a marine policy warranting free from particular average unless the vessel "be stranded, sunk or on fire," held to open the warranty if a structural part was on fire, regardless of extent (Thames & Mersey Marine

(1155)

Ins. Co. v. Pacific Creosoting Co., 223 Fed. 561, 139 C. C. A. 101, affirming decree [D. C.] 210 Fed. 958).

2976 (e). In *Kuh v. British America Assur. Co.*, 130 App. Div. 38, 114 N. Y. Supp. 268, reversing 59 Misc. Rep. 589, 112 N. Y. Supp. 410, the printed part of a marine policy set forth the risks insured against, and provided that no particular average should be paid unless amounting to 5 per cent. A typewritten rider stated the goods insured, and that the insurer would pay particular average if amounting to 3 per cent., each package to be separately insured, the original sworn weights to be taken as a basis of settlement, and insurer to pay for loss of weight in excess of 1 per cent. on the entire shipment. It was held that the insurer was liable for damages amounting to 3 per cent. on each package, and, if there was loss of weight in excess of 1 per cent. on the entire shipment, the insurer was liable for that, whether the loss for any particular package were 3 per cent. or not, but the liability for the 1 per cent. loss was only for the particular risks insured against and was not absolute, irrespective of the cause of the loss.

In *Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co.* (D. C.) 184 Fed. 947, the policy contained a clause: "Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk or on fire." The libel alleged that on November 18th, while the ship was lying in port and before discharge, a fire broke out in the after 'tween-decks of the ship and burned the bulkhead forward of the lazarette, the door thereof, and a considerable portion of dunnage and other parts of the ship. An exhibit, quoting from the ship's protest, recited that the master, on the alarm being given, went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette, which were then full of cargo, and that after considerable trouble the fire was extinguished, with considerable damage. It was held that the words "on fire," as used in the particular average clause, were not synonymous with the word "burnt," contained in former policies, but were indicative of a happening whereby the ship was endangered by actual fire burning some part of it, necessitating extraordinary efforts to prevent serious damage, and that under such definition the libel was not subject to exception as stating a loss from which the insurer was exempted by the particular average clause as matter of law.

For construction of a clause in a marine policy, warranting against particular average "unless the vessel or craft or the interest in-

sured be stranded, sunk or on fire," see, also, *Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co.*, 210 Fed. 958.

5. AMOUNT OF LIABILITY AND DETERMINATION THEREOF

2982-2984. (b) Value of subject-matter

2982 (b). An open policy is one where the value is not settled in the policy, and, in case of loss, must be agreed upon or proved (*Insurance Co. of North America v. Willey*, 212 Mass. 75, 98 N. E. 677). A policy of insurance on a ship, although limited to the single risk of fire, in which the valuation clause in the form used is not filled out, is an open or unvalued marine policy under which in case of loss the value of the vessel is a matter of proof, the value to be taken as of the time of the commencement of the risk; and the insurable value of a ship in an open policy is what she is worth to her owner at the port where the voyage commences, including stores (*Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co.* [D. C.] 185 Fed. 172).

2983 (b). On an open policy of marine insurance on a cargo, the recovery in case of total loss is the value of the cargo at the place of shipment, and does not include a loss of profits (*Leonard v. Bosch*, 73 N. J. Eq. 438, 68 Atl. 56, affirmed in 74 N. J. Eq. 854, 71 Atl. 1134). In *Hood Rubber Co. v. Atlantic Mut. Ins. Co.* (C. C.) 161 Fed. 788, an open marine policy on goods to be transported by rail and lake provided: "This insurance is not to cover more than \$100,000 by any one steamer, or in any one place at one time." It was held that such clause should be construed to mean that the policy was not to cover more than \$100,000 in value carried by any one steamer, so that, goods to the value of \$349,426.70 having been assembled and loaded on a single vessel, and damaged in a disaster to the amount of \$85,996.70, the insurer was only liable for such proportion of the loss as \$100,000 bore to the actual value of the shipment on the vessel.

2984-2986. (c) Same—Valued policies

2984 (c). A valued policy is one which, for the purposes of the risk, fixes a definite value on the insured property, foreclosing dispute, no matter how high the valuation, except in case of fraud or wager. A policy is also a valued policy if, by agreement, the value is to be fixed by reference to some other instrument, such as an invoice. But the agreement must be based on some standard certain, or capable of being made certain, and known to and accepted by

the parties; and it is not a valued policy, if one of the parties may insert any value he chooses in the instrument referred to (*Insurance Co. of North America v. Willey*, 212 Mass. 75, 98 N. E. 677). In the case just cited it was held that a policy providing that the goods were valued as per form attached, which read, "Valued, premium included, at \$5.50 to the pound sterling and if invoiced in American gold, at invoice and 10 per cent.," and which further provided that all risks were to be reported as soon as known and the amounts declared as soon as ascertained, was intended as a valued policy. It was held, further, that a policy on importations, fixing the value at "invoice," meant, in absence of anything to the contrary, the invoice required by Act Cong. June 10, 1890, c. 407, 26 Stat. 131 (U. S. Comp. St. 1901, p. 1886), requiring the invoice on importations exceeding \$100 in value. And an invoice accompanying importation, not giving actual cost or market value, as required by Act Cong. June 10, 1890, c. 407, 26 Stat. 131 (U. S. Comp. St. 1901, p. 1886), is not such an invoice as the policy required to fix value; and hence policy being an open one, insured paying in reliance on such valuations, might recover the excess over the actual value.

2985 (c). On a valued policy on a cargo, the recovery in case of total loss is the whole amount of the agreed value (*Leonard v. Bosch*, 73 N. J. Eq. 438, 68 Atl. 56, affirmed in 74 N. J. Eq. 854, 71 Atl. 1134).

In *New York & Cuba Mail S. S. Co. v. Royal Exch. Assur.*, 154 Fed. 315, 83 C. C. A. 235, reversing (D. C.) 145 Fed. 713, it was held that a marine policy, insuring freight on board, or not on board, valued at £2,062, or actual freight, if more, "full interest admitted, the policy being deemed sufficient proof of interest," should be construed to cover the freight at risk at the valuation specified, though the freight actually at risk was much less in value. And if the policy insured freight on board, or not on board, valued at a specified sum, or actual freight, if more, full interest admitted, and of the actual freight the insured lost the whole, except a small salvage, there having been no abandonment, the percentage of actual freight lost should have been applied to the value in the policy.

2987-2988. (e) Insurance of part of value

2987 (e). Under a policy on a vessel, whether a valued or open policy, where the value of the vessel exceeds the amount of the

insurance, the owner is deemed a co-insurer as to such uninsured part, and the underwriter is only liable for such proportion of the loss as the amount of the insurance bears to the value of the vessel (*Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co.* [D. C.] 185 Fed. 172).

In *Hood Rubber Co. v. Atlantic Mut. Ins. Co.*, 170 Fed. 939, 96 C. C. A. 99, affirming (C. C.) 161 Fed. 788, an open policy of marine insurance on goods to be shipped from time to time by plaintiff by rail and lake contained a marginal clause providing that "this insurance is not to cover more than \$100,000 by any one steamer or in any one place at one time." It was held that such clause did not relate to the amount of the loss, but of the insurance, and that where goods, although comprising different shipments, were assembled on one steamer to the value of \$349,000, the policy was one for \$100,000 on the whole, and the insurer was liable for $\frac{100}{349}$ of a loss occurring, not exceeding \$100,000.

Charters are not entitled to recover against an insurer of cargo because of a jettison of lumber where they intentionally understated the quantity in their bill of lading. *Granger v. Providence-Washington Ins. Co.* [D. C.] 192 Fed. 674.

2989-2990. (g) Particular elements and grounds of liability

2989 (g). Where, on the stranding of certain vessels, the underwriters contracted with a wrecking company to float the vessels for a specified sum by April 15, 1907, but the vessels were not released until July 1st following, the owners were entitled to recover from the underwriters its damages for the delay, not by virtue of the wrecking company's contract, but under the policies of insurance (*Klauck v. Federal Ins. Co.*, 111 N. Y. Supp. 1037, 60 Misc. Rep. 170, 182).

2990-2993. (h) Same—Expenditures

2991 (h). In a marine policy insuring a tug against legal liability for loss or damage caused to its tows or other vessels through collision or stranding, the usual "sue and labor" clause has reference only to the subject-matter of the insurance, and has no application to expenses incurred in defending the tug itself against an unsuccessful suit to establish its liability. Hence such a policy creates no liability on the part of the insurer for the expense of successfully defending the tug against a suit to recover for the stranding of tows (*Munson v. Standard Marine Ins. Co.*, 156 Fed. 44, 84 C. C. A. 210, affirming [C. C.] 145 Fed. 957).

Where there was a mutiny among cattle men, putting the cattle which they had in charge in danger, a deviation to nearest port to obtain new men was justified, and the expenses thereof recoverable from the underwriters (*Tweedie Trading Co. v. Western Assur. Co. of Toronto*. [D. C.] 168 Fed. 962, affirmed in 179 Fed. 103, 102 C. C. A. 397).

In *St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co.*, 157 Fed. 625, 87 C. C. A. 14, 14 L. R. A. (N. S.) 1161, the company issued a policy insuring libelant on a cargo of perishable goods which were to be shipped from Tacoma to Dawson, Yukon Territory, in vessels having refrigerating compartments. The policy insured against ordinary sea perils, including stranding or collisions with any other vessel or with ice, and contained the usual sue and labor clause. The cargo was shipped in one vessel to St. Michaels, and there transferred to another, both owned by the libelant, for transportation up the Yukon river. The latter vessel was delayed several days by stranding, and, owing to the very low stage of water and the lateness of the season, the master telegraphed libelant's manager at Dawson, and had a light draft steamer sent down, to which a portion of the cargo was transferred. On reaching Circle City in October, the river above had become partially closed by ice, and navigation was dangerous. After consultation between libelant's master and manager, the refrigerating vessel was there laid up and the lighter one proceeded until frozen in 70 miles from Dawson. The latter vessel had no refrigerating plant. Both vessels were in danger of being crushed or disabled when the ice broke up in the spring, and in that event both cargoes would have been lost, owing to the nature of the goods and the impossibility of transporting them at that season, without refrigeration, even if not destroyed. After consultation between libelant and a representative of respondent, with the latter's consent, both cargoes were transported to Dawson by land during the winter. It was held that the cargo was in a position of peril from risks insured against, and that the expense of such transportation was within the sue and labor clause of the policy. It was held, further, that the libelant was not required to jettison a part of the cargo for the purpose of lightening the vessel, instead of transferring a part to another vessel; the latter course not being in violation of any provision of the policy.

2993-2995. (i) Same—Repairs

2994 (i). The provision in a policy of marine insurance that a deduction of one-third shall be made from a partial loss claim for repairs to the vessel after the first two years from the date of her original custom house survey is in addition to the one by which the insurer undertakes to be responsible for only two-thirds of the loss in the first instance (*Providence Washington Ins. Co. v. Paducah Towing Co.*, 89 S. W. 722, 28 Ky. Law Rep. 622).

2995-2997. (j) Same—General average contribution

2995 (j). In *British & Foreign Marine Ins. Co. v. Maldonado & Co.*, 182 Fed. 744, 106 C. C. A. 122, it was held that a marine insurance contract insuring contributions in general average, is a contract of indemnity requiring the insurer to pay full indemnity against loss, including loss on account of general average contribution if the total loss of insured is within the limit of the insured valuation. In this case the company issued a marine policy covering a cargo of kapok having an agreed value of \$48,632 against perils of sea, including general average contributions payable by the goods insured. The goods were damaged by fire at sea to the extent of \$7,037.87, which the insurer paid, and on the adjustment in general average it was found that the cargo's contribution was \$22,544.77, which amount libelant paid to the shipowner. In determining this amount the value of the cargo was based on its market value at destination, deducting such expenses as the owner must incur in the event of delivery and will escape in the event of total loss. The contributory value of the cargo was found to be \$66,513.29. It was held that under Civ. Code Cal. § 2744, providing that a marine insurer is liable for loss falling on the insured, through a contribution in respect to the thing insured, required to be made by him towards a general average loss called for by a peril insured against, the insurer's liability was not that proportion of the amount of libelant's contribution in general average as the policy valuation bore to the contributory value of the cargo, but the amount of libelant's general average contribution, together with the amount paid for the loss on the cargo, being less than the policy value, libelant was entitled to recover the full amount so paid in general average; the rule applied being applicable to cargo and ship alike.

In *La Fonciere Compagnie d'Assurances v. Dollar*, 181 Fed. 945, 104 C. C. A. 409, affirming 162 Fed. 563, a steamer, insured under a

term policy providing that the insurer should not be liable for any particular average loss not amounting to 5 per cent. net, was proceeding to Hoquiam, in Grays Harbor, for a cargo of lumber for San Francisco, when, in entering the harbor, she broke her rudder, rendering her unseaworthy. It was agreed between owner and insurer that San Francisco was the nearest port where she could be properly repaired, and by agreement she was towed to Hoquiam, loaded with lumber, and towed to San Francisco, where she was repaired. It was held that the voyage to San Francisco was one of necessity to a port of repairs, and the expense of the towage was in the nature of a general average charge, for the benefit of both owner and insurer, and for which the insurer was liable.

Under a policy insuring a vessel against sea perils, and providing that "in case of claim repairs to be paid without deduction of new for old, whether the average be particular or general," and that "in the event of loss by fire claim for general average contribution and salvage, charges ^{and}/or expenses excepted the liability hereunder shall be in proportion," the insurer is liable for all proper general average charges resulting from a peril insured against (*Risley v. President & Directors of Ins. Co. of North America* [D. C.] 189 Fed. 529). Under the sue and labor clause of a policy insuring freight on a cargo of live stock, where, because of the refusal of the cattlemen shipped to work, the ship was compelled to deviate from her voyage to procure others, the insurers are liable in the first instance for the expenses incurred in such deviation, being subrogated to the right of the insured to recover contribution in general average (*Tweedie Trading Co. v. Western Assur. Co.*, 179 Fed. 103, 102 C. C. A. 397, affirming [D. C.] 168 Fed. 962). Where part of the goods covered by a policy containing a warranty against particular average are damaged by leakage, so that they are thrown away, this is not a general average loss (*California Canneries Co. v. Canton Ins. Office*, 25 Cal. App. 303, 143 Pac. 549).

2997-2999. (k) Liability as affected by duties of owner, master, and crew after loss

2998 (k). It is not incumbent on the insured in a marine policy to raise and dock a vessel and have her repaired, in order to ascertain whether the cost of repairs would justify an abandonment under the terms of the policy (*Kahmann & McMurry v. Ætna Ins. Co. of Hartford, Conn.*, 242 Fed. 20).

2999-3002. (1) Effect of other insurance

3001 (1). In *Southern Cotton Oil Co. v. Merchants' & Miners' Transp. Co.* (C. C.) 179 Fed. 133, a shipowner carried five annual policies of insurance, aggregating \$40,000 covering its loss through liability to cargo owners, each having a rider providing that "the amount hereby insured is to contribute pro rata with the whole amount of insurance on the merchandise at risk." The carrier contracted in a bill of lading issued to a shipper to insure the cargo covered thereby in terms which measured its liability by that of its own insurers. It also held an open policy, which by its terms covered only so much of any loss as was over \$40,000. The shipper also held a policy on the property shipped, which contained provisions that it should be "null and void to the extent of any amount paid by or recoverable from any carrier ^{and}/or bailee," and that "this insurance shall not inure to the benefit of any lighterman or carrier whatsoever." It was held that, as applying to the contract of the carrier with the shipper made by the bill of lading, the "whole amount of insurance on the merchandise at risk," within the meaning of the riders, and which was to be taken into contribution, did not include its open policy, which by its terms did not attach to the same risk as the annual policies, nor the shipper's policy, which was clearly limited not to come into any contribution with the carrier.

3002 (1). The American clause in marine policies of insurance, providing that, in case there is prior insurance, the insurer in such policy "shall be answerable only for so much as the amount of said prior assurance may be deficient towards fully covering the vessel hereby assured," and shall return the premium on the excess, and that in case of subsequent insurance the insurer therein shall nevertheless be answerable for the full extent of the sum insured, is applicable only to cases of double insurance, where the aggregate of the policies exceeds the stated value of the property insured, in which case, if the prior insurance equals such value, the subsequent policy does not attach, and, if less, the subsequent policy attaches only to the extent of the deficiency. In either case the status of the subsequent insurer is determined at the date of the risk, and is not deferred to the occurrence of a loss, nor affected by the amount of such loss, and in case of a partial loss the insurers are liable pro tanto in proportion to the amounts for which their several policies attached (*Leary v. Murray*, 178 Fed. 209, 101 C. C.

A. 529, 21 Ann. Cas. 868). The extent of the liability of a marine insurer under a policy containing the American clause that, "in case of any insurance upon the said premises subsequent in day of date to this policy, the said * * * company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto without right to claim contribution from such subsequent assurers, * * *" cannot be enlarged or affected by the contracts of subsequent insurers, but is the same whether or not any subsequent insurance is written (*Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co.* [D. C.] 185 Fed. 172).

(1164)

XX. RISK AND CAUSE OF LOSS—FIRE AND CASUALTY INSURANCE

1. PLACE AND CAUSE OF LOSS AND EXCEPTED RISKS

3006-3012. (a) Place and circumstances of loss

3008 (a). Where an insurance policy insuring live stock described the stock as situated in a certain section of a township, it merely identified the live stock by its location, and did not restrict the indemnity to losses occurring on the premises described; hence a loss of a brood mare killed at a place eight miles distant where she had been taken to be bred was within the terms of the policy (*Cottrell v. Munterville Mut. Fire & Lightning Ins. Ass'n*, 145 Iowa, 651, 124 N. W. 612).

So recovery can be had on a policy covering merchandise in different buildings situated on two adjoining lots, though the insured property is described as situated on one of the lots, where the insurance agent and owner intended to insure the property while in either or both buildings (*A. B. Tegley Hardware Co. v. Continental Ins. Co.*, 154 Pac. 229, 97 Kan. 127).

3009 (a). Where a fire policy insured certain barns and "contents of barn buildings," and tools and machinery kept in barns insured by the policy were removed to a barn subsequently erected and not covered by the policy, the policy did not cover a loss of the tools by fire while in the new barn (*Wilson v. Farmers' Mut. Fire Ins. Co.*, 121 N. W. 284, 156 Mich. 545).

3012-3014. (b) What constitutes a fire

3012 (b). In *Furbush v. Consolidated Patrons' & Farmers' Mut. Ins. Co.*, 140 Iowa, 240, 118 N. W. 371, it was held that an explosion of gas generated from carbide in an acetylene gas plant, ignited by the striking of a match was a fire, within a policy stipulating for indemnity from loss by fire and containing no exemption of explosions.

It was said in the same case that a "fire" may be both a burning by slow and a burning by rapid combustion, either of which is covered by a stipulation of indemnity for loss by fire, unless a distinction is made in the policy.

3013 (b). In *Western Woolen Mill Co. v. Northern Assur. Co.*, 139 Fed. 637, 72 C. C. A. 1, a large quantity of wool in fleeces covered by fire insurance policies was submerged for several days during a flood, which caused spontaneous combustion, with smoke and great heat, by which the wool was damaged and its fiber destroyed, but there was no visible flame or glow. It was held that the loss was not the result of fire, within the meaning of the policies.

Where a policy provided for the insurance of plaintiff against fire, and her barn having thereafter been knocked down by lightning, but not burned, she was not entitled to recover for the damage to the property by lightning, and an alleged custom to pay for damage caused by lightning in such cases is immaterial (*Sleet v. Farmers' Mut. Fire Ins. Co. of Boone County [Ky.]* 113 S. W. 515, 19 L. R. A. [N. S.] 421).

A fire in a furnace of material so highly inflammable in character as to cause such volumes of heat and smoke to escape through the registers into the rooms as to damage the house and furniture, though without ignition outside of the furnace, is not a "friendly," but a "hostile, fire," within a policy of insurance against "direct loss or damage by fire" (*O'Connor v. Queen Ins. Co. of America*, 122 N. W. 1038, 140 Wis. 388, 25 L. R. A. [N. S.] 501, 133 Am. St. Rep. 1081, 17 Ann. Cas. 1118). See, however, the dissenting opinion of Judge Marshall, in 122 N. W. 1122, 140 Wis. 395, 25 L. R. A. (N. S.) 506, 17 Ann. Cas. 1121.

In *McGraw v. Home Ins. Co. of New York*, 93 Kan. 482, 144 Pac. 821, Ann. Cas. 1916D, 227, however, it is said that injury to a steam boiler from excessive heat, through negligence of some one connected with the insured's business, creates no liability under a policy insuring against direct loss from fire.

3014-3015. (c) Negligence of insured

3014 (c). Mere negligence on the part of an insured resulting in loss, in the absence of stipulations exempting the insurer from liability in such cases, is not a defense against a fire insurance policy, but is one of the risks covered by the insurance.

First Nat. Bank v. United States Fidelity & Guaranty Co. of Baltimore, 137 N. W. 742, 150 Wis. 601; *German Ins. Co. v. Goodfriend*, 97 S. W. 1098, 30 Ky. Law Rep. 218; *Beavers v. Security Mut. Ins. Co.*, 90 S. W. 13, 76 Ark. 595, 6 Ann. Cas. 585; *Bouchard v. Dirigo Mut. Fire Ins. Co.*, 96 Atl. 244, 114 Me. 361.

The same result is reached under the California statute, Civ. Code, § 2629, declaring that an insurer "is not exonerated by the negligence of the insured, or of his agents or others" (*O'Neill v. Union Assur. Society*, 166 Cal. 318, 135 Pac. 1124).

3015 (c). Though an insurance policy makes an act of gross negligence by the tenant the act of the insured, the mere fact that the tenant set fire to some brush near by, from which the house burned, does not prevent recovery on the policy, in the absence of proof of negligence by the tenant (*Bushnell v. Farmers' Mut. Ins. Co.*, 85 S. W. 103, 110 Mo. App. 223).

Under fire policies providing, "This company shall not be liable for loss caused by * * * neglect of the insured to use all reasonable means to save and preserve the property at and after the fire," the neglect of insured to use all reasonable means to save the property would not avoid the policies, but would only prevent a recovery for so much of the property as could have been saved by the use of reasonable means at insured's command (*German-American Ins. Co. v. Brown*, 87 S. W. 135, 75 Ark. 251).

So, under the North Dakota standard form of policy, where no proper diligence is exercised by insured to save personal property, there can be no recovery on the policies (*First Nat. Bank v. German-American Ins. Co.*, 23 N. D. 139, 134 N. W. 873).

3015-3018. (d) Willful destruction of property by insured

3015 (d). Though there is no clause in a fire policy that insurer shall not be liable if the property is destroyed by insured, it will not be liable if the property is destroyed by his voluntary, fraudulent, corrupt, or wrongful act (*Bindell v. Kenton County Assessment Fire Ins. Co.*, 128 Ky. 389, 108 S. W. 325, 33 Ky. Law Rep. 385, 17 L. R. A. [N. S.] 189, 129 Am. St. Rep. 303).

So in an action by a corporation on a policy, if M. had control, management, and power of disposition of the property the same as if he had title, or if there was an understanding among the stockholders that M. should burn the property in order that they might collect the insurance, and M. did willfully set fire to the store as alleged, plaintiff could not recover (*Meily Co. v. London & L. Fire Ins. Co.* [C. C.] 142 Fed. 873, affirmed 148 Fed. 683, 79 C. C. A. 454).

3016 (d). An insane person, burning his insured property does not relieve insurer of liability, any more than would the destruction of it by insured through his carelessness or negligence, not amount-

ing to fraud or willful misconduct (*Bindell v. Kenton County Assessment Fire Ins. Co.*, 128 Ky. 389, 108 S. W. 325, 33 Ky. Law Rep. 385, 17 L. R. A. [N. S.] 189, 129 Am. St. Rep. 303).

Under a provision in a fire insurance policy that the policy shall be void "in case of any fraud * * * touching any matter relating to this insurance or the subject thereof," and a provision that the policy shall become void "if the hazard be increased by any means within the control or knowledge of the insured," it is not a good defense that, while a plan and conspiracy of the corporation and its officers to burn the property still existed, and was in process of accomplishment, the property was burned (*Ampersand Hotel Co. v. Home Ins. Co.*, 91 N. E. 1099, 198 N. Y. 495, 28 L. R. A. [N. S.] 218, 19 Ann. Cas. 839, reversing order [1909] 115 N. Y. Supp. 480, 131 App. Div. 361).

3017 (d). The act of an owner in procuring a fire policy for the benefit of the mortgagee without regard to any act of the owner is not contrary to public policy, and the contract is enforceable at the suit of the mortgagee (*Kelsey v. Agricultural Ins. Co. of Watertown*, N. Y., 78 N. J. Eq. 378, 79 Atl. 539).

3018-3020. (e) Matters subsequent to fire

3018 (e). In *Russell v. German Fire Ins. Co.*, 111 N. W. 400, 100 Minn. 528, 10 L. R. A. (N. S.) 326, it was held that if, under all the circumstances, the parties to a contract of insurance could have reasonably foreseen that a fire might leave the wall of an adjacent building unsupported, subject to the action of the wind, and that it might be blown over and fall on the insured building, such contingency was an element of the risk. It was said in the same case that it is not necessarily the last link in the chain which constitutes proximate cause, but that which is the procuring cause; that from which the effect might be expected to follow without the concurrence of any unforeseen circumstances.

3019 (e). Damages from efforts in good faith to save property from fire are within the loss covered by a policy, as is also a loss by theft, unless expressly excluded.

Farmers' & Merchants' Ins. Co. v. Cuff, 29 Okl. 106, 116 Pac. 435, 35 L. R. A. (N. S.) 892; *National Life Ins. Co. v. Same*, 29 Okl. 113, 116 Pac. 437; *German-American Ins. Co. v. Same*, 29 Okl. 114, 116 Pac. 438; *Queen Ins. Co. v. Patterson Drug Co. (Fla.)* 74 South. 807, L. R. A. 1917D, 1091.

3020 (e). An insurance policy which covers loss of rents resulting from damage by fire does not include indemnity against extra

expense incurred by the insured in hurrying the repairs made necessary by the fire, and where there is no actual loss of rents there is no liability under the policy (*Hartford Fire Ins. Co. v. Northern Trust Co.*, 127 Ill. App. 355).

3020-3025. (f) Risks specially excepted

3020 (f). Where a fire policy expressly excepts certain occasions of fire, all other occasions or causes are included in the risk (*Bouchard v. Dirigo Mut. Fire Ins. Co.*, 96 Atl. 244, 114 Me. 361).

3021 (f). In a fire policy, a clause excepting "loss caused directly or indirectly by invasion, insurrection, riot," etc., must be construed as an exemption of the insurer from liability for a loss from fire caused by a riot; a loss otherwise than by fire being entirely outside the terms of the policy (*Luckett-Wake Tobacco Co. v. Globe & Rutgers Fire Ins. Co.* [C. C.] 171 Fed. 147).

In such a case the word "indirectly" covers all the causes of loss mentioned, and will exempt the company from liability where the loss occurred indirectly by order of any civil authorities where that exception is included in the policy, as well as where it resulted directly therefrom (*Hocking v. British America Assur. Co. of Toronto, Canada*, 62 Wash. 73, 113 Pac. 259, 36 L. R. A. [N. S.] 1155, Ann. Cas. 1912C, 965).

The liability of the company usually turns on whether the unlawful acts were sufficient to constitute a riot.

Phenix Ins. Co. of Brooklyn v. Jones, 16 Ga. App. 261, 85 S. E. 206 (house on several occasions damaged by dynamite thrown or placed by an unknown person, not a riot; company liable); *American Central Ins. Co. v. Stearns Lumber Co.*, 140 S. W. 148, 145 Ky. 255, 36 L. R. A. (N. S.) 566, Ann. Cas. 1913B, 628 (marshal's posse, though it burned the hotel, not a riot; the direct cause of the loss being the marshal's unauthorized act and hence the insurer not released from liability by the excepted risks of "riot" and "order of any civil authority"); *Spring Garden Ins. Co. v. Imperial Tobacco Co.*, 132 Ky. 7, 116 S. W. 234, 20 L. R. A. (N. S.) 277, 136 Am. St. Rep. 164 (a body of 100 or more men, armed and disguised, burned the property and intimidated and terrorized the inhabitants and civil authorities; held to be a riot, and the company not liable).

3023 (f). Where the fire resulted from the fumigation of the insured house against smallpox by order of the city board of health, its order directing the fumigation of the house was the preponderat-

ing or producing cause of the fire, and not the negligence of the health officer in fumigating (*Hocking v. British America Assur. Co. of Toronto, Canada*, 62 Wash. 73, 113 Pac. 259, 36 L. R. A. [N. S.] 1155, Ann. Cas. 1912C, 965).

A policy insuring rents provided that the company should not be liable for loss directly or indirectly caused by order of any civil authority. It was held that insurer was not liable for loss of rents during a period in which rebuilding was delayed because building permits were refused by the city authorities pending definite decision concerning certain street improvements (*Palatine Ins. Co., Limited, of Manchester, Eng., v. O'Brien*, 107 Md. 341, 68 Atl. 484, 16 L. R. A. [N. S.] 1055).

In a suit on a fire insurance policy containing a clause exempting the insurance company from liability for loss by theft, defendant was not liable for property insured which was stolen during the fire (*Sklencer v. Fire Ass'n of Philadelphia*, 60 Atl. 232, 72 N. J. Law, 48).

3025 (f). Under a fire insurance policy, exempting the insurer from loss by fire occasioned by locomotives, the insurer was liable for the destruction of buildings from fire communicated from 'a building on the right of way, though such building was set on fire by sparks from a locomotive (*Montgomery v. Southern Mut. Ins. Co.*, 88 Atl. 924, 242 Pa. 86, 51 L. R. A. [N. S.] 518).

In *Preston v. Aetna Ins. Co.*, 85 N. E. 1006, 193 N. Y. 142, 19 L. R. A. (N. S.) 133, reversing 103 N. Y. Supp. 638, 118 App. Div. 784, however, it was held that, where a policy insuring an automobile provided that the policy should not cover loss or damage caused by fire originating "within" the vehicle, the word "within" was used as the antithesis of "extrinsic" or "without," and not as a synonym of "interior," so the policy did not cover loss by fire resulting from the explosion of gasoline, which, after an accident to the automobile, flowed from its gasoline tank and covered the surface of certain water in a ditch, and was thereafter ignited from fire burning in an oil lamp on the automobile.

A number of important cases on excepted risks have arisen out of the San Francisco earthquake. Thus it has been held that a clause in a fire insurance policy providing that the insurer should not be liable "for loss caused directly or indirectly by invasion, * * * or for loss or damage occasioned by or through * * * earthquake," does not exempt the company from liability for a loss

caused by fire alone, although such fire spread from other property, in which it was directly caused by an earthquake.

Williamsburgh City Fire Ins. Co. of Brooklyn v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103; *Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co. of Brooklyn*, 158 Cal. 367, 111 Pac. 4; *Norwich Union Fire Ins. Society v. Stanton*, 191 Fed. 813, 112 C. C. A. 327; *Baker & Hamilton v. Williamsburgh City Fire Ins. Co. of Brooklyn, N. Y. (C. C.)* 157 Fed. 280. *Contra: Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co. of Brooklyn (C. C.)* 157 Fed. 285.

The insurer is not exempted from liability in such case by Civ. Code Cal. § 2628, which provides that, "when a peril is specially excepted in a contract of insurance, a loss which would not have occurred but for such peril is thereby excepted, although the immediate cause of the loss was a peril which was not excepted," since the peril "specially excepted" is fire directly caused by earthquake, and it was not the intention of the statute to create an exemption wider than that stipulated for by the parties.

Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co. of Brooklyn, 158 Cal. 367, 111 Pac. 4; *Williamsburgh City Fire Ins. Co. of Brooklyn v. Willard*, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103.

In *McEvoy v. Security Fire Ins. Co. of Baltimore*, 73 Atl. 157, 110 Md. 275, 22 L. R. A. (N. S.) 964, 132 Am. St. Rep. 428, it was held that a fire policy stipulating that insurer shall not be liable for loss caused, directly or indirectly, by invasion, civil war, etc., "or (unless fire ensues and in that event for the damage by fire only) by explosion of any kind * * * or the bursting of a boiler, or earthquake," exempts insurer from liability for direct loss caused by an earthquake, but not for loss from fire caused by an earthquake.

Where a policy insured against all direct loss by fire except as thereafter provided, and then declared that insurer should not be liable for loss caused directly or indirectly by earthquake, the exception was loss by fire caused directly or indirectly by earthquake, and not loss caused directly or indirectly by earthquake alone.

Richmond Coal Co. v. Commercial Union Assur. Co., Limited, of London, England (C. C.) 159 Fed. 985; *Pacific Union Club v. Commercial Union Assur. Co.*, 107 Pac. 728, 12 Cal. App. 503; *Same v. Palatine Ins. Co.*, 107 Pac. 733, 12 Cal. App. 515; *German Savings & Loan Society v. Commercial Union Assur. Co., Limited, of London, Eng.*, 187 Fed. 758, 109 C. C. A. 506.

In such cases, however, insurer is liable for loss by fire where an earthquake broke the water mains, causing the water to escape so that the fire department of the city had no water with which to extinguish the fire occurring the next day; the earthquake not being, in legal contemplation, the cause of the fire, for none of the parties contemplated that earthquake might cut off the water supply.

Pacific Union Club v. Commercial Union Assur. Co., 107 Pac. 728, 12 Cal. App. 503; *Same v. Palatine Ins. Co.*, 107 Pac. 733, 12 Cal. App. 515; *Commercial Union Assur. Co. v. Pacific Union Club*, 169 Fed. 776, 95 C. C. A. 242; *Norwich Union Fire Ins. Society of Norwich & London, Eng., v. Same*, 169 Fed. 778, 95 C. C. A. 244.

It was also stated in *Pacific Union Club v. Commercial Union Assur. Co.*, 107 Pac. 728, 12 Cal. App. 503, and *Same v. Palatine Ins. Co.*, 107 Pac. 733, 12 Cal. App. 515, that in an action on the policy the rule of proximate cause in actions for breach of contract, and not for torts, governs in determining whether under the contract the excepted peril directly or indirectly induced the happening of the peril insured against.

In *Luckett-Wake Tobacco Co. v. Globe & Rutgers Fire Ins. Co.* (C. C.) 171 Fed. 147, the fact that an insurance agent, who issued policies to plaintiff, urged as an inducement to procure such insurance the very danger which afterward caused a loss, but which was within the exception contained in the policies, does not constitute a waiver by the insurer of such exception, where there was no agreement to that effect, and the policies were delivered and accepted with such clause retained.

3025-3029. (g) Same—Explosions

3027 (g). Where a fire insurance policy provided that the insurer would not be liable for loss by explosion, it has been held that, if a fire precedes an explosion and the latter is an incident of the former and caused by it, insured may recover for his entire loss; but if the explosion precedes the fire, and is not caused by it, insured can only recover for the loss by fire.

German-American Ins. Co. v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; *Hall & Hawkins v. National Fire Ins. Co.*, 92 S. W. 402, 115 Tenn. 513, 112 Am. St. Rep. 870, 5 Ann. Cas. 777; *Wheeler v. Phenix Ins. Co. of Brooklyn*, 96 N. E. 452, 203 N. Y. 283, 38 L. R. A. (N. S.) 474, Ann. Cas. 1913A, 1297, reversing 120 N. Y. Supp. 1151, 136 App. Div. 909; *German Baptist Tri-County Mut. Protective Ass'n of Cass, Miami and Howard Counties v.*

Conner (Ind. App.) 115 N. E. 804; Fire Ass'n of Philadelphia v. Evansville Brewing Ass'n (Fla.) 75 South. 196.

3028 (g). A fire causing an explosion and rendering an insurer liable for the damage caused by the explosion under a policy excluding explosions as causes of loss must be an actual fire according to the common use of the term, and not a blaze produced by lighting a match, gas jet, or lamp.

German American Ins. Co. v. Hyman, 94 Pac. 27, 42 Colo. 156, 16 L. R. A. (N. S.) 77; Stephens v. Fire Ass'n of Philadelphia, 123 S. W. 63, 139 Mo. App. 369; Ross v. Liverpool & London & Globe Ins. Co., 83 N. J. Law, 340, 84 Atl. 1050; Home Lodge Ass'n v. Queen Ins. Co. of America, 21 S. D. 165, 110 N. W. 778; Maryland Casualty Co. v. Cherryvale Gas, Light & Power Co., 162 Pac. 313, 99 Kan. 563, L. R. A. 1917C, 487.

In *German Savings & Loan Society v. Commercial Union Assur. Co., Limited, of London, Eng.*, 187 Fed. 758, 109 C. C. A. 506, a fire policy provided that defendant should not be liable for loss caused directly or indirectly by earthquake, or (unless fire ensues and, in that event, for damages by fire only) by explosion of any kind. Plaintiff's property was destroyed by fire after the San Francisco earthquake. It was held that, if the fire on the first premises, not the plaintiff's, was caused by an explosion, plaintiff was entitled to recover, but that if the fire was communicated to such premises by and caught from an earthquake, and that after the premises had been ignited therefrom the fire came in contact with an explosive causing it to explode, and then continued to burn to and consume plaintiff's property, such fire was not within the provision of the policy covering a fire ensuing on an explosion, but would still retain its character of an earthquake-caused fire, in which event the origin of the fire would not be changed by the intervention of the explosion, and plaintiff would not be entitled to recover. Of similar import is *Richmond Coal Co. v. Commercial Union Assur. Co., Limited, of London, England*, 169 Fed. 746, 95 C. C. A. 178, 17 Ann. Cas. 1092, reversing (C. C.) 159 Fed. 985.

3029-3030. (h) Same—Fall of building

3029 (h). A clause of a policy rendering it void if the building or any part thereof fell, except as a result of fire, does not preclude recovery on the policy, where no substantial part of the building had fallen or become untenable, and plaintiff had not abandoned it before the fire (*Phenix Ins. Co. of Brooklyn v. Jones* [Ga. App.] 85 S. E. 206).

Such a clause, however, refers to the fall of the general building or any part thereof, and not to the particular portion insured as a store, and where one wall fell and a fire followed and the goods were damaged, though the fire did not reach the store, no recovery can be had under the policy (*Nelson v. Traders' Ins. Co.*, 74 N. E. 421, 181 N. Y. 472, affirming order [1903] 83 N. Y. Supp. 220, 86 App. Div. 66). Also the owner of goods cannot recover if the building fell from some cause other than fire, though it caught fire before it fell, if none of the goods were injured by the fire before the collapse of the building (*Ogburn-Griffin Grocery Co. v. Orient Ins. Co.*, 188 Ala. 218, 66 South. 434).

3030 (h). An exception in a policy of fire insurance to which a lightning clause was attached that "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease," refers to the falling of the building in consequence of causes other than those insured against, and hence does not except damages resulting from fall of the wall as a result of lightning (*Cummins v. Pennsylvania Fire Ins. Co.*, 153 Iowa, 579, 134 N. W. 79, 37 L. R. A. [N. S.] 1169, Ann. Cas. 1913E, 235).

In *Wiig v. Girard Fire & Marine Ins. Co. of Philadelphia, Pa.*, 100 Neb. 271, 159 N. W. 416, L. R. A. 1917E, 1061, it was held that where a fire policy provided that, if the building fell, except as a result of fire, insurance should cease, the insurer is liable where the building began to burn, and a tornado then removed the upper part of the building, which continued to burn till destroyed.

3030-3033. (i) Casualty insurance in general

3031 (i). Where a horse sustained an incurable injury, the fact that plaintiff consented that it be killed in order to end its suffering was no defense to an action on the policy.

Live Stock Ins. Ass'n of Huntington v. Edgar, 56 Ind. App. 489, 105 N. E. 641; *National Live Stock Ins. Co. v. Elliott*, 60 Ind. App. 112, 108 N. E. 784.

Under an insurance policy on a horse, providing that the insurer would not be liable for loss caused "by order of any civil authority," the insurer was not liable where the horse was shot on the advice of a veterinarian, because it had an incurable, contagious disease; and it appearing that if a state officer had been notified of the condition of the horse it would have been killed, under L. O. L. §§

5651, 5652 (*Joplin v. National Live Stock Ins. Ass'n*, 61 Or. 544, 122 Pac. 897, 44 L. R. A. [N. S.] 569).

In *Indiana & Ohio Live Stock Ins. Co. v. Krennek* (Tex. Civ. App.) 144 S. W. 1181, a live stock insurance policy was held, to prohibit recovery, where the animal died without the county named in the policy.

3032 (i). A policy covering breakage of glass in a building covers loss by breakage by the wrongful act of a third person (*Weaver v. New Jersey Fidelity & Plate Glass Ins. Co.*, 56 Colo. 112, 136 Pac. 1180, 51 L. R. A. [N. S.] 414).

A plate glass insurer, under a policy exempting it from liability for loss resulting directly or indirectly from fire, is not liable however for breakage caused by explosion of dynamite, 700 feet away, in a warehouse which was set on fire by an unknown person (*Jones v. Metropolitan Casualty Ins. Co.*, 144 Wis. 66, 128 N. W. 280, Ann. Cas. 1912A, 1091).

Similarly the insurer is not liable for the destruction of glass by an explosion caused by heat from a fire, both at a distance from the glass, under the provision of a plate glass policy, excepting from liability for damage resulting directly or indirectly from fire (*Metropolitan Casualty Ins. Co. of New York v. Bergheim*, 21 Colo. App. 527, 122 Pac. 812; *Fidelity & Casualty Co. of New York v. Williams*, 21 Colo. App. 539, 122 Pac. 815).

Nor is the insurer liable for the breaking of plate glass by dynamite used to prevent the spread of a fire within a provision of the policy requiring the breakage to be the result of accident (*Frisbie v. Fidelity & Casualty Co.*, 112 S. W. 1024, 133 Mo. App. 30).

Where plaintiff occupied the second floor of the building equipped with the sprinkler system while the fifth floor was rented to another, the policy insuring plaintiff against direct loss caused by water discharged or that might leak from the automatic sprinkler erected in the portion of the building occupied by assured described, etc., did not cover a loss sustained by leakage of the sprinkler system on the fifth floor, which seeped through the floor and ceilings and injured plaintiff's property (*Bottomley v. Royal Ins. Co.*, 76 N. E. 463, 190 Mass. 73).

In *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.*, 201 Fed. 617, 120 C. C. A. 45, Ann. Cas. 1915A, 637, however, a provision of a boiler insurance policy limiting liability for any loss or damage "resulting from any one explosion" was construed as limiting liability for any one disaster to conform to St.

Wis. 1898, § 1966—41, and the loss caused by the explosion of three boilers was held due to one explosion as the proximate cause.

3033 (i). A burglary insurance policy has been held to impose liability neither where money was taken from a safe by the use of the combination thereof, furnished the burglar by an employé (*First Nat. Bank v. Maryland Casualty Co.*, 162 Cal. 61, 121 Pac. 321, Ann. Cas. 1913C, 1170), nor where the only force was applied to the frame and cash box within the safe (*Frankel v. Massachusetts Bonding & Ins. Co.* [Mo. App.] 177 S. W. 775), nor where an officer of the bank was held up and required to open the bank and safe; the word "tool" referring to burglars' tools and explosives (*Maryland Casualty Co. v. Ballard County Bank*, 134 Ky. 354, 120 S. W. 301).

Similarly a policy of burglary insurance, conditioned against liability except for loss by an "outside job," with visible marks of force in entrance or exit, does not cover a burglary where the culprits drugged the night watchman, entered through doors by keys, and left through an elevator, the door to which they opened in the usual way (*United Sponging Co. v. Preferred Acc. Ins. Co. of New York*, 161 N. Y. Supp. 309, 97 Misc. Rep. 396).

Nor does it cover a case of entry and exit by opening an unlocked door (*Rosenthal v. American Bonding Co. of Baltimore*, 100 N. E. 716, 207 N. Y. 162, 46 L. R. A. [N. S.] 561, reversing judgment 128 N. Y. Supp. 553, 143 App. Div. 362, which had approved [Sup.] 124 N. Y. Supp. 905).

In *Sloan v. Massachusetts Bonding & Ins. Co.*, 177 App. Div. 483, 164 N. Y. Supp. 206, it was held that under a burglary policy, while fact that there was fire in building would not relieve insurer, if such fire contributed to loss by making work of thief easy, it would defeat recovery.

Where some one entered a bank building and started a fire on the floor, whereby the vault door was injured and the furniture destroyed, but there was nothing to show that any attempt had been made to get into the vault, there was no liability under a policy whereby the bank had been insured against damage to the vault or to the premises or fixtures caused by any person making an attempt to enter the vault (*Mt. Eden Bank v. Ocean Accident & Guarantee Co.*, 96 S. W. 450, 29 Ky. Law Rep. 765).

In *Michaels v. Fidelity & Casualty Co. of New York*, 105 S. W. 783, 128 Mo. App. 18, it was held that a separate laundry, under lock and key, in the basement of a flat house, set aside for the use

of an occupant of one of the flats, used by him for laundry purposes, cooking, storing of vegetables, and wherein he stored trunks packed with winter clothing, is not within the provision of a policy of burglary insurance which provides that if the assured is the occupant of an apartment, the insurance covers goods in a "locked store-room provided for the exclusive use of the assured by the landlord in the same house" to the extent of \$50.

In *Rosenthal v. American Bonding Co. of Baltimore*, 128 N. Y. Supp. 553, 143 App. Div. 362, it was stated that a policy insuring against loss by burglary of any merchandise in premises situated in the state of New York insures against burglary as defined by the statutes of New York, and the policy is not limited to common-law burglary.

A policy of insurance on an automobile, insuring against "direct loss by burglary, theft, or larceny," covers neither a taking by a former owner under a claim of ownership (*Bigus v. Pacific Coast Casualty Co.*, 145 Mo. App. 170, 129 S. W. 982), nor damages to the machine when taken and used by another without the owner's consent but without intent to steal.

Phoenix Assur. Co., Limited, of London, v. Eppstein (Fla.) 75 South. 537, L. R. A. 1917F, 540; *Stuht v. Maryland Motor Car Ins. Co.*, 156 Pac. 557, 90 Wash. 576; *Michigan Commercial Ins. Co. of Lansing v. Wills*, 57 Ind. App. 256, 106 N. E. 725; *Hartford Fire Ins. Co. v. Wimbish*, 12 Ga. App. 712, 78 S. E. 265.

Neither does it cover taking by one acting under an honest belief that he was entitled to its possession, though he used a trick or device to obtain it.

Rush v. Boston Ins. Co., 88 Misc. Rep. 48, 150 N. Y. Supp. 457; *Delafield v. London & Lancashire Fire Ins. Co.*, 177 App. Div. 477, 164 N. Y. Supp. 221.

On a policy of theft insurance on an automobile, where insurer recovered the stolen car, insured would be indemnified by its restoration to place where stolen and payment of damages by reason of the theft (*Kansas City Regal Auto Co. v. Old Colony Ins. Co.*, 196 Mo. App. 255, 195 S. W. 579).

A conditional seller can, however, recover from the theft insurer the unpaid price, though the theft was committed by the conditional buyer, whose interest was also covered by the policy (*Neal, Clark & Neal Co. v. Liverpool & London & Globe Ins. Co.*, 178 App. Div. 730, 165 N. Y. Supp. 204).

It has also been held that a borrower of an automobile, failing to return it, is guilty of converting it, within the meaning of such a policy, and that the insurer is liable for diminution in value of the automobile by wrongful use thereof by one converting it (*Federal Ins. Co. v. Hiter*, 164 Ky. 743, 176 S. W. 210, L. R. A. 1915E, 575).

A policy providing that "loss by theft, robbery or pilferage, by persons not in the employment, service or household of the assured, is covered," covers theft by an employé of a public garagekeeper at whose garage the car was kept (*Schmid v. Heath*, 173 Ill. App. 649).

In *Siegel v. Union Assur. Society of London*, 90 Misc. Rep. 550, 153 N. Y. Supp. 662, the owner of an automobile was held to have parted with ownership thereof by leaving it with accused for sale or return, within Sales Act, § 100, and a conversion of the proceeds of its sale was not a "theft, robbery, or pilferage," within a policy.

The skidding of the hind wheels of an auto truck into a gutter, upsetting it, has been held not a derailment within a certificate of insurance of transportation (*Graham v. Insurance Co. of North America*, 220 Mass. 230, 107 N. E. 915).

The word "collision" as used in a policy insuring an automobile against loss resulting from "collision," is not to be confined to a case where both of the colliding objects were in motion, but means "striking against."

Lepman v. Employers' Liability Assur. Corporation, Ltd., of London, 170 Ill. App. 379; *Harris v. American Casualty Co. of Reading, Pa.*, 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846; *Wetherill v. Williamsburgh City Fire Ins. Co.*, 60 Pa. Super. Ct. 37.

Under policy insuring automobile against collision, however, there could be no recovery for damages caused by second floor of garage falling upon it (*O'Leary v. St. Paul Fire & Marine Ins. Co.* [Tex. Civ. App.] 196 S. W. 575).

Insurer of an automobile against damage by collision with any other automobile, vehicle, or object, excluding damage caused by striking any portion of the roadbed, is not liable for damage to the automobile running off the main road and down a bank into a river (*Wettengel v. United States Lloyds*, 147 N. W. 360, 157 Wis. 433, Ann. Cas. 1915A, 626).

Nor is he liable where the automobile, insured for damages caused solely by collision with another object, the policy excluding damages from striking any portion of the roadbed, on being driven down a roadway skidded, so that the rear wheels were thrust across

a granitoid guttering and a grass plat, against a sidewalk; the guttering and sidewalk not being a portion of the roadbed within the meaning of the policy sued on (*Stix v. Travelers' Indemnity Co. of Hartford, Conn.*, 175 Mo. App. 171, 157 S. W. 870). The curbing, however, is a portion of the roadbed, and no recovery can be had for a collision therewith (*Gibson v. Georgia Life Ins. Co.*, 17 Ga. App. 43, 86 S. E. 335).

In *Harris v. American Casualty Co. of Reading, Pa.*, 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846, however, it was held that a provision in a policy that damages to an automobile from collision due to upsets shall be excluded does not defeat recovery, where an automobile ran off a highway bridge and landed at the bottom of the stream upside down; the upset being rather the result of the collision than the reverse.

Where plaintiff's treasurer, with money in inside pocket of buttoned-up coat, encountered thieves in elevator, one of whom crowded him against others, who took money without his knowledge, there was a loss within policy insuring against direct loss by robbery by force and violence, commonly known as highway robbery or holdup (*Duluth St. Ry. Co. v. Fidelity & Deposit Co. of Maryland*, 136 Minn. 299, 161 N. W. 595, L. R. A. 1917D, 684).

Liability of an insurer, under an indemnity policy covering loss of time of an employé by being out of employment, is not limited to the inquiry as to the cause assigned by the employer for the insured's suspension or discharge (*Stitt v. Locomotive Engineers' Mut. Protective Ass'n*, 177 Mich. 207, 142 N. W. 1110).

Plaintiff locomotive engineer discharged for visiting saloons and leaving his engine without permission could not, under the terms of the policy insuring him against discharge, show that he left his engine by permission and visited saloons while off duty for the purposes of the superintendent (*Palmer v. Locomotive Engineers' & Conductors' Mut. Protective Ass'n*, 189 Mich. 35, 155 N. W. 357).

3033-3035. (j) Insurance against flood, storm, or lightning

3033 (j). "Windstorm," as used in a policy insuring against loss of live stock by tornado, cyclone, or windstorm means more than an ordinary gust of wind no matter how prolonged (*Jordan v. Iowa Mut. Tornado Ins. Co. of Des Moines*, 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266). It is stated in the same case, however, that a policy insuring against loss of live stock by windstorms, cyclones, or tornadoes is not limited to loss due to a direct physical

injury to the stock as by throwing them to the ground, driving them against some obstacle or the hurling of some object against them, and that where a windstorm was the efficient cause of the loss the fact that other causes contributed to the loss does not relieve the insurer from liability.

3034 (j). In *Russell v. German Fire Ins. Co.*, 111 N. W. 400, 100 Minn. 528, 10 L. R. A. (N. S.) 326, plaintiff's building was insured from damages by fire. An adjoining building was consumed, leaving an unsupported brick wall some 30 feet higher than insured's building, and the wall fell in a strong wind damaging plaintiff's building. It was held that the words in a lightning clause, "and in no case to include loss or damage by cyclone, tornado, or windstorm," attached as a rider to the policy, are limited to the rider, and do not affect the contract as contained in the policy.

In *Cummings v. Pennsylvania Fire Ins. Co.*, 153 Iowa, 579, 134 N. W. 79, 37 L. R. A. (N. S.) 1169, Ann. Cas. 1913E, 235, however, it was held that under a fire insurance policy containing a clause extending the policy to "any direct loss or damage caused by the lightning" meaning thereby the commonly accepted use of the term "lightning," and excluding loss by cyclone or windstorm, damage to goods from water and debris, into which they were thrown by the falling of the wall as a result of lightning, was the direct and natural consequence of the lightning.

3035 (j). Under a tornado policy, excepting losses occasioned by water, held, that the insurer was not liable for damage caused by wind-driven water.

Palatine Ins. Co. v. Coyle (Tex. Civ. App.) 196 S. W. 560; *Newark Trust Co. v. Agricultural Ins. Co.*, 237 Fed. 788, 150 C. C. A. 542; *National Fire Ins. Co. v. Crutchfield*, 160 Ky. 802, 170 S. W. 187, L. R. A. 1915B, 1094.

Where a policy insuring against loss from the accidental discharge or leakage from an automatic sprinkler system, exempted insurer from liability for loss caused by cyclones, the term "cyclone" should be construed in its popular sense, and is not limited to a storm proved to have been characterized by high winds rotating about a center of low atmospheric pressure, which center moved with greater or less velocity. In such a case in construing the word "cyclone" the rule of "noscitur a sociis" may be applied. So, where the policy excepts from liability "injury resulting from or caused by earthquakes, or cyclones, or blasting, or explosives of any kind," etc., from its associates the conclusion is warranted that it was not

the purpose to apply the insurance policy to a violent windstorm, which, like an earthquake; blasting, or explosive, from without, was calculated to so jar or topple the building as to dislodge the automatic sprinkler whereby the house was flooded and the injury done (*Maryland Casualty Co. v. Finch*, 147 Fed. 388, 77 C. C. A. 566, 8 L. R. A. [N. S.] 308).

In an action for loss of a horse under a policy insuring plaintiff against loss as to his farm horses as a result of lightning, where the horse was alleged to have been struck by lightning while running in a pasture, so damaging the horse that plaintiff was compelled to kill it, it is immaterial whether the horse was killed by the lightning or by plaintiff as a result of being injured by the lightning, since the recovery is based on the injury and not on the killing (*Williams v. American Ins. Co.*, 196 Ill. App. 370).

Under provision in tornado insurance policy that insurer should not be liable unless the building was entirely inclosed and under roof, insurer was not liable until it was so inclosed, but that when it was inclosed its liability attached (*Johnson & Stroud v. Rhode Island Ins. Co.*, 172 N. C. 142, 90 S. E. 124).

2. PLEADING AND PRACTICE IN RELATION TO RISK AND CAUSE OF LOSS

3035-3037. (a) Pleading and burden of proof

3035 (a). When assured has shown the execution of the policy, the loss and amount thereof, and notice to the insurer, the burden is on the insurer to prove that the loss or a part thereof is within one of the exceptions in the policy.

Richmond Coal Co. v. Commercial Union Assur. Co., Limited, of London, England (C. C.) 159 Fed. 985; *German-American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; *Jordan v. Iowa Mut. Tornado Ins. Co. of Des Moines*, 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266; *German-American Ins. Co. v. Brown*, 87 S. W. 135, 75 Ark. 251; *Fidelity & Casualty Co. of New York v. First Bank of Fallis*, 142 Pac. 312, 42 Okl. 662; *Stephens v. Fire Ass'n of Philadelphia*, 123 S. W. 63, 139 Mo. App. 369; *Milwaukee Mechanics' Ins. Co. v. Frosch* (Tex. Civ. App.) 130 S. W. 600; *Fountain v. Connecticut Fire Ins. Co. of Hartford* (Cal. App.) 117 Pac. 630.

3036 (a). A complaint, in an action for loss by death from disease or accident of the animals insured, is defective on demurrer where it does not allege that the death of the animal sued for was

(1181)

caused either by disease or accident (*Knutzen v. National Live Stock Ins. Co.*, 121 N. W. 632, 108 Minn. 163).

So a complaint in an action on a fire insurance policy, alleging that the insured property remained in the dwelling until destroyed, that the damage to the property was a certain sum, and that plaintiff saw the damage to the property caused by the fire, does not sufficiently allege that the insured property was destroyed or injured by fire (*Krank v. Continental Ins. Co.*, 100 N. Y. Supp. 399, 50 Misc. Rep. 144).

A declaration, however, predicated on an insurance policy which covers "all direct loss or damage by fire" need not allege that the loss was not occasioned by causes specifically not insured against (*Scottish Nat. Ins. Co. v. Adams*, 122 Ill. App. 471).

In an action on a fire insurance policy, where the destruction of the property by the insured is relied on as a defense, it should be affirmatively pleaded (*Herpolsheimer v. Citizens' Ins. Co.*, 79 Neb. 685, 113 N. W. 152). And the burden of proof on that issue, as on overvaluation, is on the insurer (*Delaware Ins. Co. of Philadelphia v. Hill* [Tex. Civ. App.] 127 S. W. 283).

3037 (a). The formal sufficiency of the allegations as to cause of loss are determined by the ordinary rules of pleading.

In the following cases the sufficiency of various allegations has been considered: *Board of Education of City and County of San Francisco v. Alliance Assur. Co.* (C. C.) 159 Fed. 994; *Reed v. Newark Fire Ins. Co.*, 74 N. J. Law, 400, 65 Atl. 1053; *Farmers' Mut. Fire Ins. Co. v. Hill*, 45 Ind. App. 605, 91 N. E. 361; *Bindell v. Kenton County Assessment Fire Ins. Co.*, 108 S. W. 325, 33 Ky. Law Rep. 385, 17 L. R. A. (N. S.) 189, 129 Am. St. Rep. 303.

The provision in a policy of burglar insurance that assured shall swear out a warrant on request for the arrest of the offender is obligatory only after request, and, under a plea averring such request, and a refusal, concluding to the country, plaintiff may prove excuse in the avoidance of such provision. *Thomas Orr Trucking & Forwarding Co. v. Metropolitan Surety Co.*, 77 N. J. Law, 749, 73 Atl. 541; *Ampersand Hotel Co. v. Orient Ins. Co.*, 97 N. E. 489, 204 N. Y. 619, reversing 147 App. Div. 925, 131 N. Y. Supp. 1101, reargument denied 97 N. E. 1101, 204 N. Y. 663.

Where personal property is insured, the insured has the burden of proof that his damage was due to causes insured against.

Kansas City Regal Auto Co. v. Old Colony Ins. Co., 187 Mo. App. 514, 174 S. W. 153; *Fidelity & Casualty Co. of New York v. Dulany*, 91 Atl. 574, 123 Md. 486; *Valley Mercantile Co. v. St. Paul Fire & Marine Ins. Co.*, 49 Mont. 430, 143 Pac. 559, L. R. A. 1915B, 327,

Ann. Cas. 1916A, 1126; *Hardenbergh v. Employers' Liability Assur. Corporation*, 141 N. Y. Supp. 502, 80 Misc. Rep. 522, reversing judgment (City Ct.) *Hardenburg v. Same*, 138 N. Y. Supp. 662, 78 Misc. Rep. 105; *O'Connor v. Columbia Ins. Co.*, 169 Mo. App. 150, 152 S. W. 396; *National Surety Co. v. Redmon*, 190 S. W. 1081, 173 Ky. 294; *Phoenix Assur. Co., Limited, of London, v. Eppstein*, 75 South. 537, L. R. A. 1917F, 540.

So it is incumbent on plaintiff to show that defendant insured the property at the place where its destruction took place (*Krol v. Royal Ins. Co.*, 162 Ill. App. 202).

Where a policy of insurance excludes damages caused by explosion, and the insurer in an action thereon proves that an explosion preceded the fire, the burden is on plaintiff to prove the extent of the damages suffered from the subsequent fire (*German American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. [N. S.] 77).

Insured must prove his case only by a preponderance of the evidence (*Valley Mercantile Co. v. St. Paul Fire & Marine Ins. Co.*, 49 Mont. 430, 143 Pac. 559, L. R. A. 1915B, 327, Ann. Cas. 1916A, 1126). Similarly the defendant must establish its defense (*Mott v. Spring Garden Ins. Co.* [Tex. Civ. App.] 154 S. W. 658).

3038-3040. (b) Admissibility of evidence

3038 (b). In an action on a fire policy, evidence that plaintiff objected to the local authorities investigating the fire was admissible on the issue whether the fire had been started by him. Evidence of the value of the lot alone was proper, as tending to show that plaintiff considered the house of little value, and thus show a motive for burning it (*Mott v. Spring Garden Ins. Co.* [Tex. Civ. App.] 154 S. W. 658). So was evidence as to the existence of a mortgage on the property (*Philadelphia Underwriters Agency of Fire Ass'n of Philadelphia v. Brown* [Tex. Civ. App.] 151 S. W. 899). So was evidence of the value of the property (*Aachen & Munich Fire Ins. Co. v. Arabian Toilet Goods Co.*, 10 Ala. App. 395, 64 South. 635). So was evidence that the fire was deliberately and purposely caused by the president of a corporation, who was its manager and principal stockholder, to enable the corporation to collect its insurance (*Meily Co. v. London & L. Fire Ins. Co. (C. C.)* 142 Fed. 873, affirmed 148 Fed. 683, 79 C. C. A. 454).

To establish the innocence of the insured in such cases, evidence that plaintiff, before she was charged with burning the property, requested the sheriff to investigate the fire, as there were suspicious

circumstances about it, was admissible (*O'Toole v. Ohio German Fire Ins. Co.*, 123 N. W. 795, 159 Mich. 187, 24 L. R. A. [N. S.] 802). So was evidence by plaintiff as to the value of its assets at the time of the fire; but, under the circumstances presented, evidence of conversations and other fires from 1½ to 2½ years before the fire causing the loss on which the suit was founded, was irrelevant (*Palatine Ins. Co., Limited, of Manchester, England, v. Santa Fé Mercantile Co.*, 13 N. M. 241, 82 Pac. 363).

3039 (b). In the following cases evidence was held inadmissible:

Capella v. Royal Ins. Co., 143 Wis. 78, 126 N. W. 547 (fire of small amount a year previous); *Queen Ins. Co. v. Van Giesen*, 72 S. E. 41, 136 Ga. 741 (five months prior to the burning of the goods covered by the policy sued on, the plaintiff had suffered another loss by fire); *Schornak v. St. Paul Fire & Marine Ins. Co.*, 104 N. W. 1087, 96 Minn. 299 (that insured had scattered oil on the walls of his living rooms, situated 50 feet from the barn which was burned); *Citizens' Mut. Fire Ins. Co. of Cecil County v. Conowingo Bridge Co.*, 82 Atl. 372, 116 Md. 422 (witness' belief as to the cause of the fire).

3040 (b). Where the issue was whether certain calves had died as the result of a lightning stroke, it was proper to permit plaintiff to testify as to the action of the calves after the storm and the extraordinary symptoms developed by them (*Freeman v. Farmers' Mut. Fire & Lightning Ins. Co.*, 97 S. W. 225, 121 Mo. App. 532).

So in an action on a policy of insurance against cyclones and storms, the testimony of a witness who lived nine miles away from the property destroyed, but who was within the path of the storm by which it was alleged to have been destroyed, is admissible to show the character and extent of the storm; but evidence of witnesses who were not at the scene of the loss until some 70 days thereafter, and after a large part of the wreckage had been removed, as to what evidences they saw of lightning was inadmissible (*Keane v. Century Fire Ins. Co.*, 150 Iowa, 658, 130 N. W. 724).

So evidence that an attorney who was not authorized to represent defendant, but did so with the knowledge of its agent, examined insured under oath, and prepared proofs of loss, which were accepted by defendant, was admissible under the plea (*Aachen & Munich Fire Ins. Co. v. Arabian Toilet Goods Co.*, 10 Ala. App. 395, 64 South. 635).

In action on burglary policy, evidence that other apartments in the same building had been entered is admissible to show that

plaintiff's loss was the result of burglary (*Reese v. Fidelity & Deposit Co. of Maryland*, 156 N. Y. Supp. 408, 93 Misc. Rep. 31); and in an action on a theft policy to recover the value of jewels, which were obtained from plaintiff by fraud, evidence of her reason for surrendering possession of the jewels was admissible to show that the property was really stolen (*Smith v. National Surety Co.*, 77 Or. 17, 149 Pac. 1040).

3040-3042. (c) Sufficiency of evidence

3042 (c). The sufficiency of evidence was considered in the following cases:

Sufficient: *Great Eastern Casualty Co. v. Boli* (Tex. Civ. App.) 187 S. W. 686; *Stich v. Fidelity & Deposit Co. of Maryland* (Sup.) 159 N. Y. Supp. 712; *Russell v. German Fire Ins. Co.*, 111 N. W. 400, 100 Minn. 528, 10 L. R. A. (N. S.) 326; *Cottrell v. Munterville Mut. Fire & Lightning Ins. Ass'n*, 145 Iowa, 651, 124 N. W. 612; *Schor-nak v. St. Paul Fire & Marine Ins. Co.*, 104 N. W. 1087, 96 Minn. 299; *Meily Co. v. London & Lancashire Fire Ins. Co.*, 148 Fed. 683, 79 C. C. A. 454, affirming (C. C.) 142 Fed. 873; *Bruff v. Northwestern Mut. Fire Ass'n*, 59 Wash. 125, 109 Pac. 280, Ann. Cas. 1912A, 1138; *Cohn v. Federal Ins. Co. (Sup.)* 113 N. Y. Supp. 12; *Jordan v. Iowa Mut. Tornado Ins. Co. of Des Moines*, 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266; *Lesser v. Jefferson Fire Ins. Co.*, 133 S. W. 551, 141 Ky. 667; *Russell v. German Fire Ins. Co.*, 111 N. W. 400, 100 Minn. 528, 10 L. R. A. (N. S.) 326; *Rush v. Boston Ins. Co.*, 88 Misc. Rep. 48, 150 N. Y. Supp. 457; *Fienglas v. New Amsterdam Casualty Co. (N. Y. Mun. Ct.)* 151 N. Y. Supp. 371; *Colley v. National Live Stock Ins. Co.*, 185 Mo. App. 616, 171 S. W. 663; *Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244; *Fidelity & Casualty Co. of New York v. Dulany*, 91 Atl. 574, 123 Md. 486; *Liverpool & London & Globe Ins. Co. v. Wright*, 164 S. W. 952, 158 Ky. 290; *Heaton v. St. Paul Fire & Marine Ins. Co.*, 132 Pac. 1007, 89 Kan. 840; *Hardenburgh v. Employers' Liability Assur. Corporation*, 138 N. Y. Supp. 662, 78 Misc. Rep. 105.

Insufficient: *Callahan v. London & Lancashire Fire Ins. Co.*, 98 Misc. Rep. 589, 163 N. Y. Supp. 322; *Polstein v. General Acc., Fire & Life Assur. Corp.*, 173 App. Div. 938, 158 N. Y. Supp. 868; *Milwaukee Mechanics' Ins. Co. v. Frosch* (Tex. Civ. App.) 130 S. W. 600; *Hammond Packing Co. v. Howey*, 129 N. Y. Supp. 1062, 145 App. Div. 299; *Valley Mercantile Co. v. St. Paul Fire & Marine Ins. Co.*, 49 Mont. 430, 143 Pac. 559, L. R. A. 1915B, 327, Ann. Cas. 1916A, 1126; *Hardenburgh v. Employers' Liability Assur. Corporation*, 141 N. Y. Supp. 502, 80 Misc. Rep. 522, reversing *Hardenburgh v. Same*, 138 N. Y. Supp. 662, 78 Misc. Rep. 105; *Home Ins. Co. of New York v. Crowder*, 164 Ky. 792, 176 S. W. 344; *McGraw v. Home Ins.*

Co. of New York, 93 Kan. 482, 144 Pac. 821, Ann. Cas. 1916D, 227; Fidelity Phenix Fire Ins. Co. of New York v. Abilene Dry Goods Co. (Tex. Civ. App.) 159 S. W. 172; Hart v. American Fidelity Co. (Sup.) 121 N. Y. Supp. 605; First Nat. Bank v. Maryland Casualty Co., 162 Cal. 61, 121 Pac. 321, Ann. Cas. 1913C, 1170; Brill v. Metropolitan Surety Co. (Sup.) 113 N. Y. Supp. 476; Rochester German Ins. Co. v. Schmidt (C. C.) 151 Fed. 681; German Ins. Co. v. Goodfriend, 97 S. W. 1098, 30 Ky. Law Rep. 218; Richmond Coal Co. v. Commercial Union Assur. Co., Limited, of London, England (C. C.) 159 Fed. 985; Hart v. American Fidelity Co. (Sup.) 126 N. Y. Supp. 626; German American Ins. Co. v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; Warren v. Farmers' Mut. Fire Ins. Co., 109 S. W. 88, 130 Mo. App. 226; Schindler v. United States Fidelity & Guaranty Co., 109 N. Y. Supp. 723, 58 Misc. Rep. 532.

The sufficiency of evidence to go to the jury was considered in the following cases:

Reeder v. Harborecreek Mut. Fire Ins. Co., 43 Pa. Super. Ct. 437; Rice v. Detroit Fire Marine Ins. Co. of Detroit, Mich. (Mo. App.) 176 S. W. 1113; Silverstone v. London Assur. Corporation, 176 Mich. 525, 142 N. W. 776; Fidelity & Casualty Co. of New York v. First Bank of Fallis, 142 Pac. 312, 42 Okl. 662; Cottrell v. Munterville Mut. Fire & Lightning Ins. Ass'n, 145 Iowa, 651, 124 N. W. 612; Moss v. Home Ins. Co. of New York, 99 S. W. 308, 30 Ky. Law Rep. 630.

Where the evidence merely showed that the property had disappeared, insured cannot recover on a burglary insurance policy.

Gordon v. Etna Indemnity Co. of Hartford, Conn. (Sup.) 116 N. Y. Supp. 558; Dushenes v. National Surety Co. of New York, 139 N. Y. Supp. 881, 79 Misc. Rep. 232.

Provisions in a burglary insurance policy requiring visible marks of actual violence determine an evidentiary fact, and do not provide that it should be the sole proof (National Surety Co. v. Silberberg Bros. [Tex. Civ. App.] 176 S. W. 97). It is said in the same case that slipping back of bolt in door, locked the night before, which was seen through a narrow space, is visible evidence and visible marks of forceable entry.

So, although it is not necessary to establish the corpus delicti by direct testimony in an action on a policy of burglary insurance, it is essential to show some facts from which inference of a loss by burglary reasonably follows (National Surety Co. v. Redmon, 190 S. W. 1081, 173 Ky. 294).

Marks of violence made by firemen are not, however, visible evidence of forcible entry or exit, which permits recovery under a

policy of burglary insurance (*Dangler v. National Surety Co.*, 168 App. Div. 89, 153 N. Y. Supp. 727).

The question whether marks of visible entry on the premises, made a prerequisite to recovery by the policy, were inflicted by the insured as a blind, is for the jury. *National Surety Co. v. Silberberg Bros.* (Tex. Civ. App.) 176 S. W. 97.

3042-3043. (d) Instructions

3043 (d). Where an issue has been properly presented, the parties are entitled to an instruction setting forth the law in relation thereto.

Milhim v. Hawkeye Ins. Co., 171 Ill. App. 262; *Stephens v. Fire Ass'n of Philadelphia*, 123 S. W. 63, 139 Mo. App. 369; *Slack v. Milwaukee-Mechanics Ins. Co.*, 186 Ill. App. 565.

But hypercritical objections cannot be sustained to instructions which, taken as a whole, present a clear and definite statement of the law applicable to the questions presented as to the cause of loss.

Meily Co. v. London & L. Fire Ins. Co. (C. C.) 142 Fed. 873, affirmed 148 Fed. 683, 79 C. C. A. 454; *Home Ins. Co. v. Gagen*, 76 N. E. 927, 38 Ind. App. 680; *Torpedo Top Co. v. Royal Ins. Co.*, 162 Ill. App. 338.

3043-3044. (e) Trial and review

3043 (e). Questions as to how and when the loss occurred are peculiarly for the jury.

Kansas City Regal Auto Co. v. Old Colony Ins. Co., 174 S. W. 153, 187 Mo. App. 514; *Wheeler v. Phenix Ins. Co. of Brooklyn*, 96 N. E. 452, 203 N. Y. 283, 38 L. R. A. (N. S.) 474, Ann. Cas. 1913A, 1297, reversing *Same v. Phenix Ins. Co. of Brooklyn*, 120 N. Y. Supp. 1151, 136 App. Div. 909; *German American Ins. Co. v. Hyman*, 94 Pac. 27, 42 Colo. 156, 16 L. R. A. (N. S.) 77.

Though ordinarily whether the damage to insured property was caused by a fire within the policy is a question for the jury, where the evidence is practically undisputed, the determination of the question by the court is not error (*O'Connor v. Queen Ins. Co. of America*, 122 N. W. 1038, 140 Wis. 388, 25 L. R. A. [N. S.] 501, 133 Am. St. Rep. 1081, 17 Ann. Cas. 1118).

However, a fraudulent fire can rarely be proved except by circumstances, and the question is for the jury if there is any evidence at all of the fraudulent act (*Lesser v. Jefferson Fire Ins. Co.*, 133 S. W. 551, 141 Ky. 667).

Where the loss was caused by a fire resulting from an explosion of a gasoline stove, the fact that the damages attributable to the explosion and those attributable to the fire were not apportioned did not preclude plaintiff from recovering, in the absence of evidence that the explosion of itself did any damage (*Walker v. Western Underwriters' Ass'n*, 105 N. W. 597, 142 Mich. 162).

(1188)

XXI. EXTENT OF LOSS AND LIABILITY OF INSURER— FIRE AND CASUALTY INSURANCE

1. EXTENT OF LOSS

3046-3050. (a) Total loss

3046 (a). There is a total loss when the property has lost its specific character, and is so broken and disintegrated that it cannot be designated as the structure which was insured, though some of its parts remain standing.

Rogers v. Connecticut Fire Ins. Co. of Hartford, 139 S. W. 265, 157 Mo. App. 671; American Cent. Ins. Co. v. Noe, 88 S. W. 572, 75 Ark. 406; Schmidt v. Williamsburg City Fire Ins. Co. of Brooklyn, N. Y., 151 N. W. 920, 98 Neb. 61; Brown v. Connecticut Fire Ins. Co. of Hartford, Conn. (Mo. App.) 184 S. W. 122.

3047 (a). So there is a total loss if the property is so far destroyed that no substantial part remains capable of being utilized to advantage in restoring it to the condition in which it was before the fire.

Teter v. Franklin Fire Ins. Co., 82 S. E. 40, 74 W. Va. 344; Hinkle v. North River Ins. Co., 75 S. E. 54, 70 W. Va. 681; Kinzer v. National Mut. Ins. Co., 127 Pac. 762, 88 Kan. 93, 43 L. R. A. (N. S.) 121; Springfield Fire & Marine Ins. Co. v. Homewood, 122 Pac. 196, 32 Okl. 521, 39 L. R. A. (N. S.) 1182; Dinneen v. American Ins. Co. of City of Newark, N. J., 152 N. W. 307, 98 Neb. 97, L. R. A. 1915E, 618, Ann. Cas. 1917B, 1246; City of Aurora v. Firemen's Fund Ins. Co., 165 S. W. 357, 180 Mo. App. 263; Stevens v. Norwich Union Fire Ins. Co., 96 S. W. 684, 120 Mo. App. 88.

3049 (a). Rev. St. Ohio, § 3691, providing that the foundation walls shall not be considered as part of a building in settling losses does not prohibit the insurance of the foundation walls, but does provide that they shall not be considered a part of the building or structure in settling the loss; and where the building is also insured the cellar and foundation walls must be insured for a specific sum, and described separately (German-American Ins. Co. v. McBee, 97 N. E. 378, 85 Ohio St. 161, affirming 31 Ohio Cir. Ct. R. 469).

3050 (a). Where plaintiff obtained from defendant a blanket policy covering farm implements, machinery, and grain on his

premises, and certain of his buildings were destroyed by fire, and implements and grain in other buildings were not injured, he cannot show that when the policy was taken out it was intended only to cover the property destroyed, so as to enable him to claim as for a total loss (*Johnston v. Phelps County Farmers' Mut. Ins. Co.*, 102 N. W. 72, 73 Neb. 50).

An appropriation by the owner of the proceeds of the sale of debris, after total loss to his own use, would not invalidate the insurance of the mortgagee, or cast upon him the burden of proving the amount realized (*Reed v. Firemen's Ins. Co. of Newark*, 80 Atl. 462, 81 N. J. Law, 523, 35 L. R. A. [N. S.] 343).

Statutory provisions relating to total loss were considered in the following cases:

Acts 1909, c. 447. *Laurenzi v. Atlas Ins. Co.*, 176 S. W. 1022, 131 Tenn. 644.

Laws 1899, c. 33 (Code 1906, c. 34, § 18aI), relating to extent of liability in case of total loss, is not repealed by Laws 1907, c. 77 (Code Supp. 1909, c. 34). *Hinkle v. North River Ins. Co.*, 75 S. E. 54, 70 W. Va. 681.

3050-3051. (b) Effect of building regulations

3050 (b). A building insured against fire is a "total loss" where, though only partly burned, it is rendered unfit for the purpose for which it was constructed, and there is an ordinance or law prohibiting reconstruction.

Palatne Ins. Co. v. Nunn, 55 South. 44, 99 Miss. 493; *New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Ins. Co. of New Orleans*, 54 South. 466, 128 La. 45.

3051-3052. (c) Practice

3052 (c). In *Fire Ass'n of Philadelphia v. Strayhorn* (Tex. Civ. App.) 165 S. W. 901, an instruction defining total loss was held sufficiently favorable to insurer.

2. LIMITATION OF LIABILITY BY CHARTER OR BY POLICY

3053-3054. (a) Limitation of liability by charter or by-laws

3053 (a). In *Dorwin v. North Wisconsin Farmers' Mut. Cyclone Ins. Co.*, 152 N. W. 454, 160 Wis. 663, it was held that, under a by-law of a mutual insurance company, hail losses of a year exceeding the assessment therefor, policy holders were to share in
(1190)

it only after deduction of expenses for the year; and the date when the by-law required the company to make its assessment was the commencement of its fiscal year as regards deduction of expenses therefor before participation of policy holders for losses.

3054-3057. (b) Limitation of liability by provisions in policy

3054 (b). Under the terms of the policy, insurer may be liable for only three-fourths of the amount of the actual value.

Olympia Brewing Co. v. Pioneer Mut. Ins. Ass'n, 101 Pac. 371, 53 Wash. 16; *Young v. New York Horse Ins. Co. of New York* (Sup.) 115 N. Y. Supp. 1075.

So the insurer may be liable only for the loss minus a certain amount fixed in the policy (*Stix v. Travelers' Indemnity Co. of Hartford, Conn.*, 157 S. W. 870, 175 Mo. App. 171).

3055 (b). An average clause in a fire policy, providing that in case of loss the policy shall attach to each of the insured buildings in such proportion as the value of each building bears to the aggregate value of the entire insured property, is primarily intended to apply to manufactories or storehouses, the contents of which are covered by a blanket policy, where the amount of the contents in any particular building is not determinable until after the loss (*Dahms & Sons Co. v. German Fire Ins. Co.*, 132 N. W. 870, 153 Iowa, 168, Ann. Cas. 1913D, 1301). It was also stated in the same case that Code, § 1746, was intended to prohibit stipulations for coinsurance, or requiring insured to maintain insurance up to a stipulated percentage of the value of the property, and the average clause was not invalid under that section, or any other statute, and was not unreasonable as applied to the subject-matter.

3056 (b). Parties to an insurance contract may agree on a valuation in advance, not only as to tangible property insured, but with reference to expected profits or gains, which, in the absence of fraud, will be conclusive (*O'Brien v. North River Ins. Co. of City of New York* (212 Fed. 102, 128 C. C. A. 618, L. R. A. 1917C, 722)).

3057 (b). Where a vacancy permit, limiting a loss during vacancy to three-fourths of the insurance, was not attached to the policy, which contained no such provision, and plaintiff was permitted to recover on the theory that the forfeiture for vacancy was waived, he was entitled to full indemnity (*Patterson v. American Ins. Co. of Newark, N. J.*, 160 S. W. 59, 174 Mo. App. 37). And a fire policy provision that insurer shall not be liable, beyond actual value de-

stroyed by fire, for loss caused by ordinance or law regulating construction or repair of buildings, is invalid under Code 1906, § 2592, prohibiting an insurer from denying values fixed in the policy, etc. (*Palatine Ins. Co. v. Nunn*, 55 South. 44, 99 Miss. 493).

Rev. St. 1898, § 1943a, providing that no fire insurance company shall issue any policy limiting the amount to be paid in case of loss below "the actual cash value of the property if within the amount of the insurance for which premium is paid," should be construed as referring to the actual cash value of the property "destroyed," and not to the property insured (*Newton v. Theresa Village Mut. Fire Ins. Co.*, 104 N. W. 107, 125 Wis. 289).

Under Rev. St. 1909, § 7030, prohibiting insurance against fire for more than three-fourths of the property's value, an insurer is estopped to claim that the total insurance exceeded that limit when the policy was issued (*Rogers v. Connecticut Fire Ins. Co. of Hartford*, 139 S. W. 265, 157 Mo. App. 671); but can show the actual value of the property just before the loss, and discharge its liability by paying three-fourths of that amount (*Surface v. Northwestern Nat. Ins. Co.*, 139 S. W. 262, 157 Mo. App. 570).

In *Buffalo Forge Co. v. Mutual Security Co.*, 76 Atl. 995, 83 Conn. 393, it was held that, under a policy of strike insurance which provided for an indemnity not exceeding \$50,000 against all direct damage from suspension of operations, in case of partial suspension of operation the net profits of the preceding year furnished the basis of estimate, as in case of entire suspension, and that defendant was liable for such proportion of the net profits and fixed charges as the production prevented bore to the average daily production. It was also stated in the same case that the term "fixed charges" in such policy meant those expenses necessarily incurred in maintaining the organization in such state of efficiency as would enable it to resume normal production without substantial delay after the strike was ended, or as it might be broken by a gradual return of employes, and was not limited to interest, taxes, rent, maintenance, employes under contract, and such as could not be stopped without detriment to the property, exclusive of salaries, office force, or wages of mechanics.

3058-3059. (c) Same—Effect of valued policy law

3059 (c). The valued policy law (Rev. St. 1909, § 7020) is treated as if incorporated in fire policies issued subsequent to its passage (*Sharp v. Niagara Fire Ins. Co.*, 147 S. W. 154, 164 Mo. App.

(1192)

475); and a stipulation of a fire policy on a building limiting liability for actual partial loss is void under the valued policy law.

National Fire Ins. Co. v. Dennison, 113 N. E. 260, 93 Ohio St. 404, L. R. A. 1916F, 992; Hartford Fire Ins. Co. v. Henderson Brewing Co., 182 S. W. 852, 168 Ky. 715; Dinneen v. American Ins. Co. of City of Newark, N. J., 152 N. W. 307, 98 Neb. 97, L. R. A. 1915E, 618, Ann. Cas. 1917B, 1246; Liverpool & London & Globe Ins. Co., Limited, of Liverpool, England, v. Payton, 194 S. W. 503, 128 Ark. 528; Fireman's Ins. Co. v. Jesse French Piano & Organ Co. (Tex. Civ. App.) 187 S. W. 691.

Under Rev. St. Mo. 1909, § 7030, it is presumed that amount of insurance on stock of goods is three-fourths of their value, and if there are several policies, their total amount will be considered as only three-fourths of the value (Harris v. Hartford Fire Ins. Co. [Mo. App.] 191 S. W. 1037).

So under Acts 31st Leg. Tex. (4th Called Sess.) c. 8, § 18, insured, under policy containing an 80 per cent. coinsurance clause is entitled to that per cent. of the policy, less the amount of his premium note, expense of adjustment, etc., with interest (Merchants' & Bankers' Fire Underwriters v. Brooks [Tex. Civ. App.] 188 S. W. 243).

3. EXTENT OF LIABILITY IN GENERAL

3061-3063. (a) In general

3061 (a). A blanket policy of fire insurance covers every item described in it, and, if the loss of any portion of the property exhausts the full amount of the policy, the whole insurance must be paid (Carlton Lumber Co. v. Lumber Ins. Co. of New York, 158 Pac. 807, 81 Or. 396, judgment modified on rehearing 81 Or. 396, 159 Pac. 969). And sequential damages to the property insured, not discovered or readily discoverable until after the fire, may be considered by the jury in an action on the policy (Teter v. Norfolk Fire Ins. Corporation, 82 S. E. 201, 74 W. Va. 461).

3063 (a). Under a policy insuring an automobile against damage from collision, providing that the insurance company should not be liable for more than "the actual cost of the suitable repair of the property injured," the measure of damages was the actual cost of repair (Lepman v. Employers' Liability Assur. Corporation, Limited, of London, 170 Ill. App. 379).

In Christison v. St. Paul Fire & Marine Ins. Co. (Minn.) 163 N. W. 980, L. R. A. 1917F, 612, however, a provision of a policy in-

insuring owner of automobile was held to not limit liability to actual cost of repairs, which did not restore another's injured car so that insured might recover on judgment against him for its depreciation. So it has been said that the measure of damages for injuries to insured property is the cost of repairing machines when able to be repaired or their cash value if completely ruined (*Non-Royalty Shoe Co. v. Phoenix Assurance Co., Limited*, of London, England [Mo. App.] 178 S. W. 246).

The Louisiana statute (Acts 1900, p. 209, No. 135, § 2), providing that, whenever property covered by a policy of insurance shall be totally destroyed, the full amount of the insurance thereon shall be paid, and when it is partially destroyed such amount shall be paid as will permit the insured to restore the damaged property to its original condition, when considered in connection with section 1 of the act, is limited exclusively to policies of insurance covering property which is immovable by nature (*Melancon v. Phoenix Ins. Co.*, 40 South. 718, 116 La. 324).

3063-3064. (b) Partial loss

3063 (b). Where the loss is partial but equal to or greater than the amount of all the insurance permitted and actually carried, the insured, if not at fault, is entitled to full indemnity (*Teter v. Franklin Fire Ins. Co.*, 82 S. E. 40, 74 W. Va. 344); and the value of articles not destroyed must be considered in ascertaining the actual loss (*Sharp v. Niagara Fire Ins. Co.*, 147 S. W. 154, 164 Mo. App. 475).

3064 (b). A fire policy insured \$600 on household goods. A portion of them were rescued from the fire. Those saved from the fire amounted in value to \$100, and those destroyed to \$800. It was held that the loss was only partial, requiring, in case of disagreement as to the amount of the loss, the submission to appraisement as provided for in the policy (*Stevens v. Norwich Union Fire Ins. Co.*, 96 S. W. 684, 120 Mo. App. 88).

So in an action on a policy of burglary insurance, the amount of the loss was properly proved by adding to the last previous stock inventory, taken about six months previously, all stock since purchased, and deducting all sales made, and the stock on hand after the burglary (*Ingersoll v. United Surety Co.*, 126 N. Y. Supp. 391, 141 App. Div. 527).

3065-3069. (e) Amount of interest of insured

3066 (e). Clause of fire insurance policy providing that if interest of insured was not sole, company should not be liable in sum
(1194)

exceeding cash value of insured's interest, held to relate to case where ownership was less than perfect legal and equitable title, and fact had been noted on policy (*Home Mut. Fire Ins. Co. v. Pittman*, 71 South. 739, 111 Miss. 420).

A husband having had an insurable interest in property owned by his wife, recovery on the policy issued to him is not limited by the value of his insurable interest; and recovery of the full amount of the policy is proper, where it is less than the value of the property insured (*Kludt v. German Mut. Fire Ins. Co.*, Auburn, Fond du Lac County, 140 N. W. 321, 152 Wis. 637, 45 L. R. A. [N. S.] 1131, Ann. Cas. 1914C, 609).

So, in absence of evidence as to the value of an equity of redemption, the insured can recover the amount of the physical damage done to the property insured, not exceeding the sum named in the policy (*Jenks v. Liverpool, London & Globe Ins. Co.*, 92 N. E. 998, 206 Mass. 591).

So, where there was evidence that insured had a larger insurable interest in a damaged piano than the amount allowed, an objection that the allowance was excessive could not be sustained (*Dahrooge v. Sovereign Fire Assur. Co. of Canada*, 141 N. W. 572, 175 Mich. 248).

Similarly, the owner of an insured building can recover under his policy for damage by fire to a party wall located one-half on his land and one-half on the adjoining owner's land, though he only owns the fee to the center of the wall.

Citizens' Fire Ins. Co. of Missouri v. Lockridge & Ridgeway, 116 S. W. 303, 132 Ky. 1, 20 L. R. A. (N. S.) 226; *Nelson v. Continental Ins. Co.*, 182 Fed. 783, 105 C. C. A. 215, 31 L. R. A. (N. S.) 598.

3067 (e). Under Civ. Code Cal. §§ 2550, 2551, 2588, a tenant who erects a building on the premises, though holding under a lease containing no privilege of renewal and providing for a reversion of the building to the lessor at the end of the term, and who procures insurance on the building destroyed before the end of the term, may only recover the value of his interest in the building (*Sievers v. Union Assur. Society of London*, 128 Pac. 771, 20 Cal. App. 250).

Similarly, where the agent who wrote the policy knew that insured was a lessee, but thought that he had title to partitions, doors, and windows in the building which in fact belonged to the lessor, the insured, in case of a loss, could not recover the rental value of the property, or of office rooms formed by such partitions, doors,

and windows (*Williamsburgh City Fire Ins. Co. v. Weeks Drug Co.* [Tex. Civ. App.] 133 S. W. 1097).

In *Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co.*, 83 Atl. 801, 109 Me. 274, 42 L. R. A. (N. S.) 135, Ann. Cas. 1913E, 738; it was held that where a leasehold interest is insured, the value for the unexpired term is the measure of loss, which was held properly ascertained by taking the present worth of an amount representing the difference between the reasonable rental value of the premises and the rental cost to plaintiff for a certain period.

3068 (e). Where a contractor agreed to finish a building, which was partially built, upon its destruction by fire during construction, and while he held a policy upon the building, he is entitled to recover only the value of the building at the time of the fire, less its value when he commenced work (*Sammons & Bishop v. American Fire Ins. Co.*, 77 S. E. 1108, 94 S. C. 366, Ann. Cas. 1915B, 1095).

3069-3070. (g) Policy insuring interest of mortgagee

3069 (g). A mortgagee of chattels to whom the mortgagor has given a bill of sale of the property, he to sell it, deduct the amount of the mortgage, pay other debts of the mortgagor, and give any balance to the mortgagor, being the legal owner and trustee of an express trust, may recover the full amount of an insurance policy taken out by him on the property, though it exceeds the amount of his mortgage (*Wheaton v. Liverpool & London & Globe Ins. Co.*, 104 N. W. 850, 20 S. D. 62).

3070-3071. (h) Loss of rents and profits

3071 (h). An insurance policy, indemnifying insured against loss of rents caused by fire or lightning actually sustained on rented premises for and during such period as may be reasonably necessary to restore the premises to the same tenantable condition as before the fire, covers such period as was necessary to place the contract for repairs, and is not limited to the time actually spent in the making of the repairs (*Hartford Fire Ins. Co. v. Pires* [Tex. Civ. App.] 165 S. W. 565). But where a policy provided that if the owner should not rebuild the loss should be determined by the time necessary for rebuilding, the loss was to be computed, where the building could not be rebuilt, without considering loss of time, time for removal of debris, or delay incident to inclement weather (*Amusement Syndicate Co. v. Milwaukee Mechanics' Ins. Co.*, 136 Pac. 941, 91 Kan. 67).

So under a policy providing that insured should not be liable for loss caused by ordinance or law regulating construction or repair of buildings or by interruption of business or otherwise, insurer is not liable for loss of rent caused by the city authorities in delaying rebuilding, pending ordinance relocating street lines, or for loss of rent from interruption of business caused by delays in rebuilding resulting from the fall of débris of the fire throughout the burnt district (*Palatine Ins. Co. v. O'Brien*, 71 Atl. 775, 109 Md. 100).

Similarly, where the theater whose reconstruction was forbidden by a city ordinance was practically entirely destroyed by fire, and a store and office building was erected upon the site, the recovery should be based upon the time it would have taken to reconstruct the old building, had that been permissible, and not upon the time it actually took to build the new one (*Amusement Syndicate Co. v. Prussian Nat. Ins. Co.*, 116 Pac. 620, 85 Kan. 367, rehearing denied 85 Kan. 616, 118 Pac. 76).

Similarly, a policy which insures for loss of use and occupation occasioned by fire which provides that such loss, if any, is to be computed from the occurrence of any fire to the time when the building in question and the equipment therein could with reasonable diligence and dispatch be rebuilt, repaired or replaced, does not cover a loss resulting from a termination of the lease under a provision contained therein which confers the right of termination upon the lessor in the event of destruction by fire, it not appearing that the contract of insurance was entered into with knowledge of such lease; the policy in question being construed to cover solely the period within which the restoration of the premises could with the diligence referred to have been accomplished (*Grand Pacific Hotel Co. v. Michigan Commercial Ins. Co.*, 148 Ill. App. 143, affirmed 90 N. E. 244, 243 Ill. 110).

In *O'Brien v. North River Ins. Co. of City of New York*, 212 Fed. 102, 128 C. C. A. 618, L. R. A. 1917C, 722, a policy, insuring hotel proprietor in the sum of \$10,000 on profit due to assured by reason of a paid-up contract for hotel reservations during a political convention, was held to cover the sum specified as a fixed valuation in case of total loss, and did not mean the gross sum to be paid to insured under the contract by the person making the reservation.

In *Page v. Northern Ins. Co. of New York*, 125 N. Y. Supp. 1066, 141 App. Div. 239, it was held that under the terms of the policy the insurer's liability extended only to a percentage of profits on the difference between the total value of the goods insured and the

amount received by insured as salvage on the damaged goods taken over by the insurance companies under the policies; the percentage profit being limited to a percentage on the amount of damages sustained by insured.

In *Lite v. Firemen's Ins. Co. of Newark, N. J.*, 86 N. E. 1127, 193 N. Y. 639, affirming 104 N. Y. Supp. 434, 119 App. Div. 410, a policy undertook to insure "against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding \$15,000," and described the subject of insurance as follows: "On the profits of the lease of the" buildings insured. "If said buildings shall be totally destroyed by fire, this company shall pay the whole amount hereby insured," less a certain deduction; and in case of damage, rendering "said buildings untenable, this company shall pay at the rate of \$416.66 per month" from the date of the fire to the date when the buildings could be rendered fit for occupancy by due diligence. A fire rendered part of the building uninhabitable. It was held that the policy was a mixed one, open as to a partial loss and valued as to a total loss, and that the insured was entitled to recover for loss of profits caused by part of the building being untenable.

Where a policy insuring rent provided for payment of loss not exceeding one-twelfth of the amount insured for any one month and a fire loss was adjusted and paid at an amount equal to one-half the policy, and where a second fire resulted in further loss, the policy was in force at time of second fire at one-half the amount thereof, and that the monthly payments on the second loss were limited to one-twelfth of that amount, not one-twelfth of the original insurance (*Van Nest v. Citizens' Ins. Co. of Missouri*, 158 N. W. 725, 134 Minn. 94, L. R. A. 1916F, 693).

3072-3073. (j) Extent of liability under Lloyd's policies

3073 (j). Under a Lloyd's fire policy, providing that no action should be brought on it except against the manager as attorney in fact and representing all the underwriters, and binding the underwriters to abide the result of any suit so brought, an action was properly brought against the attorneys in fact representing the several underwriters named in the policy.

Warfield-Pratt-Howell Co. v. Williamson, 84 N. E. 706, 233 Ill. 487;
McLean v. Tobin, 109 N. Y. Supp. 926, 58 Misc. Rep. 528.

An association under the Lloyd's system is subject to equitable jurisdiction in an action to enforce a contract of insurance (*William-*
(1198))

son v. Warfield-Pratt-Howell Co., 136 Ill. App. 168, affirmed 84 N. E. 706, 233 Ill. 487).

In *Blair v. National Shirt & Overalls Co.*, 137 Ill. App. 413, it was held that an action brought upon an insurance policy issued under the Lloyd's system and which contains a clause providing that no suit shall be brought on the policy against more than one of the underwriters at any time or in any court other than the highest court of original jurisdiction is not barred by reason of the fact that the plaintiff, after the bringing of the suit, brought other suits against other defendants upon their separate and individual contracts contained in the policy. It was also stated in the same case that a judgment of a justice of the peace may constitute such an adjudication as is contemplated by the policy.

3073-3076. (k) Deductions and offsets in general

3074 (k). Verdict for full value of wheat covered by policy is excessive where damaged wheat has been sold with plaintiff's consent by owner of warehouse in which it was contained (*Goddard v. Northwestern Mut. Fire Ass'n*, 148 Pac. 893, 85 Wash. 585).

3076 (k). The insurer having canceled the insurance and returned the premium, without notice to the mortgagee, whose interest was insured, the mortgagee, recovering of the insurer on a loss occurring, is not required to return to the insurer the premium which it returned to the property owner (*Rawls v. American Central Ins. Co.*, 81 S. E. 505, 97 S. C. 189).

In action upon policy insuring against loss to leasehold by fire, the contract relations between lessor and lessee, and the settlement of their differences arising from a fire were matters with which insurer had no concern (*Kahn v. American Ins. Co.*, 162 N. W. 685, 137 Minn. 16).

Where the hazard under a fire insurance policy was increased by acts of a tenant without the knowledge of insured, so as not to avoid the policy, the claim of insured on the policy should be reduced by the amount of additional premiums for a policy covering the increased hazard (*Royal Exch. Assurance of London v. Thrower* [D. C.] 240 Fed. 811).

3076. (l) Unpaid premiums

3076 (l). Where credit was given for the premium, and a total loss occurred before the premium matured, defendant was entitled to deduct the amount of the premium from the amount of the loss (*Interstate Fire Ins. Co. v. McFall*, 76 S. E. 293, 114 Va. 207).

So, where an insurance agent executed a temporary contract of insurance or binder, insured to pay the premium upon receipt of regular policy, and a loss occurred during the existence of the temporary contract, the insured could recover the amount stipulated as indemnity in the binder, less the rate of premium (*Queen Ins. Co. of America v. Hartwell Ice & Laundry Co.*, 68 S. E. 310, 7 Ga. App. 787).

3076-3077. (m) Duties of insured after loss in general

3076 (m). It is insured's duty to use all reasonable means to save and preserve the insured property from impending loss or damage from fire (*Queen Ins. Co. v. Patterson Drug Co.* [Fla.] 74 South. 807, L. R. A. 1917D, 1091).

Though it was held in *Thornton v. Security Ins. Co.* [C. C.] 117 Fed. 773, referred to in vol. IV, p. 3076, Briefs on Insurance, that the observance of a provision in a policy requiring insured to protect the property from further damage and forthwith separate the damaged from the undamaged property, etc., is an absolute condition precedent to recovery, and the case of *Johnson v. Hartford Fire Ins. Co.*, 157 N. Y. Supp. 893, 94 Misc. Rep. 163, seems to follow this rule, yet it has been decided in several cases in the state courts that failure to protect the property after loss does not defeat the insured's right of action, but merely affects the amount of his recovery.

Beavers v. Security Mut. Ins. Co., 90 S. W. 13, 76 Ark. 595, 6 Ann. Cas. 585; *Gage v. Connecticut Fire Ins. Co. of Hartford, Conn.*, 127 Pac. 407, 34 Okl. 744.

A condition for separation by insured after a fire of the damaged goods from the undamaged is given a liberal construction in favor of insured; and it is enough that there is such a separation that insurer can estimate the loss (*Greengrass v. North River Ins. Co.*, 139 N. Y. Supp. 937, 79 Misc. Rep. 237). So, under such a policy "forthwith" means within a reasonable time, considering the circumstances (*Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 141 N. W. 447, 161 Iowa, 5). So such a policy does not require segregation where the loss exceeds the amount of the insurance (*Winchester v. North British & Mercantile Ins. Co. of London & Edinburgh*, 116 Pac. 63, 160 Cal. 1, 35 L. R. A. [N. S.] 404).

In *Siemers v. Meeme Mut. Home Protection Ins. Co.*, 126 N. W. 669, 143 Wis. 114, 139 Am. St. Rep. 1083, it was held that a provision that, in case of a fire or exposure to loss or damage thereby,

it shall be the duty of the insured to use their best endeavors for saving and preserving the property defines the duty of the insured only when the property is on fire, or is so menaced by fire that damage is likely to result, and is not violated by taking off the spark arrester of an engine while the engine was being used to cut ensilage and before the fire started.

3077 (m). In *Flynn v. Hanover Fire Ins. Co. of New York*, 121 N. Y. Supp. 621, 67 Misc. Rep. 117, a policy provided that in case of loss the assured should protect the property from further damages and exhibit it as often as required to the insurer's agent. The firemen threw a considerable portion of the burned articles from the apartment occupied by plaintiff into the common yard of the building, where it remained for three weeks after the fire, during which time the insurance men called there twice; but when the appraisers called, a week or two thereafter, the apartment had been cleaned and closed and the débris removed by persons unknown, plaintiff having abandoned the apartment and moved into a new one immediately after the fire. There was held to be a substantial compliance with the policy; plaintiff not being required to keep the débris indefinitely for the insurer's benefit.

In *Levi v. Palatine Ins. Co.*, 78 Atl. 617, 75 N. H. 551, it was held that a provision that, if the property is exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same applies only to property threatened by fire, and not to property damaged thereby, and calls for no particular conduct by the insured to minimize a loss after a fire; but for any loss or damage to the property of insured, caused by his negligence in caring for the property after a fire, there can be no recovery on a policy insuring against fire loss only. It was said in the same case that, where plaintiff followed the instructions of defendant's local agent in caring for goods damaged by fire, the defendant insurance company under the circumstances waived any right it may have had to a different course in the treatment or "conditioning" of the goods damaged.

In *Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 161 Iowa, 5, 141 N. W. 447, it was held that under Code, § 1750, insurance adjuster was authorized to waive a provision that insured should separate the damaged from the undamaged goods and place them in the best possible condition. It was also held in the same case that under the evidence it was a question for the jury whether two days

was a reasonable time in which to comply with the provision, and whether the provision had been waived.

An allegation by defendant that plaintiff negligently stood by and permitted the building to be consumed by fire, but averring no particular facts, and not stating that plaintiff could have prevented the fire or saved the property, states no defense (*Home Ins. Co. of New York v. Overturf*, 74 N. E. 47, 35 Ind. App. 361).

3077-3078. (n) Sale of goods after loss

3077 (n). Where insured after a loss fails to separate the damaged goods from the undamaged and to place them in the best possible order, as required by the policy, and sells goods before the insurer can inspect them or appraise the damage, unless compliance with the policy is waived, there can be no recovery (*Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 141 N. W. 447, 161 Iowa, 5).

The insured, however, does not forfeit his rights by removing and disposing of the damaged goods after giving the insurers a reasonable opportunity to examine same, of which opportunity they took advantage (*Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co.*, 152 N. W. 650, 129 Minn. 292).

4. VALUE OF PROPERTY OR INTEREST

3078-3080. (a) Value in general

3079 (a). The value of insured goods at the time of their destruction is the measure of indemnity for the loss, under a policy stipulating for indemnity to the extent of a fixed sum.

McIntyre v. Liverpool, London & Globe Ins. Co., 110 S. W. 604, 131 Mo. App. 88; *Dakin v. Queen City Fire Ins. Co. of Sioux Falls*, S. D., 117 Pac. 419, 59 Or. 269.

So the measure of damages is not the original value of the goods insured, but the amount or extent of the loss or damage occasioned by the fire.

Security Ins. Co. v. Slack, 183 Ill. App. 579; *Slack v. Milwaukee-Mechanics' Ins. Co.*, 186 Ill. App. 565.

There are two methods of ascertaining the value: The cost of replacing, less depreciation from use or age, and the value of the building at destruction, less the value of the ruins.

Moulton v. Globe Mut. Ins. Co., 154 N. W. 830, 36 S. D. 339; *Security Ins. Co. v. Kelly* (Tex. Civ. App.) 196 S. W. 874.

Under a policy of ordinary or "straight" insurance, the value of the property is not important, if not less than the amount of the insurance, since, if the loss is total and the value of the property equals or exceeds the amount of insurance, the insurer is liable for the full amount of the policy, and in case of partial loss is liable for the amount of the loss (*Buse v. National Ben Franklin Ins. Co. of Pittsburgh, Pa.*, 160 N. Y. Supp. 566, 96 Misc. Rep. 229).

Recovery of fire insurance is not defeated because the amount of loss cannot be determined without difficulty, and is to some extent a matter of estimate (*Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co.*, 83 Atl. 801, 109 Me. 274, 42 L. R. A. [N. S.] 135, Ann. Cas. 1913E, 738).

So fire insurance covers gifts (*Milwaukee Mechanics' Ins. Co. v. Frosch* [Tex. Civ. App.] 130 S. W. 600), and the "actual value" of insured property is its salable or cash value (*Milwaukee Mechanics' Ins. Co. v. Frosch* [Tex. Civ. App.] 130 S. W. 600).

Thus in *Gulf Compress Co. v. Insurance Co. of Pennsylvania*, 167 S. W. 859, 129 Tenn. 586, it was held that where insurer refused to replace machinery destroyed by fire with another plant, which was then cheap, or to furnish the money to buy it, it could not insist that the loss by the fire should be measured by the value of the plant it refused to buy. And insured, in a fire policy covering a machine obtained at a sacrifice sale for \$11,500, and insured at \$15,000, was allowed to recover on the basis of the actual cash value of the property at the time of the loss, in view of the failure of insurer to procure another machine equally good for \$15,000.

3080-3081. (b) Personal property

3080 (b). Ordinarily the market value of the property destroyed by fire is the correct measure of the liability of insurer thereof, and it is not permissible to prove extrinsic value without first showing that the property had no market value (*State Mut. Fire Ins. Co. v. Cathey* [Tex. Civ. App.] 153 S. W. 935).

Thus, in an action for loss of cotton stored in New York City, the value of the cotton "at the time the loss occurred," where that was during the hours when the Cotton Exchange was open, may be determined by taking the ruling price of "spot" cotton for the day as fixed by the committee of the Exchange (*Liverpool, London & Globe Ins. Co. v. McFadden*, 170 Fed. 179, 95 C. C. A. 429, 27 L. R. A. [N. S.] 1095).

So the fact that local conditions had destroyed any demand for insured personal property at the place it was located at the time of loss would not entitle the insurer to have it valued at such place, where by moving it to another place its fair market value could be obtained (*Prussian Nat. Ins. Co. v. Lawrence*, 221 Fed. 931, 137 C. C. A. 501, L. R. A. 1915E, 489).

Where personal property covered by a fire policy had no market value at the time of a loss, the intrinsic value could be shown (*State Mut. Fire Ins. Co. of Texas v. Cathey* [Tex. Civ. App.] 172 S. W. 187).

Thus insured is entitled to recover under a fire policy not merely what she could have sold the secondhand goods destroyed for in the market, but their cash value to her: that is, what it would have cost to replace them (*Southern Nat. Ins. Co. v. Wood*, 133 S. W. 286, 63 Tex. Civ. App. 319).

3081-3084. (c) Real estate

3081 (c). The measure of a fire loss was the reasonable value of the premises injured and destroyed, and not their value considered in connection with an existing contract by the owner to sell to the United States (*German Fire Ins. Co. v. Duncan*, 130 S. W. 804, 140 Ky. 27).

Where a fire policy covered a frame building and a brick wall without separate valuation, and the building was destroyed without injury to the wall, the insurer was liable for the actual loss to the extent of the full amount of the policy (*Kinzer v. National Mut. Ins. Ass'n*, 127 Pac. 762, 88 Kan. 93, 43 L. R. A. [N. S.] 121).

3082 (c). In *Citizens' Savings Bank & Trust Co. v. Fitchburg Mutual Fire Ins. Co.*, 84 Atl. 970, 86 Vt. 267, it was held, however, that plaintiff was not concluded in determining the amount of the loss by the cost of constructing a similar building at the same place at the time of the loss, less a deduction for depreciation, however caused, but that in case of total loss, the value of the building as it stood on the land just before the fire is the measure of insured's damages.

3085-3087. (e) Stipulations fixing the measure of damages

3085 (e). It is competent for the parties to stipulate for a method of ascertaining and computing the loss (*Whitney Estate Co. v. Northern Assur. Co. of London*, 101 Pac. 911, 155 Cal. 521, 23 L. R. A. [N. S.] 123, 18 Ann. Cas. 512).

Under a clause providing that an insurance company shall not be liable beyond the actual cash value of the property covered, and that the liability shall not exceed the cost to insured to repair or replace the property destroyed, measure of an insured manufacturer's cost of replacing whisky whose value increases with age is not the cost of the raw material of which a like product may be made and of the labor required to make it, but is the cost of immediately replacing the article by a like product by purchase or otherwise.

Mechanics' Ins. Co. of Philadelphia v. C. A. Hoover Distilling Co., 182 Fed. 590, 105 C. C. A. 128, 31 L. R. A. (N. S.) 873; *Frick v. United Firemen's Ins. Co.*, 67 Atl. 743, 218 Pa. 409; *Same v. Svea Fire & Life Ins. Co.*, 67 Atl. 747, 218 Pa. 420.

So under such a clause insured could recover the actual cash value of hats destroyed, where he was unable to replace the goods in time for the current season's trade (*Phillips v. Home Ins. Co.*, 112 N. Y. Supp. 769, 128 App. Div. 528).

Under such a clause, however, the measure of damages was not the cost of replacing the goods instantaneously on destruction, but what it would cost to replace the same from the markets where such goods were usually manufactured, or could be purchased within a reasonable time, and, in the case in hand, 30 days was said to be a reasonable time (*Texas Moline Plow Co. v. Niagara Fire Ins. Co.*, 87 S. W. 192, 39 Tex. Civ. App. 168).

In *Liverpool, London & Globe Ins. Co. v. McFadden*, 170 Fed. 179, 95 C. C. A. 429, 27 L. R. A. (N. S.) 1095, however, it was held that the extent of the liability is not the cash value at the time the property is exposed to the danger of loss by the outbreak of the fire, but the actual cash value at the time the loss occurs, which is necessarily to be referred, if material, to the time when in point of fact, as nearly as can be ascertained, the fire reaches and consumes or damages it, even in a case where the threatened loss was so extensive that it may itself have enhanced the market value prior to the time when the actual loss occurred.

The measure of damages under such a clause is the cost of replacing, less the salvage, or in other words, the difference between the fair and reasonable market value before and after the fire (*Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 141 N. W. 447, 161 Iowa, 5).

It is not the original cost of the property (*Thomas Orr Trucking & Forwarding Co. v. Metropolitan Surety Co.*, 73 Atl. 541, 77 N. J. Law, 749).

The words "actual cash value of the property at the date of the fire" do not mean market value, but such value must be ascertained from the evidence and determined by the jury (*Yost v. Anchor Fire Ins. Co.*, 38 Pa. Super. Ct. 594).

The "three-fourths value" clause attached to and forming a part of a contract of insurance should be interpreted according to the same rules by which other contracts are construed, and a substantial compliance therewith is sufficient (*Shawnee Fire Ins. Co. v. Thompson & Rowell*, 119 Pac. 985, 30 Okl. 466).

Plaintiff may recover the full amount of insurance if three-fourths of the value of the articles destroyed amounted to that sum (*United States Fire Ins. Co. v. Sam Bynum & Co.*, 137 S. W. 771, 143 Ky. 804).

3087-3089. (f) Valued policies

3087 (f). In an action on a valued fire policy, it was not necessary to state the value of the insured goods in the instructions, where there was no evidence that it had depreciated since the policy was issued (*Hilburn v. Phoenix Ins. Co.*, 124 S. W. 63, 140 Mo. App. 355).

3088 (f). The three-fourths value clause in fire policies does not apply to the estimated value of real estate insured, unless the insured has been guilty of fraud in fixing the value (*Henry Clay Fire Ins. Co. v. Barkley*, 169 S. W. 747, 160 Ky. 153).

3089-3098. (g) Effect of statutory provisions

3089 (g). Under the "valued policy laws," in case of a total loss the amount of the policy is conclusive on the insurer as to the value of the property insured or destroyed, and shall be considered a liquidated demand against the insurer.

Oppenheim v. Fireman's Fund Ins. Co., 138 N. W. 777, 119 Minn. 417; *American Cent. Ins. Co. v. Noe*, 88 S. W. 572, 75 Ark. 406; *Springfield Fire & Marine Ins. Co. v. Homewood*, 122 Pac. 196, 32 Okl. 521, 39 L. R. A. (N. S.) 1182; *Oklahoma Farmers' Mut. Indemnity Ass'n v. McCorkle*, 97 Pac. 270, 21 Okl. 606; *Johnson v. Reliance Ins. Co. of Philadelphia, Pa.*, 168 S. W. 914, 181 Mo. App. 443; *Mississippi Home Ins. Co. v. Barron*, 45 South. 875, 91 Miss. 722; *City of Aurora v. Firemen's Fund Ins. Co.*, 165 S. W. 357, 180 Mo. App. 263; *Co-operative Ins. Ass'n of San Angelo v. Ray* (Tex. Civ. App.) 138 S. W. 1122; *Joyce v. St. Paul Fire & Marine Ins. Co.* (Mo. App.) 194 S. W. 745; *Farber v. American Automobile Ins. Co.*, 177 S. W. 675, 191 Mo. App. 307; *Fidelity-Phoenix Fire Ins. Co. v. O'Bannon* (Tex. Civ. App.) 178 S. W. 731;

La Font v. Home Ins. Co., 182 S. W. 1029, 193 Mo. App. 543;
Ætna Ins. Co. v. Heidelberg, 72 South. 852, 112 Miss. 46, L. R. A.
 1917B, 253, modifying judgment on suggestion of error 72 South.
 470.

3093 (g). Under the Washington statute, Laws 1903, p. 150, c. 97, § 12, a mutual company is exempt from the application of the "valued policy" statute (*Davis v. Pioneer Mut. Ins. Ass'n*, 87 Pac. 829, 44 Wash. 532).

The law does not preclude the insurer from setting up that the valuation required to be written in a policy was procured by fraud on the part of the insured.

Drummond v. White-Swearingen Realty Co. (Tex. Civ. App.) 165 S. W. 20; *Fadden v. Phoenix Ins. Co.*, 92 Atl. 335, 77 N. H. 392.

3094 (g). Provisions in a policy limiting the insurer's liability in conflict with the law are nugatory and invalid.

Oklahoma Farmers' Mut. Indemnity Ass'n v. McCorkle, 97 Pac. 270, 21 Okl. 606; *Teter v. Norfolk Fire Ins. Corporation*, 82 S. E. 201, 74 W. Va. 461; *Darden v. Liverpool & London & Globe Ins. Co.*, 68 South. 485, 109 Miss. 501; *Phoenix Ins. Co. v. Wintersmith*, 98 S. W. 987, 30 Ky. Law Rep. 369.

Where property insured is clearly real estate, a stipulation that it shall be considered as personalty is void, as violative of the valued policy law applying to real estate, though it might be otherwise if the nature of the property were doubtful (*Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House* [Tex. Civ. App.] 147 S. W. 629).

So in Mississippi, under Laws 1912, c. 224, a fire company can issue a schedule policy covering both insurable realty and personalty other than household or kitchen furniture, and attach a three-quarter valuation clause, with an express stipulation confining its application to the items of personalty listed and valued under separate heads (*Darden v. Liverpool & London & Globe Ins. Co.*, 68 South. 485, 109 Miss. 501).

Under the Missouri statute, deduction for depreciation after the date of the policy may be made.

Spickard v. Fire Ass'n of Philadelphia, 146 S. W. 808, 164 Mo. App. 1; *Same v. Franklin Fire Ins. Co.* (Mo. App.) 146 S. W. 811; *Hilburn v. Phoenix Ins. Co.*, 124 S. W. 63, 140 Mo. App. 355; *Stevens v. Norwich Union Fire Ins. Co.*, 96 S. W. 684, 120 Mo. App. 88; *Gragg & Gragg v. Northwestern Nat. Ins. Co.*, 111 S. W.

1184, 132 Mo. App. 405; *Strawbridge v. Standard Fire Ins. Co. of Hartford, Conn.*, 187 S. W. 79, 193 Mo. App. 687.

3095 (g). Rev. St. 1899, § 7979 (Ann. St. 1906, p. 3794), providing that no insurer shall accept a risk on any property at a ratio greater than three-fourths of the value of the property insured, and, when taken, its value shall not be questioned in any proceedings, is a direction not to insure for more than three-fourths value, and that, when a value is fixed, it cannot be denied that the sum fixed is three-fourths of the value of the property (*Crossan v. Pennsylvania Fire Ins. Co.*, 113 S. W. 704, 133 Mo. App. 537).

This provision applies also to insurance of personal property (*Gragg & Gragg v. Northwestern Nat. Ins. Co.*, 111 S. W. 1184, 132 Mo. App. 405).

So, where insurer issued new policy describing property as located in house to which it was to be moved, policy was a valued policy in the new location (*Weston v. American Ins. Co.*, 177 S. W. 792, 191 Mo. App. 282).

The definition of "total loss," however, as used in the statute concerning valued policies (Rev. St. Mo. 1909, §§ 7020, 7021), has no application to cases of insurance of personal property and the adjustment of loss thereunder (*Sharp v. Niagara Fire Ins. Co.*, 147 S. W. 154, 164 Mo. App. 475).

A building of a lessee, covered by a fire policy, is not real property, within the Missouri statute (Rev. St. 1909, §§ 7020, 7021); but the owner, suing for loss, must prove the actual cash value at the time of the loss, subject to the right to rely on section 7030 (*Sharp v. Niagara Fire Ins. Co.*, 147 S. W. 154, 164 Mo. App. 475). It was said in the same case, however, that Rev. St. 1909, § 7030, was applicable to policies covering real as well as personal property; and a policy on chattels is valued only to the extent of precluding insured from denying their value at the time of the issuance of the policy.

The Washington valued policy law, however, does not apply to insurance on personal property (*Bright v. Hanover Fire Ins. Co.*, 92 Pac. 779, 48 Wash. 60).

3096 (g). The valued policy law applies even when the interest of the insured is a limited one.

Bright v. Hanover Fire Ins. Co., 92 Pac. 779, 48 Wash. 60 (purchaser before completion of contract); *King v. Phoenix Ins. Co. of Brooklyn, N. Y.*, 92 S. W. 892, 195 Mo. 290, 113 Am. St. Rep.

678, 6 Ann. Cas. 618 (builder); *American Cent. Ins. Co. v. Antram*, 38 South. 626, 86 Miss. 224 (builder).

Where structures, when insured, were so far completed that the partitions were set, floors laid, roofs completed, and outside walls practically finished, they were "buildings" within Pub. St. 1901, c. 170, § 5, providing for the issuance of valued policies on buildings (*Tomuschat v. North British & Mercantile Ins. Co.*, 92 Atl. 329, 77 N. H. 388, Ann. Cas. 1915D, 1155).

When a building or structure is totally destroyed, except the foundation wall, that the description in a policy covering the property includes the foundation, does not prevent application of Rev. St. Ohio, § 3643, known as the "Valued Policy Law," in the settlement of the loss as a total loss (*German-American Ins. Co. v. McBee*, 97 N. E. 378, 85 Ohio St. 161, affirming 31 Ohio Cir. Ct. R. 469).

3097 (g). A petition in an action on a policy on real property, issued since the enactment of the valued policy law, need not state the value of the property (*Sharp v. Niagara Fire Ins. Co.*, 147 S. W. 154, 164 Mo. App. 475).

Under Code Iowa, § 1742, which provides that in any action on a policy for loss of any building insured the amount stated in the policy shall be prima facie evidence of the insurable value of the property at the date of the policy, where defendant, through its agent, knew, when it issued the policy sued on for \$4,000, that there was to be \$7,000 of insurance on the property, and the property was wholly destroyed, defendant was liable for four-sevenths of the loss, prima facie amounting to \$7,000, with interest, under its by-laws, providing that in case of loss insured shall receive from defendant only such proportion of the loss as the sum insured by it shall bear to the whole amount of insurance in force at the time of the damage (*Wensel v. Property Mut. Ins. Ass'n of Waterloo*, 105 N. W. 522, 129 Iowa, 295).

3098 (g). The provisions of the Kansas valued policy law covering improvements on real estate, conclusive evidence of value in case of a total loss, do not apply to a policy which insures against the loss of rents through the destruction of such improvements (*Amusement Syndicate Co. v. Prussian Nat. Ins. Co.*, 116 Pac. 620, 85 Kan. 367, rehearing denied 85 Kan. 616, 118 Pac. 76).

In California, however, such a policy has been held analogous to a "valued policy" defined by Civ. Code, § 2596, as a policy expressing on its face an agreement that the thing insured shall be valued

at a special sum, in so far as it prescribes a method of determining the amount of loss (*Whitney Estate Co. v. Northern Assur. Co. of London*, 101 Pac. 911, 155 Cal. 521, 23 L. R. A. [N. S.] 123, 18 Ann. Cas. 512).

In *Rev. St. Ohio 1906*, § 3643, providing that, in the absence of any change increasing the risk, the full amount mentioned in the policy shall be paid in case of a total loss, changes in insured building or structure itself are referred to, and not anything distinct from or accidentally related to the corpus of the insured building (*Germania Fire Ins. Co. v. Werner*, 81 N. E. 980, 76 Ohio St. 543, 12 L. R. A. (N. S.) 456, 118 Am. St. Rep. 891).

5. EFFECT OF OTHER INSURANCE AND APPORTIONMENT OF LOSS

3098-3100. (a) In general

3099 (a). Where the loss is total, the insurer's liability is not affected by the existence of a concurrent insurance within the limit permitted by the policy (*Teter v. Franklin Fire Ins. Co.*, 82 S. E. 40, 74 W. Va. 344). So, though the loss is not total, if it exceeds such limit.

Citizens' Mut. Fire Ins. Co. of Cecil County v. Conowingo Bridge Co., 77 Atl. 378, 113 Md. 430; *Buse v. National Ben Franklin Ins. Co. of Pittsburg, Pa.*, 160 N. Y. Supp. 566, 96 Misc. Rep. 229.

Where several policies covering the same property provided that the insurer should not be liable for a greater proportion of any loss than the amount covered by the policy should bear to the whole insurance on the property, each policy was a separate, independent contract of insurance, on which the insured could only recover such proportion of the loss as the particular insurer was liable for under such provision.

Liverpool & London & Globe Ins. Co. v. Delta County Farmers' Ass'n, 121 S. W. 599, 56 Tex. Civ. App. 588; *Fireman's Fund Ins. Co. v. Palatine Ins. Co.*, 88 Pac. 907, 150 Cal. 252.

Under the standard policy, the value of real property on total loss is conclusively fixed by the total of all the insurance written therein which is the amount of the policy and concurrent insurance, and the total amount of loss is the sum total of insurance, and, the value of the property being conclusively fixed at a sum equal to the loss, the several policies cannot be prorated (*Lawver v. Globe Mut. Ins. Co.*, 127 N. W. 615, 25 S. D. 549).

3100 (a). Where a building is totally destroyed by fire, the fact that there is more than one policy of insurance on the property does not prevent the application of Rev. St. Ohio, § 3643, providing that, in case of the total loss, the whole amount mentioned in the policy shall be paid; and, in case there are two or more policies on the property each shall contribute to the payment of the whole loss, in the settlement of the loss (*German-American Ins. Co. v. McBee*, 97 N. E. 378, 85 Ohio St. 161).

The fact that plaintiff has obtained satisfaction from other insurance is an affirmative defense, which is not shown by the allegation that plaintiff had other insurance, which aggregated more than the loss, without any showing that he had collected (*Columbus Dry Goods Co. v. Globe & Rutgers Fire Ins. Co.*, 115 N. Y. Supp. 1106, 131 App. Div. 603).

A provision in a fire policy that, if at the time of a fire the whole amount of insurance on the property shall be less than the actual cash market value thereof, insurer shall in case of loss be liable for such portion only of the loss or damage as the amount insured by the policy shall bear to the actual cash market value of the property at the time of the fire, does not nullify the stipulation in the policy limiting insurer's liability to no greater proportion of the loss sustained than the amount insured by it bears to the whole insurance on the property (*Liverpool & London & Globe Ins. Co. v. Delta County Farmer's Ass'n*, 121 S. W. 599, 56 Tex. Civ. App. 588).

The Wisconsin statute (St. 1898, § 1943a) prohibits fire insurance companies from issuing any policy limiting the amount to be paid in case of loss below the property's actual cash value, if within the amount of insurance for which premium is paid, and from requiring the use of any co-insurance clause to be made a part of any policy, except at the option of insured. In *Bloch v. American Ins. Co.*, 132 Wis. 150, 112 N. W. 45, it was held that the statute applies only to cases where the insurer attempts without consent of the insured, and without reduction of premium, to limit its liability below the face of the policy for which the insured has paid full premium, and where the value of the goods destroyed is within the amount of such insurance carried on the property. The section is not in conflict with the standard policy law (St. 1898, §§ 1941-43, to 1941-64), prescribing the form of certain fire policies, and does not prohibit permission for nor restriction of additional insurance, nor waiver of the invalidity of the additional insurance. Conse-

quently an agreement that at insured's option and in consideration of a reduced rate of premium permission was granted for other insurance to an amount including that policy not exceeding 75 per cent. of the actual cash value of the property, provided that, if at the time of fire the total insurance should exceed such per cent., the policy should become void only in proportion to such excess to such total insurance, was authorized by the express provisions of the standard policy law, and not in conflict with section 1943a, and hence valid.

3101-3103. (b) Insurance constituting other or concurrent insurance

3101 (b). The term "concurrent insurance" designates insurance placed in other companies covering the same risk, while there is no "coinsurance" unless the insured bears a proportion of the risk (*Oppenheim v. Fireman's Fund Ins. Co.*, 138 N. W. 777, 119 Minn. 417).

Whether void or voidable by the issuance of a second policy, a prior policy should be considered as insurance in determining the second insurance company's liability under a clause providing that it was liable for no greater amount than its policy bore to the whole amount of the insurance (*Southern Nat. Ins. Co. of Austin v. Barr* [Tex. Civ. App.] 148 S. W. 845).

3102 (b). A pro rata clause of a Michigan standard policy applies to a case where a prior policy became void ipso facto on the issuance of a subsequent policy by reason of a provision in such prior policy that the insured should not be entitled to recover thereon if he should procure any other insurance, whether valid or not, on the property insured (*Webb v. Concordia Fire Ins. Co.*, 132 N. W. 523, 167 Mich. 144, 36 L. R. A. [N. S.] 350).

3103 (b). A fire policy provided that the insurer should not be liable for a greater proportion of any loss than the amount insured by the policy bore to the "whole insurance," whether valid or not, "covering such property," etc. It was held that a floating insurance policy covering plaintiff's injured goods, but providing that the policy should not cover in whole or in part any merchandise on which there might be at the time specific insurance, excepting on the excess of value over and above such specific insurance, when such specific insurance was exhausted, did not cover the goods insured by the first policy, and was not to be considered in determining the "whole insurance" on the property at the time of the loss (*Klotz*

Tailoring Co. v. Eastern Fire Ins. Co., 102 N. Y. Supp. 82, 116 App. Div. 723).

Where it appeared that at the time of a fire the property covered by an insurance policy was insured in another company, and that plaintiff accepted from it a small sum in satisfaction of his policy, and there was evidence authorizing a finding that this sum did not represent a pro rata share of the loss, but was accepted by plaintiff only because the company was not liable in any amount, such acceptance was no defense to an action on the policy of the other company (*Georgia Co-op. Fire Ass'n v. Harris*, 52 S. E. 88, 124 Ga. 114).

3103-3104. (c) Same—Identity of property insured

3103 (c). Where another policy covered the insured property, and also property in other places, there was double insurance on the property covered by both policies, and insurer was liable under its stipulation for no greater proportion of the loss of such property than the amount of its policy bore to the whole insurance (*Liverpool & London & Globe Ins. Co. v. Delta County Farmers' Ass'n*, 121 S. W. 599, 56 Tex. Civ. App. 588).

3105-3108. (d) Same—Identity of interest insured

3105 (d). The fact that a mortgagee has the property insured by another company without the knowledge of plaintiff, the owner, does not limit defendant's liability to a proportionate share of the loss (*Kelley v. People's Nat. Fire Ins. Co.*, 181 Ill. App. 142, judgment affirmed 104 N. E. 188, 262 Ill. 158, 50 L. R. A. [N. S.] 1164).

So, under a policy insuring a dwelling house with provision for pro rata payment in case of other insurance, the owner's recovery is not limited to loss or damage of his interest in the property insured, as provided in a land sale contract, to a purchaser who had, as required thereby, obtained other insurance (*Smith v. American Ins. Co.*, 143 N. W. 54, 177 Mich. 123).

3107 (d). Where a partnership consisting of two persons insures its property in one company, and one of the partners insures his individual interest in three other companies, the insurance is not double insurance, and the company insuring the partnership was not entitled to have the policy prorate the loss with the other three companies (*Yanko v. Standard Fire Ins. Co.*, 31 Pa. Super. Ct. 1).

3108-3110. (e) Apportionment of insurance

3108 (e). On a blanket policy for \$5,000 covering boll cotton contained in six warehouses and covered by several other blanket policies in other companies, aggregating \$22,500, defendant's share of the loss was $\frac{5000}{27500}$ thereof, and it was not necessary to determine the amount of loss on each warehouse (*Scottish Union & National Ins. Co. v. Moore Mill & Gin Co.*, 143 Pac. 12, 43 Okl. 370).

3109 (e). An insurance company issued a standard fire policy for \$20,000. At a time when the total insurance amounted to \$400,000, the company wrote to the broker through whom the insurance was written requesting return of the policy for cancellation. The broker, before the loss, procured \$15,000 of insurance from other companies, and so informed the company. The company's notice of cancellation of the policy was received on the day of the loss. It was held that insured was entitled to recover from the company the proportional amount of the loss based on a valid existing insurance for \$20,000, and not for \$5,000, as the company was not entitled to any credit because of the new insurance except as to the total insurance in force; its notice of cancellation taking effect by its terms only at the end of five days after notice to the insured (*National Conduit & Cable Co. v. Commercial Union Assur. Co.*, 203 N. Y. 580, 96 N. E. 1122, affirming judgment 120 N. Y. Supp. 7, 135 App. Div. 136).

3110 (e). The "average clause" in a fire policy on the contents of several buildings is valid, and applicable in apportioning under the "coinsurance clause" loss in one building (*United States Cooperage & Handle Co. v. Firemen's Fund Ins. Co.*, 174 S. W. 193, 188 Mo. App. 376).

In *Northwestern Fuel Co. v. Boston Ins. Co. of Boston, Mass.*, 154 N. W. 515, 131 Minn. 19, however, an "average" or "distribution" clause of certain insurance policies was held not applicable, where the insured property is in one place.

Where each of several policies provided that, if there be other insurance, insured shall recover on the policy no greater proportion of the loss than the sum insured bears to the whole amount insured, each company should pay the proportion of the value of the property which the amount of its policy bears to the amount of all of the insurance, though some of the policies covered additional property.

National Fire Ins. Co. v. Dennison, 113 N. E. 260, 93 Ohio St. 404, L. R. A. 1916F, 992; *Taber v. Continental Ins. Co.*, 100 N. E. 636, 213 Mass. 487, Ann. Cas. 1914A, 664.

3111-3113. (f) Same—Compound and specific policies

3111 (f). A policy issued by the A. company provided that the insurance should not attach until all specific insurance was exhausted. Insured also had other insurance on the property. It was held that specific insurance is to be deemed exhausted when all that can be collected has been collected for a loss arising from any of the risks so insured against, and that, there being no agreement that the policy should not attach until the entire amount of the specific insurance had been required for the payment of losses, the other insurance was exhausted within the policy, and that the company was liable up to the amount insured by it for the balance of the loss (*Cutting v. Atlas Mut. Ins. Co.*, 85 N. E. 174, 199 Mass. 380).

3112 (f). Defendant company issued a policy containing a provision that defendant should not be liable for a greater proportion of loss on the property than "the amount hereby insured" bears to the whole insurance. The property insured consisted of three adjoining store buildings separated only by a partition wall, and in defendant's policy the amount of the insurance was divided among the three buildings, \$1,250 being placed upon one building and \$625 each on the other two. The A. Company also insured the same property for \$2,500, under a policy containing the same provisions as defendant's policy, but the policy of the A. Company was issued for \$2,500 upon the property as a whole. The property was subsequently damaged to the extent of \$3,495.49. It was held that it was proper to apportion one-half of the loss to each company (*Royal v. Hartford Fire Ins. Co.*, 158 Ill. App. 463).

3113 (f). In distributing the loss upon two parts of a building under one roof between a blanket policy and a policy specifically liable on each part, each providing that the liability shall not be greater than the amount insured thereby shall bear to the whole insurance, the blanket policy should be regarded as insuring each part to an entire amount unappropriated when it is reached, making the adjustment part by part in the order of the greater loss, if that will work substantial equity to all parties, and deducting a sum appropriated to the part as it is adjusted and passed (*Grollmund v. Germania Fire Ins. Co.*, 83 Atl. 1108, 82 N. J. Law, 618, L. R. A. 1915B, 509; *Same v. Rochester German Ins. Co.*, 83 Atl. 1113, 82 N. J. Law, 733).

3114-3115. (g) Same—Effect of coinsurance clause

3114 (g). Generally speaking, the insurer's liability, in case of loss, under what is termed the coinsurance clause, is determined by the proportion which the amount insured by each insurer bears to the total amount of insurance (*Cutting v. Atlas Mut. Ins. Co.*, 85 N. E. 174, 199 Mass. 380).

Coinsurance is a relative division of risk between the insurer and the insured, dependent upon the relative amount of policy and the actual value of property, and taking effect only when the actual loss is partial and less than the amount of the policy; the insurer being liable to the extent of the policy for a loss equal to or in excess of that amount (*Buse v. National Ben Franklin Ins. Co. of Pittsburg, Pa.*, 160 N. Y. Supp. 566, 96 Misc. Rep. 229).

3115-3117. (h) Policy requiring other insurance

3115 (h). The stipulation as to the assured becoming a co-insurer in a certain contingency is not against public policy nor prohibited by law (*Simon v. Queen Ins. Co. of America*, 45 South. 396, 120 La. 477, 14 Ann. Cas. 847).

3116 (h). The Michigan statute (Acts 1895, p. 292, Act No. 153 [Comp. Laws, § 5183]) makes it unlawful for any fire insurance company doing business in the state to limit its liability by reason of failure of the insured to insure the property covered by the policy for any certain amount or proportion of the actual cash value thereof. A standard policy bearing a rider providing that in consideration of a reduced rate of premium the company would pay only such proportion of the loss as the sum insured in the policy bore to 80 per cent. of the value of the property insured, and that, in no case, would it be liable to a greater proportion of any loss than the amount insured bore to the whole of the insurance, was in violation of the act of 1895 (*Attorney General ex rel. Michigan Lubricator Co. v. Commissioner of Ins.*, 112 N. W. 132, 148 Mich. 566).

In *Alsop Process Co. v. Continental Ins. Co.*, 162 S. W. 313, 175 Mo. App. 317, a provision in fire policy that insurer should be liable for only such portion of any loss as the amount insured bore to the actual cash value of the property was held a provision for coinsurance, and void under Rev. St. 1909, § 7023; section 7030 limiting insurance to three-fourths of the value having no bearing on the construction of section 7023.

6. PLEADING AND PRACTICE WITH REFERENCE TO EXTENT OF LIABILITY IN GENERAL**3117-3119. (a) Pleading**

3117 (a). A petition, in an action on a fire policy, should allege the value of the property destroyed.

Hilburn v. Phenix Ins. Co., 108 S. W. 576, 129 Mo. App. 670; *Connecticut Fire Ins. Co. v. Union Mercantile Co.*, 171 S. W. 407, 161 Ky. 718.

3118 (a). Insured may sue as for a total loss, and allege in addition thereto the actual amount of the damage, and if the evidence fails to establish total loss there may be a recovery for the actual damages as proved (*Moore v. Sun Ins. Co.*, 111 N. W. 260, 100 Minn. 374).

In *Fireman's Fund Ins. Co. v. Finklestein*, 73 N. E. 814, 164 Ind. 376, a complaint and adjuster's agreement, taken together, was held to render any further allegation as to the value of the property at the time of the fire unnecessary.

3119 (a). That a policy provides that the insurer shall not be liable beyond the cash value of the property insured, and that the liability shall not exceed what it would cost the insured to repair or replace the property destroyed, is an affirmative defense, and must be specially pleaded (*Mechanics' Ins. Co. of Philadelphia v. C. A. Hoover Distilling Co.*, 182 Fed. 590, 105 C. C. A. 128, 31 L. R. A. [N. S.] 873).

In view of the rule that a party's pleading is to be taken most strongly against himself the plea that the total destruction was caused by order of a city inspector of buildings should be construed as showing a partial destruction by fire and a subsequent demolition by the building inspector, and hence bad as a plea of matter in mitigation of damages (*Reed v. Firemen's Ins. Co.*, 69 Atl. 724, 76 N. J. Law, 11).

It was also held in the same case that a plea that plaintiffs ought not to maintain their action for the alleged total destruction because the buildings were not totally destroyed was bad, as the matter set up did not go in discharge of the action, but merely in mitigation of damages, and such matters cannot be pleaded, but can only be given in evidence under the general issue.

It was also stated, however, that a party may plead to part of a count if that part is material and severable from the rest, and the plea professes to answer that part only; and hence, where the lia-

bility for loss of rents caused by damage of the insured premises by fire was an independent liability under the policy, defendant might plead to that part of the declaration averring the loss of rents by reason of the fire.

3119-3120. (b) Issues and proof

3120 (b). Defense of other concurrent insurance, lessening plaintiff's loss being affirmative evidence thereof is not admissible, unless the defense is specially pleaded (*Fager v. Commercial Union Assur. Co.*, 176 S. W. 1064, 189 Mo. App. 464).

On a valued policy, plaintiff is not entitled to prove that the premises had been materially increased in value since the policy was taken out by the addition of improvements (*Chaplin v. Mutual Cash Guaranty Fire Ins. Co.*, 129 N. W. 238, 26 S. D. 632).

Under *Vernon's Sayles' Ann. Civ. St. Tex.* 1914, art. 4874, where the insured premises are a total loss, no showing or proof of the amount, etc., of the loss is necessary (*St. Paul Fire & Marine Ins. Co. v. Laster* [Tex. Civ. App.] 187 S. W. 969).

3121-3125. (c) Evidence

3121 (c). The burden of proof of waiver of a concurrent insurance clause in a fire policy, by knowledge of the agent of the existence thereof at the time of the delivery of the policy, is on the insured (*Western Nat. Ins. Co. v. Marsh*, 125 Pac. 1094, 34 Okl. 414, 42 L. R. A. [N. S.] 991).

Where certain pictures insured by a valued policy were described as by celebrated artists and schools, the burden was on plaintiff to show that the description was correct (*Petow v. North British & Mercantile Ins. Co. of London and Edinburgh*, 92 Atl. 272, 86 N. J. Law, 384).

The burden is on plaintiff to show the value of his interest in the property destroyed, and unless he does so he can only recover nominal damages (*Ætna Fire Ins. Co. v. Kennedy*, 50 South. 73, 161 Ala. 600, 135 Am. St. Rep. 160).

Where, however, the insured's interest in the property was changed from an estate in fee to a life estate, and the insurer nevertheless continued the insurance in force with knowledge of the changed condition of the title, the burden was on the latter, aside from the provisions of Ky. St. 1903, § 700, making insurance companies liable for the face of the policy in case of total loss—to show that the life estate was of less value than the amount of insurance

(Continental Ins. Co. v. Thomason, 84 S. W. 546, 27 Ky. Law Rep. 158).

The purpose of Laws 1911, p. 243, § 105, is to prevent overinsurance, and an agent issuing a fire policy may testify to the value of the property at that time (Rasmusson v. North Coast Fire Ins. Co., 145 Pac. 610, 83 Wash. 569, L. R. A. 1915C, 1179).

On a fire policy containing a three-fourths clause and providing that the insurer should not be liable beyond the actual cash value, it was not error to permit a witness to testify that the cotton destroyed was worth \$2 per hundred at the time of loss, and to state on cross-examination that in his judgment it would have brought that amount net after it had been ginned (Scottish Union & National Ins. Co. v. Moore Mill & Gin Co., 143 Pac. 12, 43 Okl. 370).

An assessor's schedule giving the valuation of the insured property is not admissible on the question of value, where it did not appear that the insured made any return of her property for assessment that year, or that the schedule was prepared by her agent (Kelley v. People's Nat. Fire Ins. Co., 104 N. E. 188, 262 Ill. 158, 50 L. R. A. [N. S.] 1164, affirming judgment 181 Ill. App. 142).

Where a policy insuring rents required insured to rebuild or repair in as short a time as the nature of the case would admit, it must be presumed, in the absence of proof to the contrary, that plaintiff took possession of the premises as soon after the fire as possible.

Palatine Ins. Co., Limited, of Manchester, Eng., v. O'Brien, 68 Atl. 484, 107 Md. 341, 16 L. R. A. (N. S.) 1055; Palatine Ins. Co. v. O'Brien, 71 Atl. 775, 109 Md. 100.

3122 (c). An inventory taken several months after the issuance of a policy, being shown to be correct, in connection with other evidence, was admissible to show the property on hand at the time of the fire (Delaware Ins. Co. of Philadelphia v. Hill [Tex. Civ. App.] 127 S. W. 283).

But plaintiff's inventories for previous years, admitted in evidence, on which to base an estimate of the quantity and value of the goods damaged and destroyed, are not conclusive on the insured, though they constitute admissions and are entitled to such weight as the jury in their judgment may determine.

Furlong & Meloy v. American Cent. Fire Ins. Co., 113 N. W. 1087, 136 Iowa, 499; Furlong & Meloy v. North British & Mercantile Ins. Co. of Edinburgh & London, 136 Iowa, 468, 113 N. W. 1084; Same v. Aachen & Munich Fire Ins. Co. of Aix La Chapelle, 113 N. W. 1089.

Evidence other than books of account and a formal inventory are competent (*Retail Merchants' Ass'n Mut. Fire Ins. Co. v. Cox*, 138 Ill. App. 14).

In *Kahn v. London Assur. Corporation*, 173 S. W. 695, 187 Mo. App. 216, a list of personal property contained in insured house six months before time of loss was held admissible in evidence to prove amount of loss.

So testimony as to the price paid for insured's household goods about one year before the fire, the amount of wear they received, and their condition at the date of the fire, is competent evidence of their value when burned (*Popa v. Northern Ins. Co. of New York*, 158 N. W. 945, 192 Mich. 237).

3123 (c). Where most of plaintiff's books of account had been destroyed by the fire which occurred in April, but he had preserved an inventory of stock on hand on January 1st, and had obtained duplicate bills of purchases between that date and the time of the fire, it was error to refuse to permit him to refer to these documents to establish approximately the stock on hand at the time of loss by working from the inventory of January, by adding the purchases and deducting the amount of sales (*Cohen v. Sun Ins. Office*, 91 N. E. 265, 198 N. Y. 140, reversing 112 N. Y. Supp. 1125, 128 App. Div. 925).

Evidence as to the value of the property destroyed at the time it was insured and before the fire, in connection with evidence that the actual value had undergone no change from the date of the policy to the time the property was destroyed is admissible to show its actual value at the time of loss and to rebut a claim of fraudulent overvaluation (*Delaware Ins. Co. of Philadelphia v. Hill* [Tex. Civ. App.] 127 S. W. 283).

Evidence of rental value is admissible on the issue of actual value.

Citizens' Savings Bank & Trust Co. v. Fitchburg Mutual Fire Ins. Co., 84 Atl. 970, 86 Vt. 267; *Amusement Syndicate Co. v. Prussian Nat. Ins. Co.*, 116 Pac. 620, 85 Kan. 367, rehearing denied 118 Pac. 76, 85 Kan. 616.

Evidence of cost of construction of the injured building and related matters is admissible on the issue of the extent of the loss.

National Union Fire Ins. Co. v. Burkholder, 83 S. E. 404, 116 Va. 942; *Teter v. Norfolk Fire Ins. Corp.*, 82 S. E. 201, 74 W. Va. 461.

So evidence of the cost price of the articles is admissible to show the amount of loss.

Jones v. Orient Ins. Co., 171 S. W. 28, 184 Mo. App. 402; *Glaser v. Home Ins. Co.*, 93 N. Y. Supp. 524, 47 Misc. Rep. 89.

3124 (c). An affidavit made in proof of loss is admissible to show compliance with the conditions of the fire insurance policy sued on, but is not evidence of the amount of the loss (*Teter v. Franklin Fire Ins. Co.*, 82 S. E. 40, 74 W. Va. 344).

An insurance policy provided that in case of loss the proof of loss should contain a sworn statement showing, among other things, all other insurance on the property. In an action on such policy, defendant produced, on demand of plaintiff, such proof of loss made by plaintiff, containing a schedule of all other insurance, which was admitted in evidence without objection. It was held to be sufficient proof, *prima facie*, of the other insurance on the property (*Humboldt Fire Ins. Co. v. W. H. Ashley Silk Co.*, 185 Fed. 54, 107 C. C. A. 274).

In *Citizens' Savings Bank & Trust Co. v. Fitchburg Mutual Fire Ins. Co.*, 84 Atl. 970, 86 Vt. 267, it was held that quadrennial appraisal of a building and lot by listers was admissible to show the value of the building.

3125 (c). Evidence as to the amount of insurance carried prior to the date of the policy is immaterial, except on an issue of fraudulent overvaluation (*National Union Fire Ins. Co. v. Burkholder*, 83 S. E. 404, 116 Va. 942).

Where insured claimed a total loss, but had used some of the standing walls and the fixtures, evidence that they had been used merely to expedite the reconstruction was admissible as bearing on the claim of a total loss.

Citizens' Savings Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co., 86 Atl. 1056, 87 Vt. 23; *Hartford Fire Ins. Co. v. Dorroh*, 133 S. W. 465, 63 Tex. Civ. App. 560.

In *Milwaukee Mechanics' Ins. Co. v. Frosch* (Tex. Civ. App.) 130 S. W. 600, it was held that proof of the value of insured gifts at the time of destruction is sufficient, in the absence of a showing that such value exceeded their value when presented to insured.

The sufficiency of evidence was considered in *National Surety Co. v. Silberberg Bros.* (Tex. Civ. App.) 176 S. W. 97; *Scottish Union & National Ins. Co. v. Moore Mill & Gin Co.*, 143 Pac. 12, 43 Okl. 370; *Sloan v. Boston Ins. Co.*, 186 Ill. App. 81; *Same v. Queen Ins. Co. of America, Id.*, 82; *Hartford Fire Ins. Co. v. Pires*

(Tex. Civ. App.) 165 S. W. 565; *Foiles v. Detroit Fire & Marine Ins. Co.*, 141 N. W. 879, 175 Mich. 716; *Same v. Dixie Fire Ins. Co.*, 141 N. W. 882, 175 Mich. 723; *Leder v. National Union Fire Ins. Co.*, 141 N. W. 646, 175 Mich. 470; *Walrod v. Des Moines Fire Ins. Co.*, 140 N. W. 218, 159 Iowa, 121; *Spickard v. Fire Ass'n of Philadelphia*, 146 S. W. 808, 164 Mo. App. 1; *Same v. Franklin Fire Ins. Co. (Mo. App.)* 146 S. W. 811; *Home Ins. Co. v. Rogers*, 128 S. W. 625, 60 Tex. Civ. App. 456; *McFadden v. Liverpool & London & Globe Ins. Co. (C. C.)* 162 Fed. 783; *Keuthen v. Stache*, 106 N. Y. Supp. 198, 121 App. Div. 521; *British-American Ins. Co. of New York v. Columbian Optical Co.*, 108 N. W. 130, 76 Neb. 812; *Stevens v. Norwich Union Fire Ins. Co.*, 96 S. W. 684, 120 Mo. App. 88; *Phoenix Ins. Co. v. Winter-smith*, 98 S. W. 987, 30 Ky. Law Rep. 369; *Co-operative Ins. Ass'n v. Hubbs*, 115 S. W. 670, 53 Tex. Civ. App. 68; *Milwaukee Mechanics' Ins. Co. v. Frosch (Tex. Civ. App.)* 130 S. W. 600; *Boskowitz v. Continental Ins. Co.*, 161 N. Y. Supp. 680, 175 App. Div. 18, appeal dismissed 220 N. Y. 648, 115 N. E. 1034.

The sufficiency of evidence to go to the jury was considered in *City of Aurora v. Firemen's Fund Ins. Co.*, 180 Mo. App. 263, 165 S. W. 357; *Oppenheim v. Fireman's Fund Ins. Co.*, 138 N. W. 777, 119 Minn. 417.

3126-3127. (d) Trial and review

3126 (d). Amount of loss is for the jury.

Central Nat. Fire Ins. Co. of Chicago, Ill. v. Black, 220 Fed. 8, 135 C. C. A. 584; *Silverman v. Safety Mut. Fire Ins. Co.*, 44 Pa. Super. Ct. 618; *Berry v. Virginia State Ins. Co.*, 64 S. E. 859, 83 S. C. 13.

Where there is evidence of the loss of articles of value, the fact that it may be difficult or impossible to arrive at the exact cash value of the articles lost does not authorize the court to direct a verdict for defendant (*Walker v. Western Underwriters' Ass'n*, 105 N. W. 597, 142 Mich. 162).

The correctness of instructions was passed on in *Lundvick v. Westchester Fire Ins. Co.*, 104 N. W. 429, 128 Iowa, 376; *North British & Mercantile Ins. Co. v. Nidiffer*, 72 S. E. 130, 112 Va. 591, Ann. Cas. 1916A, 464; *Citizens' Savings Bank & Trust Co. v. Fitchburg Mutual Fire Ins. Co.*, 84 Atl. 970, 86 Vt. 267; *Stevens v. Norwich Union Fire Ins. Co.*, 96 S. W. 684, 120 Mo. App. 88; *Teter v. Franklin Fire Ins. Co.*, 82 S. E. 40, 74 W. Va. 344; *Hartford Fire Ins. Co. v. Pires (Tex. Civ. App.)* 165 S. W. 565; *State Mut. Fire Ins. Co. v. Cathey (Tex. Civ. App.)* 153 S. W. 935; *Bruger v. Princeton & St. M. Mut. Fire Ins. Co.*, 109 N. W. 95, 129 Wis. 281; *Moore v. Phoenix Ins. Co. of Brooklyn*, 111 N. W. 263, 100 Minn. 393; *Weissman v. County Fire Ins. Co. of Philadelphia*, 76 Atl. 1105, 83 Conn. 716.

3127 (d). Where parts of insured's books of account, including those showing its inventories and cash sales were destroyed, the action of the court in adopting the bank deposits made in the name of insured, together with the unpaid accounts and bills receivable, as a basis for ascertaining the amount of the loss was not erroneous (*Connecticut Fire Ins. Co. v. Union Mercantile Co.*, 171 S. W. 407, 161 Ky. 718).

Where insured's interest in the property destroyed was only a life estate, and she was present and testified, the court properly refused to give an instruction as to her life expectancy and the value of her interest in the house burned, based entirely on annuity tables; the jury being authorized to consider plaintiff's health and vigor in addition to the tables in determining her expectancy (*American Cent. Ins. Co. v. Leake*, 104 S. W. 373, 31 Ky. Law Rep. 1016).

Where the uncontradicted evidence in an action on a policy of burglary insurance showed a loss of \$120, aside from a showing by computation of a further loss of over \$800, a verdict of only \$100 was unsustainable (*Ingersoll v. United Surety Co.*, 126 N. Y. Supp. 391, 141 App. Div. 527).

In *Milwaukee Mechanics' Ins. Co. v. Frosch* (Tex. Civ. App.) 130 S. W. 600, it was held that a verdict against two insurance companies on policies covering the same loss and for equal amounts, and of even dates, implies an equal award against each company.

(1223)

XXII. RISK AND CAUSE OF LOSS—LIFE AND ACCIDENT INSURANCE

1. CAUSE OF DEATH AND EXCEPTED RISKS IN LIFE INSURANCE

3129-3133. (a) Fact and time of death

3129 (a). Though there can be no recovery on a contract of life insurance, unless it is pleaded and proved that insured is dead (*Connecticut Mut. Life Ins. Co. v. King*, 47 Ind. App. 587, 93 N. E. 1046), it is not essential that the proof of death should be conclusive (*Modern Woodmen of America v. Gerdorn*, 77 Kan. 401, 94 Pac. 788). Moreover, if there is evidence tending to show the death of insured, though the body was not found, it is not necessary to a recovery on the policy to show efforts made to locate him (*Pfeifer v. Supreme Tribe of Ben Hur*, 191 Mo. App. 38, 176 S. W. 710). It is generally sufficient if the fact of death be shown by a preponderance of evidence (*Kennedy v. Modern Woodmen of America*, 243 Ill. 560, 90 N. E. 1084, 28 L. R. A. [N. S.] 181, affirming 149 Ill. App. 471).

Sufficiency of the evidence to show fact of death, see *Spahr v. Mutual Life Ins. Co. of New York*, 98 Minn. 471, 108 N. W. 4; *Lindahl v. Supreme Court I. O. F.*, 100 Minn. 87, 110 N. W. 358, 8 L. R. A. (N. S.) 916, 117 Am. St. Rep. 666; *Springmeyer v. Sovereign Camp, Woodmen of the World*, 163 Mo. App. 338, 143 S. W. 872; *Pfeifer v. Supreme Tribe of Ben Hur*, 191 Mo. App. 38, 176 S. W. 710; *Shuford v. Life Ins. Co. of Virginia*, 167 N. C. 547, 83 S. E. 821.

Sufficiency of evidence taken pursuant to a stipulation pending defendant's appeal to show that insured was living when the judgment was rendered for plaintiff at trial, see *Alridge v. Brotherhood of American Yeomen*, 154 Mo. App. 700, 136 S. W. 31.

Where, in an action by an administratrix the complaint alleged due proof of the death of the insured during the continuance of the policy, an answer admitting that "proofs of death" were given amounts to a waiver of the necessity of formal proof of death at the trial. *Smith v. Prudential Ins. Co. of America*, 132 N. Y. Supp. 529, 147 App. Div. 580.

Fact of death as a question for the jury, see *Butler v. Supreme Court of I. O. F.*, 60 Wash. 171, 110 Pac. 1007.

The question as to the fact of death can hardly arise, except when the insured has disappeared. While death cannot be inferred from the mere fact of disappearance, yet the plaintiff in an action on the policy is not required to prove conclusively that insured is dead, but only bound to produce such evidence as would fairly lead to such presumption (*Modern Woodmen of America v. Gerdorn*, 77 Kan. 401, 94 Pac. 788). In *Samberg v. Knights of the Modern Maccabees*, 158 Mich. 568, 123 N. W. 25, 133 Am. St. Rep. 396, where the insured had disappeared from his residence and had not been heard from for over seven years, it was held that an instruction that the order was not liable unless the member was actually or presumptively dead, and that, if he was alive and in a certain place during the seven years' period as claimed by a witness, there can be no recovery, and that such evidence can be overcome only on finding that the witness was mistaken in his identification, or was falsifying, was sufficiently favorable to the order.

By-law declaring that absence or disappearance of member should not be evidence of his death is void, under Rev. St. Tex. 1911, art. 5707, creating a presumption of death from absence for seven years. Supreme Ruling of Fraternal Mystic Circle v. Hoskins (Tex. Civ. App.) 171 S. W. 812.

There is no presumption as to the exact time of death in case of disappearance, and where the proof of death consisted of evidence that insured had disappeared July 7, 1898, and had not been heard of for more than seven years, the jury, in answer to an interrogatory as to the time of death, answered that he died "before April 1, 1900," a request to require the jury to make the answer more specific by fixing the exact date of death was properly refused (*Butler v. Supreme Court of I. O. F.*, 60 Wash. 171, 110 Pac. 1007). It must, however, be pleaded and proved that the insured died during the life of the policy.

Alexander v. Woodmen of the World, 161 Ala. 561, 49 South. 883; *United States Health & Accident Co. v. Veitch*, 161 Ala. 630, 50 South. 95; *Patterson v. Grand Lodge K. of P.*, 162 Ala. 430, 50 South. 377; *Supreme Lodge K. P. v. Crenshaw*, 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307; *Bradley v. Modern Woodmen of America*, 146 Mo. App. 428, 124 S. W. 69; *Johnson v. Sovereign Camp, Woodmen of the World*, 147 S. W. 510, 163 Mo. App. 728.

Sufficiency of pleading as to fact of death while policy in force, see *Patterson v. Grand Lodge K. of P.*, 162 Ala. 430, 50 South. 377; *Supreme Lodge K. P. v. Crenshaw*, 58 S. E. 628, 129 Ga. 195, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307.

Estoppel of insurer to deny that policy was in force, see *Keith v. Modern Woodmen of America*, 167 Iowa, 239, 149 N. W. 225, L. R. A. 1915B, 793; Supreme Ruling of Fraternal Mystic Circle v. Hoskins (Tex. Civ. App.) 171 S. W. 812.

The evidence was regarded as insufficient to warrant a finding that insured died within 57 days after his disappearance in *Spahr v. Mutual Life Ins. Co. of New York*, 108 N. W. 4, 98 Minn. 471.

Evidence held sufficient to authorize a finding that a member of a fraternal insurance association died before a designated date. *Supreme Lodge of Pathfinder v. Johnson* (Tex. Civ. App.) 168 S. W. 1010.

3131 (a). In *Samberg v. Knights of the Modern Maccabees*, 158 Mich. 568, 123 N. W. 25, 133 Am. St. Rep. 396, it was held that a by-law, providing that the disappearance of a member from his place of residence for any length of time shall not be presumptive evidence of his death, adopted after the issuance of a benefit certificate, is inapplicable to an action on the certificate based on the member's death because he has not been heard from for seven years after his disappearance from his home, because it renders ineffectual Comp. Laws 1897, § 1225, providing that a person disappearing and his whereabouts remaining unknown for seven years shall be presumed to be dead, and the beneficiary proving the disappearance of the member, and a failure to hear from him for over seven years, is entitled to recover. On the other hand, in *McGovern v. Brotherhood of Locomotive Firemen and Engineers*, 31 Ohio Cir. Ct. R. 243, it was said that a by-law, declaring that no death losses shall be paid where the only evidence thereof is the disappearance of a member, is for the mutual benefit of all members, and not contrary to public policy, and where the constitution of the association reserves the right to amend the by-laws, such by-law is binding upon members and beneficiaries, notwithstanding its enactment but 15 days before a legal presumption of the death of a member is established, and acceptance by the association from the beneficiary of all the premiums and assessments required by the policy with knowledge of such disappearance.

It has been held in California that, where plaintiff relied on absence for more than seven years to raise a presumption of death, she was bound to show, in addition to such absence, diligent effort to locate insured, and that she had made inquiries in all places where he might reasonably be expected to be found, if alive, and had exhausted every source of information without avail (*Brown*

v. Grand Lodge A. O. U. W. of California, 13 Cal. App. 537, 110 Pac. 351); and also that the cause of action on a death benefit certificate, providing for payment on "satisfactory evidence" of insured's death, does not arise till lapse of the seven years, giving the presumption, under Code Civ. Proc. § 1963, subd. 26, of his death necessary for proof thereof (*Benjamin v. District Grand Lodge No. 4, Independent Order B'Nai B'rith*, 171 Cal. 260, 152 Pac. 731). 'It was, however, held in *Modern Woodmen of America v. Gerdorn*, 77 Kan. 401, 94 Pac. 788, that reasonable diligence to locate insured only was necessary. In *Kennedy v. Modern Woodmen of America*, 149 Ill. App. 471, affirmed in 243 Ill. 560, 90 N. E. 1084, 28 L. R. A. (N. S.) 181, it was held that investigations made after suit upon a benefit certificate has been instituted are competent where the death is sought to be established under the presumption arising from seven years' continued and unexplained absence. And in the same case it was said that after seven years' unexplained absence of insured, if information has been given to relatives of the presence of insured, to the effect that he had been seen at a certain time and place, failure to investigate such clue may be justified by showing the bad reputation for truth and veracity of the person who has given such information. Whether the insured's friends made a sufficient inquiry to determine whether he was dead is for the jury (*Butler v. Supreme Court of I. O. F.*, 60 Wash. 171, 110 Pac. 1007).

An allegation that insured died at a certain time does not render admissible evidence of his disappearance to support the presumption of death from absence (*Martin v. Modern Woodmen of America*, 158 Mo. App. 468, 139 S. W. 231). In Iowa it has been held that letters of administration issued by the district court to wife of absentee under Acts 33d Gen. Assem. c. 200, are inadmissible to prove the absentee's death in the wife's action on a fraternal society death certificate (*Werner v. Fraternal Bankers' Reserve Society*, 172 Iowa, 504, 154 N. W. 773, Ann. Cas. 1918A, 1005). Where the question was whether the assured, 26 years of age, who had not been heard from for over 7 years, was dead, it was not error to exclude mortality tables; the expectancy of life of a man of the age of the assured not being material (*Heagany v. National Union*, 106 N. W. 700, 143 Mich. 186).

Admissibility of evidence as to character, habits, family relations, etc., in cases of disappearance, see *Pfeifer v. Supreme Tribe of Ben Hur*, 191 Mo. App. 38, 176 S. W. 710; *Butler v. Supreme Court of I. O. F.*, 60 Wash. 171, 110 Pac. 1007.

It is sufficient if the facts necessary to raise the presumption of death, after seven years' unexplained absence, are established by a preponderance of the evidence, (*Kennedy v. Modern Woodmen of America*, 149 Ill. App. 471, affirmed in 243 Ill. 560, 90 N. E. 1084, 28 L. R. A. [N. S.] 181).

The sufficiency of the evidence to warrant a finding of insured's death, though there was no direct proof thereof, and he had been unheard of for two years only is considered in *Springmeyer v. Sovereign Camp, Woodmen of the World*, 143 S. W. 872, 163 Mo. App. 338.

In an action on an insurance policy, based on the legal presumption of death after absence for seven years, evidence considered sufficient to warrant the jury in arriving at the conclusion that he was dead. *Lichtenhan v. Prudential Ins. Co. of America*, 191 Ill. App. 412.

Sufficiency of the evidence to sustain a finding fixing the date of insured's death, after the presumption of death from unexplained absence had sufficed to prove the fact of his death is considered in *Linneweber v. Supreme Council Catholic Knights of America*, 158 Pac. 229, 30 Cal. App. 315.

The question of the death of the assured, not heard from for over seven years, was for the jury, though there was evidence warranting a finding that assured, on leaving his place of residence, expressed an intention to seek employment elsewhere (*Heagany v. National Union*, 106 N. W. 700, 143 Mich. 186).

The sufficiency of the evidence to sustain a verdict as to the death of the insured and the identity of the body is considered in *Lindahl v. Supreme Court I. O. F.*, 110 N. W. 358, 100 Minn. 87, 8 L. R. A. (N. S.) 916, 117 Am. St. Rep. 666.

3133-3135. (b) Cause of death in general

3133 (b). Generally the plaintiff in an action on a life policy makes out a prima facie case on proof of the fact of death, and the burden is on the insurer to show that the cause of death was one of the excepted risks (*Cummings v. Sovereign Camp of Woodmen of the World*, 170 Mo. App. 194, 155 S. W. 488). But in Iowa it has been held that the burden was on plaintiff to show that the insured's death resulted from a cause within the terms of the insurance (*Clark v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 201, 135 N. W. 1114, 42 L. R. A. [N. S.] 631). So in Illinois it is held that the burden of proof rests on plaintiff to establish that the assured met an accidental death under conditions imposing liability expressed in the terms of the contract of insurance (*Moses v. Illinois Commercial Men's Ass'n*, 189 Ill. App. 440).

Statements made by a physician in the proofs of death are competent evidence against the beneficiary, if such beneficiary has, in such proofs of death, adopted the statements (*Lundholm v. Mystic Workers of the World*, 164 Ill. App. 472). So, a sworn statement as to the cause of the death by the physician attending the deceased, made in response to interrogatories made by the society and filed with the proofs of death, is competent evidence for defendant (*Vail v. North American Union*, 191 Ill. App. 297). But a physician's certificate as to the cause of death, not referred to in the proofs of loss, is inadmissible (*Salts v. Prudential Ins. Co.*, 140 Mo. App. 142, 120 S. W. 714). And to the same effect is *Brotherhood of American Yeomen v. Hickey* (Tex. Civ. App.) 191 S. W. 162.

The admissibility of certain evidence as bearing on the cause of death is considered in *Pacific Mut. Life Ins. Co. v. Shields*, 182 Ala. 106, 62 South. 71.

Proofs of death in an action involving recovery on life policies are competent to prove that such proofs were made, but incompetent to prove the facts therein stated. *Bowman v. Anderson*, 268 Mo. 1, 186 S. W. 1012.

3134 (b). In Iowa it has been held that the result of a coroner's inquest was admissible as prima facie evidence of the fact that death resulted from the cause found by the coroner's jury (*Boeck v. Modern Woodmen of America*, 162 Iowa, 159, 143 N. W. 999). So, too, in Illinois it is held that a coroner's verdict is competent where the defense is that death resulted from a cause which precluded liability by the society (*Lundholm v. Mystic Workers of the World*, 164 Ill. App. 472). But the general rule seems to be that the record of proceedings at a coroner's inquest is not admissible to show the cause of death.

Pacific Mut. Life Ins. Co. v. McCabe, 162 S. W. 1136, 157 Ky. 270; *Queatham v. Modern Woodmen of America*, 148 Mo. App. 33, 127 S. W. 651; *Kinney v. Brotherhood of American Yeomen*, 106 N. W. 44, 15 N. D. 21. And see *Metropolitan Life Ins. Co. v. Wagner*, 50 Tex. Civ. App. 233, 109 S. W. 1120, and *American Nat. Ins. Co. v. White*, 126 Ark. 483, 191 S. W. 25.

Of course, the question depends on the terms of the policy. So, where a policy expressly provides that proofs of death shall contain the record and verdict of the coroner's inquest, if any be held, and that the proofs of death shall be evidence of the facts therein stated in behalf of the company, the beneficiary, in a suit on the policy, by willfully omitting from the proofs the record of the proceedings

of the coroner's inquest, in violation of the express terms of the policy, may not deprive the insurer of the evidence contained therein, but the insurer may introduce it at the trial (*Metropolitan Life Ins. Co. v. Wagner*, 50 Tex. Civ. App. 233, 109 S. W. 1120). On the other hand, in *Craiger v. Modern Woodmen of America*, 40 Ind. App. 279, 80 N. E. 429, a by-law of the society provided that, in case a coroner's inquest was held on the death of an assured, a copy of the coroner's proceedings, all the evidence, and the verdict must accompany the proofs of death, but did not stipulate the purpose of such proofs. In an action on the certificate, the beneficiary did not introduce in evidence the proofs of death, to which was attached a copy of the coroner's verdict, with the evidence, but merely proved, as pleaded in the complaint, that they had been made out on blanks furnished by the defendant, delivered to it, and accepted as satisfactory. It was held that the proofs of death and attached coroner's verdict and evidence before him were inadmissible as evidence under a general denial.

3135 (b). The Indiana statute (Acts 1907, c. 152), entitled "An act to collect accurate records of deaths * * * contagious diseases * * * prescribing the duties of the state board of health," etc., and requiring physicians to report to the health officers all deaths, and that records of deaths shall be kept by the health officers, etc., was enacted in the exercise of the police power to prevent the spread of contagious diseases and to promote the public health, and does not interfere with private rights or create a new rule of evidence, and a record of a board of health giving the cause of death of a member of a fraternal association is not admissible in evidence in an action on the certificate.

Brotherhood of Painters, Decorators & Paperhangers of America v. Barton, 46 Ind. App. 160, 92 N. E. 64; *Same v. Peters*, 46 Ind. App. 733, 92 N. E. 183.

3135-3138. (c) Excepted risks

3135 (c). A provision in a policy that no benefits will be paid for sickness resulting from diseases contracted or injuries received before the delivery of the policy is valid (*Life & Casualty Ins. Co. v. King*, 137 Tenn. 685, 195 S. W. 585). And where the certificate exempts the insurer from liability where the assured died within one year from certain diseases, the burden rested on the insurer to show the fact of death from such a cause and within the excepted time (*Red Men's Fraternal Accident Ass'n of America v.*

Rippey, 181 Ind. 454, 103 N. E. 345, 50 L. R. A. [N. S.] 1006, rehearing denied 181 Ind. 454, 104 N. E. 641, 50 L. R. A. [N. S.] 1006).

Where the insurer contends that the cause of death was one of the risks excepted in the policy, it has the burden of showing that such excepted risk was the proximate cause of death.

Brotherhood of Painters, Decorators and Paperhangers of America v. Barton, 46 Ind. App. 160, 92 N. E. 64; Same v. Peters, 46 Ind. App. 733, 92 N. E. 183; Nardinger v. Ladies of the Maccabees of the World (Minn.) 163 N. W. 785.

Where insured was killed as the result of a difficulty and defendant resisted a recovery on the certificate on the ground that insured was the offending party within a by-law prohibiting a recovery under such circumstances, evidence of insured's general reputation for peace and quiet and that he was a violent and dangerous man was irrelevant (Knights of Maccabees of the World v. Shields, 156 Ky. 270, 160 S. W. 1043, 49 L. R. A. [N. S.] 853, rehearing denied 157 Ky. 35, 162 S. W. 778, 49 L. R. A. [N. S.] 860).

3137 (c). Since cancer is a disease from which men are not immune, the fact that a cancer attacks the womb of a female insured does not make it one of the "diseases peculiar to women," within the meaning of a provision of a policy excepting such diseases from the risks assumed by the insurer (Shuler v. American Benev. Ass'n, 111 S. W. 618, 132 Mo. App. 123). Policies on female lives often contain a provision exempting the insurer from liability for death resulting from pregnancy, or waiving all benefits if death results from such cause. A death from puerperal septicæmia resulted from pregnancy within the meaning of a clause by which the insured waived all right to benefits in case death should result from pregnancy (Knights and Ladies of Columbia Ins. Order v. Shoaf, 77 N. E. 738, 166 Ind. 367). But though insured's confinement at childbirth was followed by puerperal septicæmia, if she had begun to recover from that ailment, when pneumonia developed, causing her death, it cannot be said that her pregnancy and confinement contributed to her death (Thompson v. Royal Neighbors of America, 154 Mo. App. 109, 133 S. W. 146).

Sufficiency of evidence to show that death resulted from confinement due to pregnancy, see *Rose v. Commonwealth Beneficial Ass'n*, 4 Boyce (Del.) 144, 86 Atl. 673.

In *Knights and Ladies of Columbia Ins. Order v. Shoaf*, 166 Ind. 367, 77 N. E. 738, it was held that a provision in a mutual

benefit certificate that it should be void in case the female holder should be attended at confinement or miscarriage by any one not a regularly licensed physician, etc., was superseded by a special contract by which insured waived all benefits in case her death resulted from pregnancy. And in the same case it was said that where insured executed a waiver of all benefit in case of her death resulting from pregnancy, the action of the insurer in executing the certificate, and in requiring the beneficiary therein after death had resulted from pregnancy to make proof of loss, have a guardian appointed for a minor beneficiary, and incur expense in meeting an officer of the insurer did not estop it from relying on the waiver as a defense to an action on the certificate. In *Stegner v. Modern Brotherhood of America*, 24 S. D. 371, 123 N. W. 842, it was held that in an action on a certificate to which was attached a special pregnancy waiver which provided that the company would not be liable should the insured die by reason, directly or indirectly, of her pregnancy, and, if she died within a year, the burden of proof was to be upon the beneficiaries to show that death was not caused by pregnancy, or anything growing out of or connected therewith, where the insured died 10 days after giving birth to a child, it was not error to refuse to charge that the presumption was raised by reason of the death of insured that she died from some ailment connected with her condition, and that plaintiff must prove by a preponderance of the evidence that she died from some cause entirely disconnected with her condition, since the parties did not by their contract undertake to create a presumption of fact. They only attempted to place the burden of proof upon the beneficiary.

The provisions of an application for membership, that the association should not be liable to pay any benefits because of the results of confinement due to pregnancy, refer only to sick benefits, and do not preclude recovery of funeral benefits, even if death was the result of such confinement (*Rose v. Commonwealth Beneficial Ass'n*, 4 Boyce [Del.] 144, 86 Atl. 673).

The word "abortion," as used in a policy exempting the insurer from payment of all claims resulting from an abortion, means the intentional causing of a "miscarriage" which means the failure of a woman to carry a fetus to maturity (*Flory v. Supreme Tribe of Ben Hur*, 98 Neb. 160, 152 N. W. 295).

It is competent for the insured to waive all claim under the policy in case of death resulting from smallpox, and to make such

waiver binding on a beneficiary under the policy by the terms of the application (*Bankers' Union of the World v. Mixon*, 103 N. W. 1049, 74 Neb. 36). Where the application waived on the part of the applicant the liability of the order for death of the applicant from smallpox, but neither the application nor a copy thereof was attached to the policy, as required by Ky. St. 1903, § 679, to make it a part of the contract, the waiver was not available to the order to defeat liability on the policy for death of the applicant from smallpox (*Grand Lodge A. O. U. W. v. Edwards*, 85 S. W. 701, 27 Ky. Law Rep. 469).

3138-3139. (d) Same—Death while engaged in unauthorized occupation

3138 (d). A recovery cannot be had on a certificate issued to a member of a benefit society who, after its issuance, entered into employment prohibited by the by-laws of the association and thereupon executed a waiver of liability in the event of death resulting from such employment where death did result to such member by reason of such employment (*Fraternal Aid Ass'n v. Hitchcock*, 121 Ill. App. 402). Employment as fireman on a railway yard switching engine is "service in switching cars," within a provision exempting insurer from liability on insured entering such service (*Diseker v. Equitable Life Assur. Society of United States*, 87 S. C. 187, 69 S. E. 153). The fact that insured was part owner of a steam engine used in operating a sawmill, and met his death by an explosion of the boiler, is not engaging in or using explosives within the meaning of a life policy (*Anchor Life Ins. Co. v. Meyer*, 61 Ind. App. 35, 111 N. E. 436).

Whether a member of a mutual benefit association died by accident while in a prohibited employment is for the jury (*Wolfgang v. Modern Woodmen of America*, 167 Mo. App. 220, 149 S. W. 1167).

If plaintiff puts in evidence proofs of loss which show that death resulted while engaged in a prohibited occupation, it is proper for the court to instruct the jury accordingly. *Quinn v. North American Union*, 162 Ill. App. 319.

As to cause of death being directly traceable to hazards of an occupation as to which the by-laws provided the insurance should not apply, unless hazardous occupation certificate should be procured, see *Frain v. Modern Woodmen of America*, 60 Colo. 585, 155 Pac. 330.

3139-3142. (e) Same—Death caused by intemperance or use of narcotics

3139 (e). Death from delirium tremens renders void a benefit certificate under a by-law forfeiting it, where death results from the use of intoxicating liquors (*Curtis v. Modern Woodmen of America*, 159 Wis. 303, 150 N. W. 417). Wood alcohol is a narcotic poison, and not an intoxicating liquor, and an insured who died from drinking wood alcohol taken by mistake for grain alcohol did not die, directly or indirectly, from the use of intoxicating liquor (*Modern Woodmen of America v. Lawson*, 110 Va. 81, 65 S. E. 509, 135 Am. St. Rep. 927).

In *Loyal Americans of the Republic v. Mayer*, 137 Ill. App. 574, the certificate provided that it should become void if the member should become intemperate in the use of alcoholic drinks or drugs to such an extent as to permanently impair his health. The certificate also provided that it should be "incontestable, except for fraud, after the expiration of three years from the date thereof." It was held that the contract of insurance did not cover the death of a member by the use of intoxicating liquor or by the practice of any pernicious habit that obviously tends to shorten life occurring within three years after the date of the certificate, but that after three years it was incontestable, except for fraud.

3140 (e). Where a by-law of a mutual benefit society provided that it should be relieved from liability in case the member became intemperate in the use of intoxicating liquors, or his death should result from his intemperate use thereof, the words "intemperate use" should be construed as equivalent to habitual intemperance in such use, but the word "use" employed in the sentence relieving the company from liability in case of death resulting from the intemperate use of such liquors was not employed with reference to a fixed habit, but should be construed to mean the means only by which death was caused, so that where insured died as the result of a fall, which was directly caused by his intoxicated condition, the society was not liable without regard to whether insured had acquired a fixed habit of intoxication (*Ury v. Modern Woodmen of America*, 149 Iowa, 706, 127 N. W. 665).

Where an intoxicated person is shot in a drunken brawl, there can be no recovery on a benefit certificate which provided that if death resulted directly or indirectly from intemperance the certificate should become void (*Devine v. Modern Woodmen of America*, 171 Ill. App. 592). Even though a waiver of a defense predicated

upon the excessive use of intoxicating liquors may be established, yet such a waiver does not extend to and include the separate and distinct defense predicated upon the death of the insured having resulted directly or indirectly from his intemperate use of intoxicating liquors (*Busing v. Modern Woodmen of America*, 151 Ill. App. 49).

3141 (e). Where a policy is in terms avoided if death results from use of intoxicating liquors, a return of premiums is not a prerequisite to a defense of a suit based thereon (*Modern Woodmen of America v. Young*, 59 Ind. App. 1, 108 N. E. 869).

The burden is on the insurer to show that the insured died from the intemperate use of liquor.

Lockway v. Modern Woodmen of America, 121 Minn. 170, 141 N. W. 1; *Cummings v. Sovereign Camp, Woodmen of the World*, 170 Mo. App. 194, 155 S. W. 488.

The sufficiency of the evidence to show that death was the result of intemperance is considered in *Boeck v. Modern Woodmen of America*, 162 Iowa, 159, 143 N. W. 999; *Lockway v. Modern Woodmen of America*, 121 Minn. 170, 141 N. W. 1; *Cummings v. Sovereign Camp, Woodmen of the World*, 170 Mo. App. 194, 155 S. W. 488.

Sufficiency of evidence to show that the death of the member was not caused by the use of drugs is considered in *Snyder v. Supreme Ruler of Fraternal Mystic Circle*, 122 S. W. 981, 122 Tenn. 248, 45 L. R. A. (N. S.) 209.

3142 (e). Where the defense was that insured's death was caused by his intoxication, the question was an issue of fact for the jury (*Hegna v. Modern Brotherhood of America*, 118 Minn. 368, 136 N. W. 1035). If there was evidence which would have justified a finding that death was so caused, the direction of a verdict for plaintiff was error (*Collver v. Modern Woodmen of America*, 154 Iowa, 615, 135 N. W. 67).

3142-3152. (f) Same—Death while engaged in violation of law

3143 (f). A provision in a certificate of membership in a fraternal insurance society, that if the death of the member should occur in the violation of any law, the certificate should be void is valid (*Bosler v. Modern Woodmen of America*, 100 Neb. 570, 160 N. W. 966, L. R. A. 1917C, 195). But a defense based on such condition is affirmative, requiring strict proof (*Gilkey v. Sovereign Camp of Woodmen of the World* [Mo. App.] 178 S. W. 875). Under the clause exempting the insurer from liability if the death of

the insured occurs in consequence of, or while engaged in, the violation of law, if the insured was shot and killed in consequence of his violation of law, it is immaterial whether the person shooting him committed an offense (*Woodmen of the World v. Hipp* [Tex. Civ. App.] 147 S. W. 316). So if no reason appears why a slayer killed insured, except anger, a recovery of the full amount of insured's policy is not barred by a provision limiting recovery in case his death was the result of a violation of the law (*Empire Life Ins. Co. v. Einstein*, 12 Ga. App. 380, 77 S. E. 209). If assured's adversary was guilty of unjustifiable homicide in killing assured, the latter's death is not within the exception of a policy against death while violating the law, but if the circumstances rendered the killing justifiable, there was a violation of law within the exception (*American Nat. Life Ins. Co. v. White*, 126 Ark. 483, 191 S. W. 25). So, under a benefit certificate excepting risk where death is caused by criminal act, beneficiaries under certificate of one who had assaulted an officer and who was killed by accidental discharge of the officer's revolver in the scuffle could not recover (*United States Bank & Trust Co. v. Switchmen's Union of North America*, 256 Pa. 228, 100 Atl. 808, L. R. A. 1917E, 311). If insured was shot and killed by another before he committed any act other than to curse and abuse his assailant, he was not killed in an affray (*Eminent Household of Columbian Woodmen v. Gallant*, 194 Ala. 680, 69 South. 884). The insurer must show affirmatively, not only that insured was killed by another, but that such other acted in self-defense (*Gilkey v. Sovereign Camp of Woodmen of the World* [Mo. App.] 178 S. W. 875).

The exception is abrogated by the clause declaring the policy incontestable after a certain number of years.

Kelly v. North American Union, 146 Ill. App. 611; *Hanisch v. North American Union*, 170 Ill. App. 79.

3146 (f). One who assaulted the person by whom he was killed does not come within the exception, if he was insane or of unsound mind at the time of the assault (*Howle v. Eminent Household of Columbian Woodmen*, 118 Ark. 226, 176 S. W. 313). So, too, if insured while insane and resisting arrest was killed by the sheriff, his insurance was not forfeited under the exemption in case insured met his death while violating the criminal laws of the state (*Woodmen of the World v. Dodd* [Tex. Civ. App.] 134 S. W. 254).

Under *Kirby's Dig. Ark. § 1557*, voluntary intoxication of a member of a fraternal order is no excuse for his violation of law by which

he met his death. *Eminent Household of Columbian Woodmen v. Howle*, 124 Ark. 224, 187 S. W. 176.

That decedent shot himself while carrying a pistol on a highway did not show that he died in consequence of a violation of the laws of the state within the exception (*Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 South. 1006). One who is killed while crossing a railroad at a point where the public was licensed to cross, was not violating the law so as to relieve the insurer of liability for his death (*Johnson v. Hawkeye Commercial Men's Ass'n*, 171 Iowa, 425, 152 N. W. 561). Where insured was slain by a husband, either while he was attempting to have sexual intercourse with the wife, or immediately after the act of sexual intercourse was complete, the death was not caused or superinduced in the violation of, or attempt to violate, any criminal law, within the meaning of the policy (*Supreme Lodge K. P. v. Crenshaw*, 58 S. E. 628, 129 Ga. 195, 13 L. R. A. [N. S.] 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307). Under the exception there can be no recovery where death results from the assured having a miscarriage produced if such miscarriage was not essential to the preservation of the life of the assured (*Lundholm v. Mystic Workers of the World*, 164 Ill. App. 472).

Unqualified the word "abortion" in primary meaning is equivalent of "miscarriage," and does not import crime, and Comp. Laws Mich. 1897, §§ 11502, 11503, adopts synonymous term "miscarriage," and recognizes that causing or procuring it may be innocent, and even necessary to preserve life. *Gilchrist v. Mystic Workers of the World* (Mich.) 163 N. W. 10.

Under a policy exempting the insurer from liability for injuries if the assured was violating a city ordinance, insurer is liable, though the assured was erecting a fire escape without erecting a covering to protect the street, and though a city ordinance required such a covering in the construction of new buildings or in the unroofing or tearing down of old buildings (*W. N. Kratzer & Co. v. Pennsylvania Casualty Co.*, 86 Atl. 303, 238 Pa. 515). And it has been held that insured's death did not result while violating an ordinance prohibiting persons "to catch hold of, or swing upon the cars of a railroad company, while such car is in motion," where death occurred from her attempting to swing herself from a car while in motion (*National Life & Accident Ins. Co. v. Lokey*, 166 Ala. 174, 52 South. 45).

3147 (f). In *Flower v. Continental Casualty Co.*, 140 Iowa, 510, 118 N. W. 761, the policy provided for the payment of a certain

sum, unless insured's death or injury resulted from, or was received while, violating the law. The Iowa statute (Code, § 4811) makes it a misdemeanor for any one not an officer of the road to get upon any railroad car, etc., while it is in motion, or get upon, cling to, or otherwise attach himself to such car. It was held that while, to constitute the crime within the statute, an accused must have gotten on or off the car, the purpose of the policy was to guard against exposure to dangers incident to the performance of unlawful acts, though the offense was never consummated, and, if an insured was injured while attempting to get on a moving car, he could not recover.

3149 (f). Within the terms of the exception, an assault, vicious in character, with a large bottle, was a criminal assault with intent to commit murder, and the insured being killed by a police officer assaulted, the insured therefore lost his life while breaking the law, and no recovery in favor of the beneficiary could be sustained (*Sleeting v. Supreme Tribe of Ben Hur*, 161 Ill. App. 449). So, too, no recovery may be had where the evidence shows that the insured without provocation struck a police officer a violent blow, that he pursued the officer who ran away to avoid him and that the officer fired when the insured was committing assault, or assault and battery and inflicted the wound which caused death (*Smith v. Royal League*, 177 Ill. App. 326). And to the same effect is *Eminent Household of Columbian Woodmen v. Howle*, 109 Ark. 400, 160 S. W. 238.

As to sufficiency of the evidence to show that insured was killed because of an assault made by him in violation of a penal statute, see *Woodmen of the World v. Hipp* (Tex. Civ. App.) 147 S. W. 316.

If insurer pleads the exception on the ground of a felonious assault by the insured, the answer should negative self-defense on the part of insured (*Eminent Household of Columbian Woodmen v. Kesterson*, 140 Ky. 562, 131 S. W. 384). If insured's part in the assault was in self-defense the exemption does not apply (*Knights of Maccabees of the World v. Shields*, 160 S. W. 1043, 156 Ky. 270, 49 L. R. A. [N. S.] 853, rehearing denied 162 S. W. 778, 157 Ky. 35, 49 L. R. A. [N. S.] 860). So, where insured shot and killed S. in self-defense, and was also shot and killed by S., insured did not die in consequence of a violation or attempted violation of the laws of the state or of the United States, within the exception (*Woodmen of the World v. Walters*, 124 Ky. 663, 99 S. W. 930, 30 Ky. Law Rep. 916). And on the question of self-defense, if under the

evidence the actual danger to insured was preceded by appearances of danger to him, it was not error to instruct on defense by insured of his person against what "appeared" to him to be an unlawful assault by K. on him, on the theory that any danger to insured was actual, and not apparent in the sense of being imaginary danger to him, as a justification of his assault on K. (*Woodmen of the World v. McCoslin*, 59 Tex. Civ. App. 574, 126 S. W. 894). On the question whether insured was the aggressor in the difficulty in which he lost his life, and so was within the exemption, insurer has the burden of proof (*Sovereign Camp of Woodmen of the World v. Jackson* [Tex. Civ. App.] 138 S. W. 1137).

The sufficiency of the evidence as to whether insured was the aggressor or acted in self-defense is considered in *Sovereign Camp of Woodmen of the World v. Purdom*, 143 S. W. 1021, 147 Ky. 177; *Woodmen of the World v. McCoslin*, 59 Tex. Civ. App. 574, 126 S. W. 894; *Sovereign Camp of Woodmen of the World v. Jackson* (Tex. Civ. App.) 138 S. W. 1137; *Woodmen of the World v. Hipp* (Tex. Civ. App.) 147 S. W. 316.

Where insured was shot and killed in a difficulty with another, whether insured voluntarily engaged in the difficulty which resulted in his death is for the jury (*Baker v. Supreme Lodge Knights of Pythias*, 103 Miss. 374, 60 South. 333).

Where it appeared that insured and another became involved in a quarrel, and that insured seized a chair as if to strike the other, and that on being asked by a third person to stop he did so, and made no attempt to strike the other, whereupon the other shot and killed him, it was proper to refuse to submit to the jury the question whether insured died from "external, violent and accidental" means within the meaning of the policy (*State Life Ins. Co. v. Ford*, 101 Ark. 513, 142 S. W. 863).

The exception sometimes provides, also, that the insurer shall not be liable if insured is killed in a duel. A difficulty between insured and another is not necessarily a duel, within the exception (*Baker v. Supreme Lodge Knights of Pythias*, 103 Miss. 374, 60 South. 333, Ann. Cas. 1915B, 547).

3150 (f). In order that the insurer shall be relieved from liability under the exception, the violation of law must be the proximate cause of insured's death.

Woodmen of the World v. Wright, 7 Ala. App. 255, 60 South. 1006; *Howle v. Eminent Household of Columbian Woodmen*, 118 Ark. 226, 176 S. W. 313; *Empire Life Ins. Co. v. Einstein*, 12 Ga. App. 380, 77 S. E. 209.

Thus to defeat a recovery on a life insurance policy on the ground that at the time of his death the insured was carrying a concealed weapon in violation of the statute, it must be shown not only that the offense was being committed, but, further that it brought about the death of the insured (*Interstate Life Assur. Co. v. Dalton*, 165 Fed. 176, 91 C. C. A. 210, 23 L. R. A. [N. S.] 722). And to the same effect is *Baker v. Supreme Lodge Knights of Pythias*, 103 Miss. 374, 60 South. 333, Ann. Cas. 1915B, 547, in which it was held that mere proof that insured was killed immediately after he had drawn a concealed pistol is insufficient to show that his death was caused in the violation of the criminal law.

Where insured shot a police officer and fled from arrest, and could not be otherwise taken, killing by an officer is justifiable and the direct and proximate result of insured's vicious conduct. But the death of insured, who shot an officer and was pursued by the officer for the purpose of avenging his own injury and shot, is not the natural and proximate result of insured's own vicious conduct, and the insurer was therefore liable (*Railway Mail Ass'n v. Moseley*, 211 Fed. 1, 127 C. C. A. 427).

The exception in some cases contains an additional clause exempting the insurer if the insured shall die while "in the custody of the law." In such case there can be no recovery if insured died in a police hospital while in custody for failure to pay a fine, though he did not die in consequence of such confinement (*Gauger v. American Patriots*, 105 N. E. 755, 263 Ill. 604, affirming 184 Ill. App. 490).

3152 (f). In an action on a policy which provides that it shall be void if death should occur in consequence of any violation of law, the burden is on defendant to prove that death did so occur.

Supreme Lodge K. P. v. Lipscomb, 50 Fla. 406, 39 South. 637; *Brahmsteadt v. Mystic Workers of the World*, 152 Wis. 580, 140 N. W. 354.

An affidavit by plaintiff, made to secure a peace warrant against her husband, is inadmissible in evidence, in an action on an insurance policy on her husband's life to show that his death was the result of a violation of law (*Sovereign Camp of Woodmen of the World v. Purdom*, 143 S. W. 1021, 147 Ky. 177). And where the action on the policy is defended on the theory that the member was killed by a third person in self-defense, evidence of the third person's indictment, trial, and acquittal is inadmissible (*Sovereign Camp W. O. W. v. McDonald*, 109 Miss. 167, 68 South. 74). If the

defense is predicated upon the exception of death in violation of law the same must be established by a preponderance of the evidence, and each and every element which constituted the crime charged must likewise be established by a preponderance of the evidence (*Brown v. Mystic Workers of the World*, 151 Ill. App. 517). And to the same effect is *Supreme Lodge K. P. v. Lipscomb*, 39 South. 637, 50 Fla. 406.

The sufficiency of the evidence to take the question to the jury is considered in *Sovereign Camp Woodmen of the World v. Bailey* (Tex. Civ. App.) 163 S. W. 683; *Bounds v. Sovereign Camp of Woodmen of the World*, 85 S. E. 770, 101 S. C. 325, Ann. Cas. 1917C, 589; *Gilkey v. Sovereign Camp of Woodmen of the World* (Mo. App.) 178 S. W. 875.

Sufficiency of the evidence to support a finding of the jury that insured did not die as the result of a violation of the law, though deceased made the initial assault, is considered in *Sovereign Camp of Woodmen of the World v. Keen*, 16 Ga. App. 703, 86 S. E. 88.

Where the defense is that deceased's death occurred in consequence of a violation of law by him, the court should instruct what constituted a violation of the law (*Sovereign Camp of Woodmen of the World v. Purdom*, 143 S. W. 1021, 147 Ky. 177).

3152-3153. (g) Same—Death at the hands of justice

3152 (g). The question whether execution for a crime is an excepted risk, though not specified in the policy, has been considered in two recent cases. In *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, 83 N. E. 542, 14 L. R. A. (N. S.) 356, 122 Am. St. Rep. 54, 13 Ann. Cas. 129, which involved the same parties as the *Collins Case* in 27 Pa. Super. Ct. 353, cited in the original text, the Supreme Court of Illinois held that to permit recovery in such cases was not contrary to the public policy of the state. The court, regarding an insurance policy payable to the estate or personal representatives of the insured as a species of property, based its decision on the provision of the Constitution of Illinois of 1870 (article 2, § 11), declaring that no conviction of a crime shall work a corruption of blood or forfeiture of estate.

The second case involved a policy taken out by one McCue, a resident of Virginia, in the Northwestern Mutual Life Insurance Company, a Wisconsin corporation. McCue was convicted and executed for the murder of his wife. Suit on the policy, brought originally in the state court of Virginia, was removed to the United States Circuit Court, where on the pleadings and agreed facts judg-

ment was given for the defendant. The case was appealed to the United States Circuit Court of Appeals for the Fourth Circuit where the judgment of the lower court was reversed (*McCue v. Northwestern Mut. Life Ins. Co.*, 167 Fed. 435, 93 C. C. A. 71). The decision of the Circuit Court of Appeals seems to be this: The policy was issued by a Wisconsin corporation authorized by its special charter to "make all and every insurance appertaining to or connected with life risks" without limitation. The policy was a Wisconsin contract, construable and enforceable under its laws. By the rule of public policy established by the decisions of the state Supreme Court the manner of death of an insured does not avoid the policy where third persons are beneficiaries, in the absence of any provision in the policy to that effect. Consequently the fact that the insured was executed for a crime did not bar a recovery on the policy by his heirs, where it contained no provision excluding such risk. Moreover, the fact that insured was legally executed for crime will not defeat recovery on the policy on the ground that death by such means was not one of the risks insured against, where the policy was in a mutual company of which all policy holders became members and which was authorized by its charter "to make all and every insurance appertaining to or connected with life risks," the policy contained no exception of such risk, and the general state agent of the company accepted payment of a premium from the insured after he had committed the crime for which he was afterward executed and while he was in prison awaiting trial. However, on appeal to the Supreme Court of the United States, the judgment was reversed (*Northwestern Mut. Life Ins. Co. v. McCue*, 223 U. S. 234, 32 Sup. Ct. 220, 56 L. Ed. 419, 38 L. R. A. [N. S.] 57), the court basing its decision largely on the reasoning in the *Burt Case*, that to allow a recovery, where the death of the insured is the result of a conviction and execution at the hands of justice, is contrary to public policy. It has been held in North Carolina that though such risk was not excepted, an ordinary life policy, which was incontestable except for fraud after two years, does not cover execution of insured for crime (*Scarborough v. American Nat. Ins. Co.*, 88 S. E. 482, 171 N. C. 353, Ann. Cas. 1917D, 1181).

Though the killing by the husband of the paramour of the wife be under such circumstances that the law would class the act as justifiable homicide, such killing is not "at the hands of justice," either punitive or preventive, within the provision of a policy of life insurance, that if death was caused or superinduced "at the

hands of justice," the full amount of the policy could not be recovered, and Civ. Code 1895, § 2118, declaring that death "at the hands of justice, either punitive or preventive," releases the insurer (*Supreme Lodge K. P. v. Crenshaw*, 58 S. E. 628, 129 Ga. 195, 13 L. R. A. [N. S.] 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307).

3153-3156. (h) Same—Death caused by beneficiary or assignee

3153 (h). On considerations of public policy, rendering unnecessary any express exception in the contract, the death of the insured, intentionally caused by the beneficiary or assignee of the policy, is, so far as the person causing the death is concerned, an excepted risk.

Metropolitan Life Ins. Co. v. Shane, 98 Ark. 132, 135 S. W. 836; *Drown v. New Amsterdam Casualty Co.* (Cal.) 165 Pac. 5; *Anderson v. Life Ins. Co. of Virginia*, 152 N. C. 1, 67 S. E. 53; *Filmore v. Metropolitan Life Ins. Co.*, 82 Ohio St. 208, 92 N. E. 26, 28 L. R. A. (N. S.) 675, 137 Am. St. Rep. 778; *Equitable Life Assur. Soc. of the United States v. Weightman* (Okla.) 160 Pac. 629, L. R. A. 1917B, 1210.

And see, also, the following cases, where the contract contained a provision exempting the insurer from liability if the death of insured was caused by the beneficiary: *Grand Circle Women of Woodcraft v. Rausch*, 134 Pac. 141, 24 Colo. App. 304; *Lillie v. Modern Woodmen of America*, 89 Neb. 1, 130 N. W. 1004.

It has also been held that if the parents of insured were her sole heirs and beneficiaries, and had aided in procuring performance of criminal operation resulting in her death, the insurer is not liable (*McDonald v. Mutual Life Ins. Co.* [Iowa] 160 N. W. 289).

3154 (h). The insurer's liability is not absolutely terminated, but the policy may be enforced for the benefit of the representative of the insured (*Anderson v. Life Ins. Co. of Virginia*, 152 N. C. 1, 67 S. E. 53). So it is held in Minnesota that, though by murdering the insured the beneficiary forfeits right to proceeds of policy, insurer is not absolved from liability to others (*Sharpless v. Grand Lodge A. O. U. W.*, 135 Minn. 35, 159 N. W. 1086, L. R. A. 1917B, 670).

The policy or by-laws of the insurer may declare the contract absolutely void. In such case the burden to establish a felonious killing rested on insurer, and finding of coroner, or newspaper accounts of homicide, did not establish felony, and burden did not rest on beneficiary, in her suit against insurer, to establish her innocence of felonious homicide (*New York Life Ins. Co. v. Veith* [Tex.

Civ. App.] 192 S. W. 605). By-laws of a fraternal beneficial association, providing that if the member's death be caused by any beneficiary no benefit shall be paid, apply where the named beneficiary murders the member but dies before her, notwithstanding a by-law as to payment if the designated beneficiary dies before the member (*Greer v. Supreme Tribe of Ben Hur*, 195 Mo. App. 336, 190 S. W. 72).

3155 (h). In an action by the beneficiary, an answer alleging that plaintiff murdered assured, his wife, states a defense; the averment being tantamount to an allegation that the killing was intentional and felonious (*Filmore v. Metropolitan Life Ins. Co.*, 82 Ohio St. 208, 92 N. E. 26, 28 L. R. A. [N. S.] 675, 137 Am. St. Rep. 778).

The question whether insured was killed by plaintiff suing on an insurance policy is one of fact for the jury (*Lillie v. Modern Woodmen of America*, 89 Neb. 1, 130 N. W. 1004).

Where the beneficiary, the wife of the insured, killed him and then herself, an instruction that if she knew right from wrong at the time she killed the insured, and that it was wrong to kill him, then she was sane, unless at the time, even though she knew right from wrong, she acted from an irresistible impulse arising from a defect in will caused by the diseased condition of her mind and not from mere anger or revenge, was proper, where the testimony was conflicting as to her mental condition (*Metropolitan Life Ins. Co. v. Shane*, 98 Ark. 132, 135 S. W. 836).

2. CAUSE OF DEATH OR INJURY IN ACCIDENT INSURANCE

3156-3161. (a) What constitutes accident in general

3156 (a). Policies of accident insurance usually insure against death or bodily injuries "caused by external, violent, and accidental means." A policy of this character is not a contract of indemnity against injury effected by all means, but embraces only cases where the elements of force and accident concur in effecting an injury (*Schmid v. Indiana Travelers' Acc. Ass'n*, 42 Ind. App. 483, 85 N. E. 1032).

The cause of the death or injury, as well as the result, must be accidental.

Lehman v. Great Western Accident Ass'n, 155 Iowa, 737, 133 N. W. 752, 42 L. R. A. (N. S.) 562; *Riley v. Interstate Business Men's Accident Ass'n (Iowa)* 152 N. W. 617.

A person may do certain acts, the result of which may produce unforeseen consequences, and may produce what is commonly called accidental injury; but when the means are exactly what he intended to use and used, the means are not accidental within the meaning of the policy (*Schmid v. Indiana Travelers' Acc. Ass'n*, 42 Ind. App. 483, 85 N. E. 1032). So, where an insured in using nasal douche, sniffed more violently than usual, drawing germs into the middle ear, whence they penetrated into the brain, causing spinal meningitis, it was held that there could be no recovery under a policy insuring against death from injuries effected through external, violent, and accidental means (*Smith v. Travelers' Ins. Co.*, 106 N. E. 607, 219 Mass. 147, L. R. A. 1915B, 872).

Whether the means producing the injury is accidental depends on the character of its effects. Accidental means are those which produce effects which are not their natural and probable consequences.

Fidelity & Casualty Co. v. Stacey's Ex'rs, 143 Fed. 271, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, 6 Ann. Cas. 955; *Shanberg v. Fidelity & Casualty Co. (C. C.)* 143 Fed. 651, affirmed in 158 Fed. 1, 85 C. C. A. 343, 19 L. R. A. (N. S.) 1206; *Dent v. Railway Mail Ass'n (C. C.)* 183 Fed. 840; *Beile v. Travelers' Protective Ass'n of America*, 155 Mo. App. 629, 135 S. W. 497; *Wright v. Order of United Commercial Travelers of America*, 188 Mo. App. 457, 174 S. W. 833.

An accident within a policy of accident insurance is an event which takes place without one's foresight or expectation, and which proceeds from an unknown cause, or an unusual effect of a known cause not within the expectation of the person injured (*Phoenix Accident & Sick Ben. Ass'n v. Stiver*, 42 Ind. App. 636, 84 N. E. 772); that is to say, the term involves the idea of an event happening suddenly unforeseen and unexpected.

Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 Pac. 1175; *Newsome v. Travelers' Ins. Co. of Hartford, Conn.*, 85 S. E. 1035, 143 Ga. 785; *Fulton v. Metropolitan Casualty Ins. Co. of New York*, 19 Ga. App. 127, 91 S. E. 228; *Hutton v. States Accident Ins. Co.*, 186 Ill. App. 499; *Robison v. United States Health & Accident Ins. Co.*, 192 Ill. App. 475; *Phoenix Accident & Sick Benefit Ass'n v. Stiver*, 42 Ind. App. 636, 84 N. E. 772; *Schmid v. Indiana Travelers' Acc. Ass'n*, 42 Ind. App. 483, 85 N. E. 1032; *Travelers' Protective Ass'n of America v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991; *Ludwig v. Preferred Accident Ins. Co. of New York*, 113 Minn. 510, 130 N. W. 5; *Erb v. Commercial Mut. Accident Co.*, 232 Pa. 215, 81 Atl. 207.

The event, if conforming to the tests mentioned, is not the less an accident because the insured was thoughtless or negligent.

Fidelity & Casualty Co. of New York v. Morrison, 129 Ill. App. 360;
Biehl v. General Accident Assur. Corp., 38 Pa. Super. Ct. 110.

3157 (a). In view of the test proposed that the term "accident" means an event which takes place without one's foresight or expectation, it follows that a result, though unexpected, is not an accident; the means or cause must be accidental. Death resulting from voluntary physical exertions or from intentional acts of insured is not accidental, nor is disease or death caused by the vicissitudes of climate or atmosphere the result of an accident; but where, in the act which precedes an injury, something unforeseen or unusual occurs which produces the injury, the injury results through accident (*Schmid v. Indiana Travelers' Acc. Ass'n*, 42 Ind. App. 483, 85 N. E. 1032). Numerous illustrations of this phase of the question are furnished by cases where injury has resulted from voluntary physical exertion.

Reference may be made to the following cases, where it was held that the injury due to voluntary physical exertion was not accidental within the meaning of the policy: *Stone v. Fidelity & Casualty Co. of New York*, 133 Tenn. 672, 182 S. W. 252, L. R. A. 1916D, 536, Ann. Cas. 1917A, 86; assured, a man 54 years of age, normal height and weight, raised and lowered himself repeatedly in and from a Morris chair by the use of his hands and arms alone, causing death by dilation of the heart, *Hastings v. Travelers' Ins. Co. (C. C.)* 190 Fed. 258; death of insured from rupture of the heart, the walls of which had been weakened by what is known as "fatty degeneration," the immediate inciting cause of the rupture being either overexertion in assisting to carry a burden, or deep breathing following such exertion, *Shanberg v. Fidelity & Casualty Co. of New York*, 158 Fed. 1, 85 C. C. A. 343, 19 L. R. A. (N. S.) 1206, affirming (C. C.) 143 Fed. 651; insured's overexertion in precisely the manner intended, resulting in dilation of the heart and death, was not due to "accidental means," *Rock v. Travelers' Ins. Co. of Hartford, Conn.*, 172 Cal. 462, 156 Pac. 1029, L. R. A. 1916E, 1196; where insured died as a result of physical exertions in climbing steps at a hotel carrying heavy satchels, because of the rarified condition of the atmosphere, *Schmid v. Indiana Travelers' Acc. Ass'n*, 42 Ind. App. 483, 85 N. E. 1032; death from appendicitis caused by a strain resulting from overexertion while bowling, *Lehman v. Great Western Accident Ass'n*, 155 Iowa, 737, 133 N. W. 752, 42 L. R. A. (N. S.) 562; death of assured resulting from overexertion in removing a tire from a wheel of an automobile, *Lickleider v. Iowa State Traveling Men's Ass'n (Iowa)* 151 N. W. 479.

On the other hand, where the death of insured was caused by an injury resulting from his slipping and falling while cranking the motor of an automobile, the injury was "accidental" within the meaning of an accident policy (*Preferred Accident Ins. Co. v. Patterson*, 213 Fed. 595, 130 C. C. A. 175). So, too, it has been held that a strain received in the ordinary course of the insured's business is an accident within the meaning of the policy (*Patterson v. Ocean Accident & Guarantee Corp.*, 25 App. D. C. 46).

The following causes of death or injury have been regarded as accidental within the definitions given; death from apoplexy, resulting from excitement caused by witnessing a man being burned to death in an accidental fire, *International Travelers' Ass'n v. Brannum* (Tex. Civ. App.) 169 S. W. 389; death from chloroform administered by physicians preparatory to a surgical operation. *Beile v. Travelers' Protective Ass'n of America*, 155 Mo. App. 629, 135 S. W. 497; coming in contact with poison ivy, *Dent v. Railway Mail Ass'n* (C. C.) 183 Fed. 840; insured was stabbed by an insane person while on a public highway on his way from a neighbor's premises to his own home, *Phoenix Accident & Sick Ben. Ass'n v. Stiver*, 42 Ind. App. 636, 84 N. E. 772; inflammation of the eye caused by the splashing of water from a tub in which the person was washing clothing, *Sullivan v. Modern Brotherhood of America*, 133 N. W. 486, 167 Mich. 524, 42 L. R. A. (N. S.) 140, Ann. Cas. 1913A, 1116; disease caused by a wound, *Caldwell v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 327, 136 N. W. 678; injury to the bowels caused by receiving a sudden jolt in stepping off the end of a pavement, *General Accident & Life Assur. Corporation v. Meredith*, 132 S. W. 191, 141 Ky. 92; accidental fall, *Goodes v. Order of United Commercial Travelers of America*, 174 Mo. App. 330, 156 S. W. 995; ptomaine poisoning, *Johnson v. Fidelity & Casualty Co. of New York*, 184 Mich. 406, 151 N. W. 593, L. R. A. 1916A, 475; cutting finger, *Central Acc. Ins. Co. v. Rembe*, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235, 5 Ann. Cas. 155, affirming 122 Ill. App. 507; the bite of a dog, *Farner v. Massachusetts Mut. Acc. Ass'n*, 67 Atl. 927, 219 Pa. 71, 123 Am. St. Rep. 621; fish bone lodging in rectum, causing blood poisoning, *Jenkins v. Hawkeye Commercial Men's Ass'n*, 147 Iowa, 113, 124 N. W. 199, 30 L. R. A. (N. S.) 1181; abrasion of the skin, resulting in erysipelas, *McAuley v. Casualty Co. of America*, 39 Mont. 185, 102 Pac. 586; abrasion of skin, resulting in blood poisoning, *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011.

Death from taking morphine is by accidental means, whether deceased took more than intended, or intentionally took the amount, not conscious that it would produce a harmful effect. *Hodgson v.*

Preferred Acc. Ins. Co. of New York, 100 Misc. Rep. 155, 165 N. Y. Supp. 293.

Where insured suffered from dilation of the heart following the voluntary taking of a cold bath, the injury was not the result of an accident within a policy indemnifying him against injuries effected solely by accidental means (*New Amsterdam Casualty Co. v. Johnson*, 110 N. E. 475, 91 Ohio St. 155, L. R. A. 1916B, 1018). And where assured armed himself and went to a gambling house with the stated purpose of recovering money previously lost there, and was fatally shot during the attempt, held that his death was not accidental, but was the natural result of his own acts (*Postler v. Travelers' Ins. Co.*, 173 Cal. 1, 158 Pac. 1022). So, too, it has been held that the term "accidental" does not cover death resulting from reopening, in fit of coughing, of incision to remove the appendix. (*Stokely v. Fidelity & Casualty Co. of New York*, 193 Ala. 90, 69 South. 64, L. R. A. 1915E, 955).

Sunstroke in itself is not regarded as an accident, unless brought about by some concurring accident (*Semancik v. Continental Casualty Co.*, 56 Pa. Super. Ct. 392). But, if sunstroke is a risk covered in an accident policy, the term should not be interpreted as applying only to an effect produced by the heat of the sun unless the context requires it, but the term, unexplained, denotes a condition produced by any heat, solar or artificial, and consequently allows a recovery where the disability was occasioned by exposure to the heat of a furnace (*Continental Casualty Co. v. Johnson*, 85 Pac. 545, 74 Kan. 129, 6 L. R. A. [N. S.] 609, 118 Am. St. Rep. 308, 10 Ann. Cas. 851). On the other hand, it was said in a Georgia case that an accident policy, which provides for payment of the principal sum in case of death from sunstroke due to external, violent, or accidental means, does not cover death of a fireman from sunstroke resulting from exposure and heat while in performance of his ordinary duties (*Continental Casualty Co. v. Pittman*, 89 S. E. 716, 145 Ga. 641). If the policy covers death resulting from sunstroke independently of other causes, "sunstroke" is to be deemed a form of personal injury rather than a disease (*Bryant v. Continental Casualty Co.*, 107 Tex. 582, 182 S. W. 673, Ann. Cas. 1918A, 517, reversing judgment [Civ. App.] 145 S. W. 636). A sunstroke received while at work in the ordinary course of employment is an unexpected event not according to the usual course of things within the meaning of the word "accident" as used in the policy insuring against accidents (*Pack v. Prudential Casualty Co.*, 185 S. W. 496,

170 Ky. 47, L. R. A. 1916E, 952). And if it appears that at assured's request the word "sunstroke" was stricken from a provision that the policy should not cover casualties resulting from certain causes, the court could not hold, as a matter of law, that sunstroke is a disease, and not such a casualty as was covered by the policy (*Mather v. London Guarantee & Accident Co.*, 125 Minn. 186, 145 N. W. 963).

A sunstroke, which resulted from voluntary exposure to the sun's rays in the conduct of the insured's business, is within the terms of an accident policy. *Gallagher v. Fidelity & Casualty Co. of New York*, 148 N. Y. Supp. 1016, 163 App. Div. 556. But, contra, where plaintiff, in making his way to work in the customary manner, was overcome by the heat and suffered a sunstroke, the day being very warm, as was ordinary at that time of the year, the injury was not accidental, within the protection of an insurance policy. *Elsev v. Fidelity & Casualty Co. of New York* (Ind. App.) 109 N. E. 413.

3159 (a). Even when the act causing injury or death is the intentional act of another, it may, as to the insured, be an accident within the meaning of the policy, provided it is not the result of misconduct on the part of the insured and is unforeseen by him.

Maloney v. Maryland Casualty Co., 113 Ark. 174, 167 S. W. 845; *Gaynor v. Travelers' Ins. Co.*, 12 Ga. App. 601, 77 S. E. 1072; *Travelers' Protective Ass'n of America v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991 (murder of insured); *Allen v. Travelers' Protective Ass'n of America*, 163 Iowa, 217, 143 N. W. 574, 48 L. R. A. (N. S.) 600 (insured killed by burglar); *Interstate Business Men's Acc. Ass'n v. Ford*, 161 Ky. 163, 170 S. W. 525 (insured killed by robbers); *Union Accident Co. v. Willis*, 44 Okl. 578, 145 Pac. 812, L. R. A. 1915D, 358; *Erb v. Commercial Mut. Accident Co.*, 232 Pa. 215, 81 Atl. 207.

3160 (a). An injury received at the hands of a third person, who has been assaulted by insured and who is acting in self-defense, is not an accident, within the policy, according to *Prudential Casualty Co. v. Curry*, 10 Ala. App. 642, 65 South. 852. On the other hand, in *Hutton v. States Accident Ins. Co.*, 186 Ill. App. 499, it was held that the breaking of a leg while engaged in a fight in which insured was the aggressor was nevertheless an accident, as it was an unusual and unexpected result of the fight. However, in *Fidelity & Casualty Co. v. Stacey's Ex'rs*, 143 Fed. 271, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, 6 Ann. Cas. 955, reversing (C. C.) 137 Fed. 1012, where insured injured his hand in striking another and blood poisoning resulted, causing his death, the death was not ac-

cidental, as the injury was the natural result of a voluntary act of the insured.

Suicide while insane, in the absence of any exception in the policy, is an accident, according to *Tuttle v. Iowa State Traveling Men's Ass'n*, 132 Iowa, 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223.

In order that liability should attach, the accident must be the proximate cause of insured's death (*National Life & Accident Ins. Co. v. Cox*, 174 Ky. 683, 192 S. W. 636). The requirement of an accident policy that death must have resulted "necessarily and solely" from accidental injury is satisfied, where the injury was the predominating and efficient cause of the death, and that other conditions were set in motion by the injury which may have contributed to the death is immaterial (*Continental Casualty Co. v. Colvin*, 77 Kan. 561, 95 Pac. 565). Death resulting from appendicitis, caused by an accidental fall, is within a policy insuring against death resulting directly and independently from bodily injuries effected through accidental means (*Ætna Life Ins. Co. v. Wicker*, 240 Fed. 398, 153 C. C. A. 324). There can be no liability for injury to an eye, which was destroyed, where the injury itself did not destroy the eye, but negligent treatment did, and incapacity to attend business did not occur until after the treatment (*Hummer v. Midland Casualty Co.*, 181 Mich. 386, 148 N. W. 413).

3161-3162. (b) External or violent means of injury

3161 (b). To come within the terms of the policy, the injury must be due to means "external" and "violent," as well as "accidental." By these terms "external" and "violent" it is intended to avoid liability upon a fraudulent claim of indemnity for bodily injuries, based solely upon insured's testimony, and injuries caused by means coming from outside the body are "external," so that death caused by a fish bone lodging in the rectum was by "external, violent and accidental" means, within the policy, though death resulted directly from blood poisoning, which would not have resulted except for the bone; the lodging of the bone in the rectum being an "accident" (*Jenkins v. Hawkeye Commercial Men's Ass'n*, 147 Iowa, 113, 124 N. W. 199, 30 L. R. A. [N. S.] 1181). So death from poison may be external and violent (*Riley v. Interstate Business Men's Acc. Ass'n [Iowa]* 152 N. W. 617). And it has been held that the means was external, violent, and accidental where insured came in contact with poison ivy (*Dent v. Railway Mail Ass'n [C. C.]* 183 Fed. 840). In *Oklahoma Nat. Life Ins. Co. v. Nor-*

ton, 44 Okl. 783, 145 Pac. 1138, L. R. A. 1915E, 695, the policy covered injury by external, violent, "or" accidental means, and it was held that the word "or" was not interchangeable with "and," so as to create liability only when the injury was "external, violent, and accidental," but that the insurer was liable where insured was shot by another, whether the fatal injury was accidental or not.

Death from blood poisoning, which is solely the result of an injury, is "death from bodily injuries which, independently of all other causes, are effected solely and exclusively by external, violent, and accidental means." *New Amsterdam Casualty Co. v. Mays*, 43 App. D. C. 84. So an insurer was liable for death resulting from cut in lip received while shaving or being shaved, which cut became infected, *National Life & Accident Ins. Co. v. Singleton*, 193 Ala. 84, 69 South. 80; and for death due to an overdose of morphine taken without intent to cause death, *Pixley v. Illinois Commercial Men's Ass'n*, 195 Ill. App. 135; and for death caused by falling down a stairway, which directly produced pneumonia, resulting in his death, *National Life & Accident Ins. Co. v. Cox*, 174 Ky. 683, 192 S. W. 636.

3162-3164. (c) Risks of travel

3162 (c). Under a policy covering injuries received "while riding as a passenger in any public conveyance," it is essential that the insured should be a passenger at the time of death or injury. The indemnity applies, according to *Wood v. General Acc. Ins. Co. of Philadelphia (C. C.)* 156 Fed. 982, affirmed in 160 Fed. 926, 88 C. C. A. 108, only to the case of one who is a passenger in the ordinary, common, everyday use of the word, and to an injury received while such person was in or on a regular passenger conveyance. As so construed, the insurer is not liable for the death of the insured resulting from the wrecking of a railway postal car in which he was riding in the performance of his duties as a postal clerk. And to the same effect is *Bogart v. Standard Life & Accident Ins. Co. (C. C.)* 187 Fed. 851. Similarly, such a policy, insuring against injuries while riding as a passenger does not cover injury to a switchman riding on the platform of a coach in the discharge of his duties (*Ward v. North American Accident Ins. Co.*, 182 Ill. App. 317).

3163 (c). One is injured "as a passenger," if he is injured while alighting from a car that has stopped to permit passengers to alight (*McAuley v. Casualty Co. of America*, 39 Mont. 185, 102 Pac. 586). Similarly, one holding a policy insuring her against a Pott's fracture while a passenger in a public conveyance, including the platform, steps, or running board, who sustained such fracture while in the

act of alighting from a public conveyance, is entitled to recover (*Gibson v. Casualty Co. of America*, 140 N. Y. Supp. 1045, 156 App. Div. 144). So, too, one may be injured as a passenger who is seeking to board a train (*Fidelity & Casualty Co. of New York v. Morrison*, 129 Ill. App. 360), though of course the mere fact that one is attempting to board a car does not make him a passenger (*Mitchell v. German Commercial Acc. Co.*, 179 Mo. App. 1, 161 S. W. 362). An insured, who while attempting to board subway express train fell partly on platform and with his feet hanging between car and track, was a passenger "in or on" a conveyance, and entitled to indemnity for injury (*Rosenfeld v. Travelers' Ins. Co.*, Hartford, Conn., 161 N. Y. Supp. 12, 96 Misc. Rep. 672).

The insured must be riding in the place regularly provided for the transportation of passengers (*National Life Ins. Co. of United States v. Fleming*, 96 Atl. 281; 127 Md. 179). Hence insurer is not liable where insured was thrown from an uninclosed platform of railway car (*Schmohl v. Travelers' Ins. Co.* [Mo. App.] 177 S. W. 1108). But insurer has been held liable for death in falling or being thrown from platform of passenger train while attempting to pass between two cars (*Schmohl v. Travelers' Ins. Co.*, 189 S. W. 597, conforming to decision of Supreme Court *State ex rel. Schmohl v. Ellison*, 182 S. W. 740, 266 Mo. 580).

It would seem, too, that the injury must be received "as a passenger"; that is, legitimately connected with the carriage of passengers. Thus, in *Wheeler v. Fidelity & Casualty Co. of New York*, 129 Ga. 237, 58 S. E. 709, where the policy covered injuries to the beneficiary received while a passenger on a public conveyance, the wife of the insured, named as beneficiary, was killed by a gunshot wound, the shot being fired from a passing street car during an altercation on such car, the injury was not within the policy. But it is not absolutely essential that the accident should have resulted from the operation or construction of the carrier's conveyance (*American Fidelity Co. of Montpelier, Vt., v. Echols* [Okla.] 155 Pac. 1160, L. R. A. 1916D, 1176).

As to the character of the conveyance, it has been held that where assured met death in a steamboat accident, while the boat was being chartered for an excursion for a lump sum, the injuries were sustained by assured while actually riding as a passenger (*Dunn v. New Amsterdam Casualty Co.*, 126 N. Y. Supp. 229, 141 App. Div. 478, reversing 121 N. Y. Supp. 686, 67 Misc. Rep. 109). And a policy covering injuries received while riding as a passenger in a "pub-

lic conveyance" propelled by gasoline, covers injuries received while riding in an automobile hired from a taximeter cab company, engaged in hiring automobiles for public use, and driven by a chauffeur of the company (*Primrose v. Casualty Co. of America*, 81 Atl. 212, 232 Pa. 210, 37 L. R. A. [N. S.] 618). On the other hand, a storage and warehouse company which had picnic wagons which it rented for picnic parties furnishing horses and a driver, but having nothing to do with selecting the crowd, is not a common carrier within a policy insuring against death while a passenger in the conveyance of a common carrier, even though it was a common carrier with respect to its transfer business (*Georgia Life Ins. Co. of Macon, Ga., v. Easter*, 189 Ala. 472, 66 South. 514, L. R. A. 1915C, 456). Under an accident policy covering injuries "while actually riding within a conveyance drawn by horse power, * * * in consequence of a collision or other accident to the conveyance," it cannot be contended that the only injuries that can be recovered for are confined to injuries received in consequence of a collision or other accident to the conveyance (*Davis v. Midland Casualty Co.*, 190 Ill. App. 338).

In *Depue v. Travelers' Ins. Co.* (C. C.) 166 Fed. 183, the facts were these: An elevator was standing at the first floor of a building, with the door, which extended to the roof of the elevator, wide open, the attendant being elsewhere. The car was operated by a lever on the side wall to the right of one entering the door, and, while the elevator was stationary, this lever was in the center of its arc of operation. In order to start the elevator it was necessary to push down a button at the center of the arc, which permitted the movement of the lever to the right or left. The elevator was in perfect condition, both before and after the accident, which no one saw. The building superintendent found insured hanging head downward into the elevator her body caught between the roof of the elevator and the floor of the building. One limb which had been caught at the thigh was projecting over the floor. When the elevator was released, insured fell into it on its floor. It was held that insured was "in" the elevator when the injuries were inflicted, within a policy insuring against accidental injury while "in" a passenger elevator.

A platform at a station, used by the public going to and from trains, and used by the public without objection in traveling from one street to another, and to other parts of the depot grounds, is a public highway, within an accident policy insuring against injury,

while walking on a public highway, by actual contact with a moving conveyance (*Rudd v. Great Eastern Casualty & Indemnity Co.*, 131 N. W. 633, 114 Minn. 512, 34 L. R. A. [N. S.] 1205, Ann. Cas. 1912C, 606).

3164-3168. (d) Risks of occupation

3165 (d). The word "occupation," in an insurance policy, has reference to a vocation, trade, or calling, and not to a performance of acts of exercise, diversion, or recreation. Hence, where the policy insured plaintiff as the manager of a mill and contained a rider that the insurance should not be forfeited by a temporary change of occupation, it was not material that his injury sued for occurred while he was operating a mower as a mere temporary diversion (*Kenny v. Bankers' Acc. Ins. Co. of Des Moines*, 136 Iowa, 140, 113 N. W. 566).

Terms of fraternal insurance society's policy, providing for benefit upon total disability, do not apply solely to the particular occupation named in the application, unless the language constitutes the statement regarding his occupation as a warranty that he will continue so engaged. *Southern Woodmen v. Davis*, 124 Ark. 518, 187 S. W. 638.

The words "injured in an occupation," used in a clause changing the indemnity where the assured changes his occupation, are to be construed to mean "while engaged in an occupation" in the sense that it was his regular occupation when he was injured. *McCarthy v. Pacific Mut. Life Ins. Co.*, 178 Ill. App. 502.

Accident policy construed to cover fatal injury while engaged in a more hazardous occupation. *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509.

The term "occupation" includes the incidental as well as the main requirements of a vocation (*Gottfredson v. German Commercial Accident Co.*, 218 Fed. 582, 134 C. C. A. 310, L. R. A. 1915D, 312). So, where insured's occupation is stated as member of firm or manager of a beef company, "office duties and traveling only," the insurer is liable for injuries received by insured while in the refrigerator of the plant directing and instructing the workmen (*Thorne v. Casualty Co. of America*, 106 Me. 274, 76 Atl. 1106).

Where the policy described the duties of insured, who was a queensware merchant, as consisting of "office duties and traveling," and insured against loss of time from injuries, but the parties, on trial of an action on the policy, introduced evidence as to whether plaintiff was disabled from performing any of his duties, the policy

should be regarded as insuring against inability to substantially perform the general occupation of queensware merchant, and not merely against inability to perform office duties and traveling (*James v. United States Casualty Co.*, 88 S. W. 125, 113 Mo. App. 622).

Where a train was backed in on a side track to permit another to pass, and it was a brakeman's duty to close the switch after his train had backed in on the side track, and in remaining at the switch until the arrival of such other train, a period of 30 or 40 minutes, he did not disobey any instruction or rule, though it was his duty to remain on the engine when not at work, an injury then sustained, resulting in his death, was met with while engaged in the line of his duty as such brakeman within the meaning of an accident policy (*Kephart v. Continental Casualty Co.*, 17 N. D. 380, 116 N. W. 349).

Where one insured as a financial reporter was injured while testing in the air a flying machine which he had built, he was not engaged in "recreation" within a provision as to change of occupation and engaging in recreation. *Ridgely v. Aetna Life Ins. Co.*, 145 N. Y. Supp. 1075, 160 App. Div. 719.

3168-3170. (e) Limitations as to time of death or disability caused by accident

3168 (e). The word "immediately," as used in an accident policy to designate the interval between the accident and disability, is to be construed as a word of time and not of causation, and does not mean within a reasonable time, but does mean "presently," "without any substantial interval."

Continental Casualty Co. v. Ogburn, 175 Ala. 357, 57 South. 852, Ann. Cas. 1914D, 377; *Genna v. Continental Casualty Co.*, 167 Ill. App. 413.

The word "immediate," as applied to an accident policy providing that the injury should "immediately" prevent the insured from the prosecution of his business, is not synonymous with "instantly," and "without delay," but a disability is immediate, when it follows directly from an accidental hurt within such time as the processes of nature consume in bringing the person affected to a state of total incapacity to prosecute every kind of business pertaining to his occupation (*Order of United Commercial Travelers v. Barnes*, 80 Pac. 1020, 72 Kan. 293, 7 Ann. Cas. 809, affirmed 82 Pac. 1099, 72 Kan. 293, 7 Ann. Cas. 809). So it has been held that where a person is bitten in the thumb by a dog, and the use of the hand was

interfered with from the moment of the bite, and so continued until death ensued two weeks later, he was "immediately disabled," within the policy (*Farner v. Massachusetts Mut. Acc. Ass'n*, 67 Atl. 927, 219 Pa. 71, 123 Am. St. Rep. 621). And where an accident policy insured plaintiff to \$10 a week for two years against injury necessarily resulting in "loss of time at once arising from inability to engage in any business," etc., the insurer was liable for disability resulting from plaintiff's accidental injury, though not following it immediately (*Baumister v. Continental Casualty Co.*, 101 S. W. 152, 124 Mo. App. 38).

On the other hand, an injury is not within the terms of the policy, where insured was for a week or more after the accident able to continue his work.

Laventhal v. Fidelity & Casualty Co. of New York, 98 Pac. 1075, 9 Cal. App. 275; *Letherer v. United States Health & Accident Ins. Co.*, 108 N. W. 491, 145 Mich. 310; *Same v. Phoenix Accident & Sick Benefit Ass'n*, 108 N. W. 492, 145 Mich. 313.

Where a felon developed on the insured's finger the next day after being bruised, after which he was totally disabled, recovery was not precluded because the policy provided that injury must create total disability from the date of the accident, as the provision should be construed to mean total disability within 24 hours after the accident (*Robinson v. Masonic Protective Ass'n*, 87 Vt. 138, 88 Atl. 531, 47 L. R. A. [N. S.] 924). But where insured suffered an injury within an accident insurance policy, but amputation of his foot was not necessitated within 90 days therefrom, as specified in the policy, the loss of his foot was not covered thereby (*Orenstein v. Preferred Acc. Ins. Co. of New York* [Minn.] 163 N. W. 747).

There seems to be some difference of opinion whether the clause applies where the injury results in death. In *Ætna Life Ins. Co. v. Bethel*, 140 Ky. 609, 131 S. W. 523, the policy provided for the payment of a weekly indemnity against loss of time resulting from bodily injuries, "which shall, independently of all other causes, immediately, continuously, and wholly disable" insured from prosecuting his business, or if such injuries shall not wholly disable him, but shall, immediately, continuously, and wholly disable him from the performance of important duties pertaining to his occupation, the company shall pay him two-fifths of such indemnity. It was also provided that if death "results" solely from such injuries within 90 days, the company should pay the amount of the insurance to insured's wife. It was held that the words "immediately, continu-

ously, and wholly" related to the weekly indemnity for injuries, and not to the indemnity for death, so that, if death resulted in the manner provided, the company was liable without reference to whether the injury immediately, continuously, etc., disabled insured from following his occupation. And it has been held that total and continuous disability from time of accident was not essential to liability for stipulated indemnity in case of death (*Moore v. General Accident, Fire & Life Assur. Corp.*, 173 N. C. 532, 92 S. E. 362). On the other hand, it was held in *Mullins v. Masonic Protective Ass'n*, 181 Mo. App. 394, 168 S. W. 843, that where an accident policy stipulated for payment of a specified sum on his death following total disability resulting immediately and continuously from accidental injuries, and insured continued working after his injury for several days, and was then operated on for appendicitis, and died, his death was not within the policy.

The insurer is not, of course, liable for injuries sustained before the delivery of the contract in the absence of any stipulation indicating a different intention (*Wilson v. Interstate Business Men's Acc. Ass'n*, 160 Iowa, 184, 140 N. W. 860).

And to the same effect, see *Strickland v. Peerless Casualty Co.*, 112 Me. 100, 90 Atl. 974, where a health policy was involved.

3169 (e). It is also provided in some policies that the insurer shall not be liable for death loss unless death results in 90 days from the time of the injury. Under such a provision the death must, of course, occur within 90 days from the time of the accident in order to hold the insurer liable (*Continental Casualty Co. v. Ogburn*, 175 Ala. 357, 57 South. 852, Ann. Cas. 1914D, 377). A policy guaranteeing perfect protection after the policy has been in force 60 days, and stipulating for a payment of a specified sum on the death of insured caused by external, violent, and accidental means, provided death occurs within 90 days, insures against a death occurring from accidental means within 90 days after the injury, though the accident happened within 60 days after the issuance of the policy (*Empire Life Ins. Co. v. Gee*, 178 Ala. 492, 60 South. 90). So, too, if one insured in an accident policy is injured, and six months afterwards is again injured, and then dies within the 90 days after the second injury, and he would not have died but for the last injury, recovery may be had on the policy, even though the last injury would not have been fatal but for the first (*Baehr v. Union Casualty & Surety Co.*, 113 S. W. 689, 133 Mo. App. 541).

In *General Accident & Life Assur. Corp. v. Meredith*, 141 Ky.

92, 132 S. W. 191, the policy contained these provisions: Paragraph A insured against total loss of time resulting directly and independently of all other causes from bodily injuries through external, violent and accidental means, and which wholly and continuously from date of accident disabled assured from performing every duty pertaining to any occupation. Paragraph C provided for the payment of a certain sum for certain specific total losses, including life, which result solely from the injuries described in paragraph A within 90 days from the date of the accident. It was held that the provisions of paragraph A requiring the injuries to wholly and continuously disable assured from performing every duty, etc., from the date of the accident, did not apply to prevent a recovery for death, though assured had worked professionally after the accident; recovery for death being governed by paragraph C, which only required that death, etc., result within 90 days from the accident.

A by-law of a mutual accident insurance company, which provides that payment in case of accidental death would be made only in case such death resulted within 90 days after the accident, does not contravene any express provision of Laws 1893, p. 124, § 15, relating to what must appear in the policy of life and accident insurance companies. *Clarke v. Illinois Commercial Men's Ass'n*, 180 Ill. App. 300.

Under a health policy limiting recovery to disability for disease contracted after a designated time, there is no liability if the disease was contracted before that time.

Ætna Life Ins. Co. of Hartford, Conn., v. Millar, 113 Md. 686, 78 Atl. 483; *Turner v. Columbia Nat. Life Ins. Co.*, 100 S. C. 121, 84 S. E. 413.

3171-3172. (f) Questions of practice—Pleading

3171 (f). The complaint on an accident policy must allege in words or substance that the injury was caused solely by external, violent, and accidental means (*Cilley v. Preferred Acc. Ins. Co.*, 96 N. Y. Supp. 282, 109 App. Div. 394, affirmed 79 N. E. 1102, 187 N. Y. 517). And an allegation that insured's death resulted from an "accidental injury independent of all other causes" sufficiently alleged that his death was caused solely by "external, violent, and accidental means" (*Pacific Mut. Life Ins. Co. v. Shields*, 182 Ala. 106, 62 South. 71). So a complaint, which alleges that decedent was killed by being run over by a locomotive, sufficiently shows that the injury was caused solely by "external, violent and accidental means" (*Phœnix Accident & Sick Ben. Ass'n v. Lathrop*, 41

Ind. App. 141, 81 N. E. 227). So, too, does a complaint alleging that the injury which resulted in the death of the insured was caused by the accidental falling of scalding water into his ear (*Driskell v. United States Health & Accident Ins. Co.*, 93 S. W. 880, 117 Mo. App. 362). An allegation that insured was shot and thereby instantly and accidentally killed by a third person, and that insured was assassinated by the third person, who was attempting to rob a bank of which the member was an officer, shows, as against a demurrer, that the death resulted from accidental means (*Travelers' Protective Ass'n of America v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991). An allegation that the insured died from the effects of the accidental injury is in effect an averment that the injury was the direct, and not the remote, cause of death, and was equivalent to an allegation that the death of the assured resulted solely from the injury, within the terms of the policy (*Driskell v. United States Health & Accident Ins. Co.*, 93 S. W. 880, 117 Mo. App. 362).

Sufficiency of allegations in general, see *Philadelphia Life Ins. Co. v Farnsley's Adm'r*, 162 Ky. 27, 171 S. W. 1004; *Ætna Life Ins. Co. of Hartford, Conn., v. Griffin*, 58 Tex. Civ. App. 198, 123 S. W. 432.

3172 (f). An insurance company is estopped from contending that the death of the insured did not result from accidental means where, by direct statements made in open court and by various motions and proceedings in the cause, it admitted that it was liable for the face of the policy, namely, \$5,000, but denied only its liability for an additional \$5,000 provided to be paid under the terms of the policy where death resulted to the insured from accidental means while he was riding upon a public conveyance propelled by steam (*Fidelity & Casualty Co. of New York v. Morrison*, 129 Ill. App. 360).

Where the petition alleged that the insured was thrown against the floor and walls of a car and objects therein, while the proof showed he was thrown against the outside of a car while attempting to board it, there was no variance, under Civ. Code Prac. § 129, providing that no variance between pleadings and proof is material which does not mislead a party to his prejudice (*Continental Casualty Co. v. Hunt*, 90 S. W. 1056, 28 Ky. Law Rep. 1006).

3172-3174. (g) Same—Evidence

3172 (g). The burden of proof is, of course, on the plaintiff to show that the death or injury of the insured was accidental.

Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 Pac. 1175; *Preferred Acc. Ins. Co. v. Fielding*, 83 Pac. 1013, 35 Colo. 19, 9 Ann. Cas. 916; *Wilkinson v. Aetna Life Ins. Co.*, 240 Ill. 205, 88 N. E. 550, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269, affirming 144 Ill. App. 38; *Central Acc. Ins. Co. v. Spence*, 126 Ill. App. 32; *Moore v. Illinois Commercial Men's Ass'n*, 166 Ill. App. 38; *Ballance v. Woodmen's Casualty Co.*, 183 Ill. App. 625; *Franklin v. Continental Casualty Co.*, 184 Ill. App. 259; *Caldwell v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 327, 136 N. W. 678; *Vernon v. Iowa State Traveling Men's Ass'n*, 158 Iowa, 597, 138 N. W. 696; *Roeh v. Business Men's Protective Ass'n of Des Moines*, 164 Iowa, 199, 145 N. W. 479, 51 L. R. A. (N. S.) 221, Ann. Cas. 1915C, 813; *Smith v. Travelers' Ins. Co.*, 106 N. E. 607, 219 Mass. 147, L. R. A. 1915B, 872; *Beile v. Travelers' Protective Ass'n of America*, 155 Mo. App. 629, 135 S. W. 497; *Goodes v. Order of United Commercial Travelers of America*, 174 Mo. App. 330, 156 S. W. 995; *Wright v. Order of United Commercial Travelers of America*, 188 Mo. App. 457, 174 S. W. 833; *Clark v. Bankers' Acc. Ins. Co.*, 147 N. W. 1118, 96 Neb. 381.

But in the absence of proof to the contrary the presumption is that the cause of death or disability was accidental.

Gaynor v. Travelers' Ins. Co., 12 Ga. App. 601, 77 S. E. 1072; *Kephart v. Continental Casualty Co.*, 17 N. D. 380, 116 N. W. 349; *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119; *Ziebell v. Fraternal Reserve Ass'n*, 158 Wis. 612, 149 N. W. 475.

Where the death of insured followed a fall upon a sidewalk by which he was injured, the burden of proof was on the plaintiff to establish not only that the injury was accidental and was the proximate cause of death, but that such accidental injury was the sole cause of death independently of any pre-existing disease or bodily infirmity as a contributory cause thereof (*Illinois Commercial Men's Ass'n v. Parks*, 179 Fed. 794, 103 C. C. A. 286).

3173 (g). A coroner's verdict as to the manner in which death resulted is competent in an action to recover upon an accident insurance policy (*Genna v. Continental Casualty Co.*, 167 Ill. App. 413). Where the question in issue was whether insured had changed his occupation to one more hazardous, or at the time of his injury was engaged in doing an act pertaining to a more hazardous occupation, the court properly excluded testimony as to what classification the company would have placed insured in under the evi-

dence (*Scott v. Pennsylvania Casualty Co.*, 87 Atl. 963, 240 Pa. 341).

The admissibility of evidence as to the accidental cause of death or injury is considered in *General Accident Fire & Life Ins. Co. v. Shields*, 9 Ala. App. 214, 62 South. 400; *Traiser v. Commercial Travelers' Eastern Accident Ass'n*, 88 N. E. 901, 202 Mass. 292; *Young v. Railway Mail Ass'n*, 103 S. W. 557, 126 Mo. App. 325; *International Travelers' Ass'n v. Branum* (Tex. Civ. App.) 169 S. W. 389.

3174 (g). Direct evidence is not essential to establish the fact of death from accidental means. The plaintiff is not bound to prove by eyewitnesses that the injuries which caused insured's death were accidental, but the fact may be shown by circumstantial evidence (*Wilkinson v. Aetna Life Ins. Co.*, 240 Ill. 205, 88 N. E. 550, 25 L. R. A. [N. S.] 1256, 130 Am. St. Rep. 269, affirming 144 Ill. App. 38). That the evidence relied on by the plaintiff to prove that the insured died as a result of an injury to his head caused by a fall is circumstantial does not require that it be of such a nature and so related as not to fairly and reasonably permit any other conclusion than that his death was so caused; but a preponderance of the evidence that his death was so caused is sufficient (*Travelers' Protective Ass'n of America v. Roth* [Tex. Civ. App.] 108 S. W. 1039). The burden of proof resting on plaintiff to show that the death of the insured was caused by external, violent, and accidental means, is discharged on his establishing the death by unexplained violent external means (*Preferred Acc. Ins. Co. v. Fielding*, 83 Pac. 1013, 35 Colo. 19, 9 Ann. Cas. 916).

The sufficiency of the evidence is considered in *National Ass'n of Ry. Postal Clerks v. Scott*, 155 Fed. 92, 83 C. C. A. 652; *Fidelity & Casualty Co. v. Meyer*, 106 Ark. 91, 152 S. W. 995, 44 L. R. A. (N. S.) 493; *Preferred Acc. Ins. Co. v. Fielding*, 83 Pac. 1013, 35 Colo. 19, 9 Ann. Cas. 916; *Kennedy v. Aetna Life Ins. Co.*, 148 Ill. App. 273, judgment affirmed 242 Ill. 396, 90 N. E. 292; *Strehlow v. Aetna Life Ins. Co.*, 183 Ill. App. 50; *Travelers' Protective Ass'n of America v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991; *Clark v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 201, 135 N. W. 1114, 42 L. R. A. (N. S.) 631; *Caldwell v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 327, 136 N. W. 678; *Roeh v. Business Men's Protective Ass'n of Des Moines*, 164 Iowa, 199, 145 N. W. 479, 51 L. R. A. (N. S.) 221, Ann. Cas. 1915C, 813; *Continental Casualty Co. v. Hunt*, 90 S. W. 1056, 28 Ky. Law Rep. 1006; *Stull v. United States Health & Accident Ins. Co. (Ky.)* 115 S. W. 234; *Travelers' Ins. Co. v. McInerney (Ky.)* 119 S. W. 171; *General Accident & Life Assur. Corp. v. Meredith*, 132 S. W. 191, 141 Ky. 92; *Maryland Casualty Co. v. Burns*, 149

(1261)

S. W. 867, 149 Ky. 550; *Travelers' Ins. Co. v. Davies*, 153 S. W. 956, 152 Ky. 600; *Pacific Mut. Life Ins. Co. v. McCabe*, 162 S. W. 1136, 157 Ky. 270; *Thomas v. Fidelity & Casualty Co. of New York*, 106 Md. 299, 67 Atl. 259; *Maryland Casualty Co. of Baltimore v. Ohle*, 87 Atl. 763, 120 Md. 371; *Cheswell v. Fraternal Acc. Ass'n of America*, 85 N. E. 96, 199 Mass. 267; *Ludwig v. Preferred Acc. Ins. Co. of New York*, 113 Minn. 510, 130 N. W. 5; *Zeitler v. National Casualty Co.*, 124 Minn. 478, 145 N. W. 395. See *Johnson v. Bankers' Mut. Casualty Ins. Co.*, 129 Minn. 18, 151 N. W. 413, L. R. A. 1915D, 1199, Ann. Cas. 1916A, 154; *Bowman v. Northern Acc. Co.*, 101 S. W. 691, 124 Mo. App. 477; *Young v. Railway Mail Ass'n*, 103 S. W. 557, 126 Mo. App. 325; *Goodes v. Order of United Commercial Travelers of America*, 174 Mo. App. 330, 156 S. W. 995; *McAuley v. Casualty Co. of America*, 37 Mont. 256, 96 Pac. 131; *Moon v. Order of United Commercial Travelers of America*, 96 Neb. 65, 146 N. W. 1037, 52 L. R. A. (N. S.) 1023; *Clark v. Bankers' Acc. Ins. Co. of Des Moines, Iowa*, 147 N. W. 1118, 96 Neb. 381; *Huguenin v. Continental Casualty Co.*, 77 S. E. 751, 94 S. C. 138; *Royal Casualty Co. v. Nelson* (Tex. Civ. App.) 153 S. W. 674; *International Travelers' Ass'n v. Rogers* (Tex. Civ. App.) 163 S. W. 421; *Armstrong v. West Coast Life Ins. Co.*, 41 Utah, 112, 124 Pac. 518; *Robinson v. Masonic Protective Ass'n*, 87 Vt. 138, 88 Atl. 531, 47 L. R. A. (N. S.) 924; *Potter v. Aetna Life Ins. Co.*, 71 Wash. 374, 128 Pac. 647; *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119; *Pagel v. United States Casualty Co.*, 148 N. W. 878, 158 Wis. 278.

The evidence of the accident should not be limited to facts stated in the proofs furnished the insurance association; but the sufficiency of such proofs must be determined as a distinct question. *Noyes v. Commercial Travelers' Eastern Acc. Ass'n*, 76 N. E. 665, 190 Mass. 171.

In action on policy insuring plaintiff's mother against accidental loss of life while riding as passenger in railway car, agreed statement of facts examined and considered sufficient to show violent death. *Schmohl v. Travelers' Ins. Co.* (Mo. App.) 189 S. W. 597, conforming to decision of Supreme Court State ex rel. *Schmohl v. Ellison*, 182 S. W. 740, 266 Mo. 580.

3175. (h) Same—Questions for jury

3175 (h). Whether the death of insured was caused by external bodily injuries is for the jury (*McCullough v. Railway Mail Ass'n*, 73 Atl. 1007, 225 Pa. 118). But in an action on a policy insuring against an accidental breaking of a leg, the question what constitutes a "leg" was for the court, and evidence defining the word was improperly received (*Rogers v. Modern Brotherhood of America*, 111 S. W. 518, 131 Mo. App. 353).

Whether the death of an insured was caused by an accident is

for the jury, unless the evidence is so convincing that all reasonable men in the fair exercise of their judgment would adopt the same conclusion (*Ward v. Ætna Life Ins. Co.*, 82 Neb. 499, 118 N. W. 70). If the evidence is conflicting, the question was for the jury, and instructions directing a verdict for insurer and ignoring the disputed issue are properly refused.

Empire Life Ins. Co. v. Gee, 178 Ala. 492, 60 South. 90; *Travelers' Ins. Co. v. Bingham*, 105 S. W. 894, 32 Ky. Law Rep. 233; *Hurd v. Northern Acc. Co.*, 125 N. W. 414, 160 Mich. 535.

So, too, where the affidavits submitted as a part of a beneficiary's preliminary proof of death were conflicting as to whether insured died as the result of an injury caused wholly and entirely by external, violent, and accidental means within the terms of his policy, whether the insurer's directors, acting as reasonable men, should have so found on such proofs, was for the jury (*Traiser v. Commercial Travelers' Eastern Acc. Ass'n*, 88 N. E. 901, 202 Mass. 292). In *Bohaker v. Travelers' Ins. Co.*, 215 Mass. 32, 102 N. E. 342, 46 L. R. A. (N. S.) 543, it was held that where insured, occupied, while delirious from typhoid fever, a room with a single window, below which was a balcony with a protecting rail, and after being left alone momentarily he was found on the ground under the room with fatal injuries, the court could not rule as a matter of law that his death was not effected directly and independently of all other causes through accidental means.

Whether the evidence warranted a submission to the jury is considered in *Preferred Accident Ins. Co. v. Patterson*, 213 Fed. 595, 130 C. A. 175; *McEwen v. Occidental Life Ins. Co.*, 20 Cal. App. 477, 129 Pac. 598; *Columbian Nat. Life Ins. Co. v. Miller*, 140 Ga. 346, 78 S. E. 1079, Ann. Cas. 1914D, 408; *Franklin v. Continental Casualty Co.*, 184 Ill. App. 259; *Klumb v. Iowa State Traveling Men's Ass'n*, 141 Iowa, 519, 120 N. W. 81; *Brinsmaid v. Order of United Commercial Travelers of America*, 157 Iowa, 651, 138 N. W. 465; *Ætna Life Ins. Co. v. Crabtree*, 142 S. W. 690, 146 Ky. 368; *Standard Accident & Life Ins. Co. of Detroit, Mich., v. Wood*, 82 Atl. 702, 116 Md. 575; *Sullivan v. Modern Brotherhood of America*, 133 N. W. 486, 167 Mich. 524, 42 L. R. A. (N. S.) 140, Ann. Cas. 1913A, 1116; *Johnson v. Continental Casualty Co.*, 99 S. W. 473, 122 Mo. App. 369; *International Travelers' Ass'n v. Bosworth* (Tex. Civ. App.) 156 S. W. 346; *Order of United Commercial Travelers of America v. Roth* (Tex. Civ. App.) 159 S. W. 176.

(1263)

3. EXCEPTED RISKS IN ACCIDENT INSURANCE

3175-3181. (a) General principles

3176 (a). The causes referred to in an accident policy limiting recovery to "bodily injuries effected through external, violent, and purely accidental causes—such injuries as shall, solely and independently of all other causes, necessarily result in death," are proximate causes (*Continental Casualty Co. v. Lloyd*, 73 N. E. 824, 165 Ind. 52). In order that there may be a recovery, there must be a proximate connection between the accident and the injurious result (*Lehman v. Great Western Acc. Ass'n*, 155 Iowa, 737, 133 N. W. 752, 42 L. R. A. [N. S.] 562). It is, however, error to charge that there may be a recovery if the death resulted proximately from the accident, where there were other causes "that accelerated or even being added resulted in death" (*Ward v. Ætna Life Ins. Co.*, 123 N. W. 456, 85 Neb. 471). Where one single predominant agency is disclosed, directly producing as a probable result the injury, which is accidental, and which operates independently of all other like causes, the effectual means, required by an accident policy insuring against bodily injuries effected directly and independently of all other causes, through external, violent, and accidental means, exist (*Bohaker v. Travelers' Ins. Co.*, 102 N. E. 342, 215 Mass. 32, 46 L. R. A. [N. S.] 543).

In an action on a policy insuring against loss of sight, an instruction that, if the loss of sight was caused directly and independently of all other causes, through external, accidental, and violent means, there could be a recovery, but otherwise not, was sufficiently favorable to insured. *Penn v. Standard Life Ins. Co.*, 160 N. C. 399, 76 S. E. 262, 42 L. R. A. (N. S.) 597, dismissing petition for rehearing *Same v. Standard Life & Accidental Ins. Co.*, 73 S. E. 99, 158 N. C. 29, 42 L. R. A. (N. S.) 593.

Under the provision allowing a recovery where death or disability result solely from accidental injuries, it is sufficient if the injury stands out as the predominant factor in the production of the result, and it is not necessary that it must have been so virulent in character as inevitably to have produced the result, regardless of all other conditions and circumstances (*Driskell v. United States Health & Accident Ins. Co.*, 93 S. W. 880, 117 Mo. App. 362). The term "injury" means an injury to the person of the insured, traceable exclusively to the accident; and every result traceable to the accident, no matter how remote in time, is potentially caused at

the time of the accident (*Hatch v. United States Casualty Co.*, 197 Mass. 101, 83 N. E. 398, 14 L. R. A. [N. S.] 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290).

Death resulting from disease caused by a wound may be deemed the proximate result of the wound (*Caldwell v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 327, 136 N. W. 678). Though one is afflicted by a disease from which he will die within a short time, yet if by accidental means his death is caused sooner, the accident is the proximate cause of death (*Hooper v. Standard Life & Accident Ins. Co.*, 166 Mo. App. 209, 148 S. W. 116). But an extension of the injury due to the failure of the insured to observe the directions of his physician is not within the policy (*Maryland Casualty Co. v. Chew*, 92 Ark. 276, 122 S. W. 642).

Sufficiency of the evidence as to proximate cause is considered in *Ætna Life Ins. Co. v. Bethel*, 131 S. W. 523, 140 Ky. 609; *McAuley v. Casualty Co. of America*, 39 Mont. 185, 102 Pac. 586.

Where it appears that two or more causes contributed to the injury, and equally prudent persons would differ as to which was the efficient cause, the question is for the jury, in view of all the circumstances attending the injury.

Patterson v. Ocean Accident & Guarantee Corp., 25 App. D. C. 46; *Continental Casualty Co. v. Lloyd*, 165 Ind. 52, 73 N. E. 824; *General Accident, Fire & Life Assur. Corp., Limited*, of Perth, Scotland, v. *Homely*, 109 Md. 93, 71 Atl. 524; *Driskell v. United States Health & Accident Ins. Co.*, 93 S. W. 880, 117 Mo. App. 362.

3181-3184. (b) Excepted risks in general

3181 (b). Provisions in accident insurance policies, excepting certain classes and kinds of injuries and causes of death, are valid and binding (*Scales v. National Life & Accident Ins. Co.* [Mo. App.] 186 S. W. 948). So a clause in an accident policy exempting from liability for injuries occurring while the insured is insane is reasonable, not forbidden by law, and not contrary to public policy (*Interstate Business Men's Acc. Ass'n of Des Moines, Iowa, v. Atkinson*, 177 S. W. 254, 165 Ky. 532, L. R. A. 1915E, 656).

Where the policy exempted the insurer from liability for death resulting wholly or in part directly or indirectly from drowning, evidence that certain persons aboard a steamer, who went down with insured at the time when she died or was killed, met with personal bodily injuries when the vessel sank, was insufficient to raise a presumption that insured perished because of personal bodily injuries, and not by drowning (*Lewis v. Continental Casualty*

Co., 61 Wash. 154, 112 Pac. 91). Under a policy providing that "no disability shall constitute a claim for accident, * * * nor for injury, sickness, or disability which results from or is attributable to * * * orchitis," no indemnity could be recovered for time lost on account of orchitis, whether or not it resulted originally from an accident (*Sweeney v. National Relief Assur. Ass'n*, 101 N. Y. Supp. 797, 52 Misc. Rep. 144). In *Standard Accident Ins. Co. of Detroit, Mich., v. Hite*, 37 Okl. 305, 132 Pac. 333, 46 L. R. A. (N. S.) 986, the policy provided that no liability should attach for injuries received while in a caboose used for passenger service. The insured was killed while riding in a caboose attached to a stock train, he being at the time in charge of cattle. The court held that the words "on a caboose" are qualified by the words "used for passenger service," that it was not the kind of car that controlled, but the fact whether it was at the time engaged in passenger service, within the ordinary meaning of the term, and that it does not follow that a person injured while in charge of cattle and riding in the caboose, though as to the railroad a passenger, was in a car at the time "used for passenger service."

Where riding on a locomotive was a mode of travel covered by an accident policy insuring one as "contractor, office and traveling," a provision that the policy did not cover death while riding on a locomotive was an inconsistency, and did not preclude a recovery, though insured at the time he was killed was riding on a locomotive (*Ward's Adm'r v. Preferred Acc. Ins. Co.*, 67 Atl. 821, 80 Vt. 321). Where the policy excepted injuries received while the insured was riding on a motorcycle, it is a good defense that the injuries were so received (*International Travelers' Ass'n v. Peterson* [Tex. Civ. App.] 183 S. W. 1196).

If there was evidence that insured was killed while in the occupation in which he was insured, a verdict in favor of insurer could not be directed on the ground that insured was killed in an occupation more hazardous than that in which he was insured (*Ward's Adm'r v. Preferred Acc. Ins. Co.*, 67 Atl. 821, 80 Vt. 321). Under conflicting evidence, the questions whether insured had changed his occupation at the time of the accident, or was doing an act pertaining to an occupation more hazardous than that for which he was insured, are for the jury (*Scott v. Pennsylvania Casualty Co.*, 87 Atl. 963, 240 Pa. 341). However, where a railroad employé is killed by a train when not on duty or performing any office of his employment, his death is not directly traceable to his employment

within a policy exempting the insurer from liability in case of the death by accident directly traceable to employment in the occupation of brakeman on a freight train (*Wolfgram v. Modern Woodmen of America*, 167 Mo. App. 220, 149 S. W. 1167).

When an injury is caused by means insured against, and medical treatment administered is rendered necessary by the nature of the injury, the death of the insured, if caused by the injury and the medical treatment, was accidental, within a policy insuring against death caused by "external, violent, and accidental means" (*Gardner v. United Surety Co.*, 125 N. W. 264, 110 Minn. 291, 26 L. R. A. [N. S.] 1004). So an accident policy providing for nonliability in case of death or disability resulting from medical or surgical treatment does not contemplate such treatment when necessary to relieve the insured from the results of an accidental injury (*Vernon v. Iowa State Traveling Men's Ass'n*, 158 Iowa, 597, 138 N. W. 696). Death from chloroform administered by physicians preparatory to a surgical operation is not necessarily within an exception exempting the insurer from liability for death resulting from surgical treatment (*Beile v. Travelers' Protective Ass'n of America*, 155 Mo. App. 629, 135 S. W. 497). A health insurance policy, expressly excepting disability from any disease of the generative organs, etc., did not cover disability caused by prostatitis, although the infection causing such disease was a secondary infection from throat trouble (*Bartallotte v. Commercial Casualty Ins. Co.* [Sup.] 163 N. Y. Supp. 95).

3183 (b). In an action to recover for personal injuries sustained by the insured while acting as a motorman, where the policy provides that there shall be no liability if the injuries are sustained by reason of the violation of a rule of the employer of the insured, and it appears that a rule of the employer forbade the insured to leave his car "without first throwing off the overhead switch, and removing the controller handle," and the evidence is conflicting as to whether the insured had complied with this order, the case is for the jury, and a verdict and judgment for plaintiff will be sustained (*Burkhardt v. Columbia Relief Fund Ass'n*, 35 Pa. Super. Ct. 284).

In some policies injury by firearms is an excepted risk, unless the accidental discharge is established by an eyewitness. If such exception is ambiguous, it will be construed most strongly against the company (*Iowa State Traveling Men's Ass'n v. Ruge*, 242 Fed. 762, 155 C. C. A. 350). A witness, though she saw deceased almost immediately before and after the shot, is not an eyewitness within

such exception (*Lundberg v. Interstate Business Men's Acc. Ass'n*, 162 Wis. 474, 156 N. W. 482, Ann. Cas. 1916D, 667).

3184 (b). That death was due to an excepted cause is a matter of defense, which need not be negated or anticipated by the complaint (*Red Men's Fraternal Acc. Ass'n v. Rippey*, 181 Ind. 454, 103 N. E. 345, 104 N. E. 641, 50 L. R. A. [N. S.] 1006). To take advantage of the defense that the loss is within one of the excepted risks, it must be pleaded affirmatively, and is not available under a general denial, unless the complaint contains averments putting the question in issue (*Mutual Trust & Deposit Co. v. Traveler's Protective Ass'n*, 57 Ind. App. 329, 104 N. E. 880, reversing on rehearing 100 N. E. 451). So a by-law of a mutual assessment association, relieving it from liability for any injury to a member, whether resulting in death or otherwise, which is the result of the discharge of firearms, where there is no eyewitness to the discharge, except the member himself, is not a condition precedent to the going into effect of the certificate, but a condition avoiding liability in a particular event, which must be alleged and proved to be available as a defense, under the rule that exceptions to an insurer's liability, not incorporated in the provisions creating liability, must be set up and proved as a defense by the insurer (*Connell v. Iowa State Traveling Men's Ass'n*, 139 Iowa, 444, 116 N. W. 820). The defense that insured was injured in a more hazardous occupation than that stated in the policy may be pleaded either in the language of the policy or in its legal effect (*McCarthy v. Pacific Mut. Life Ins. Co. of California*, 178 Ill. App. 502).

A defendant insurance company in an action on an accident policy held entitled to show that the injury was one excepted by the contract, though such injury was not named in the petition. *Romayne v. Hawkeye Commercial Men's Ass'n* [Iowa] 135 N. W. 735.

The burden is on the insurer to show that the death or disability resulted from a cause excepted in the policy.

Franklin v. Continental Casualty Co., 184 Ill. App. 259; *Vernon v. Iowa State Traveling Men's Ass'n*, 158 Iowa, 597, 138 N. W. 696; *Allen v. Travelers' Protective Ass'n of America*, 163 Iowa, 217, 143 N. W. 574, 48 L. R. A. (N. S.) 600; *Beile v. Travelers' Protective Ass'n of America*, 155 Mo. App. 629, 135 S. W. 497; *Union Accident Co. v. Willis*, 44 Okl. 578, 145 Pac. 812, L. R. A. 1915D, 358; *Starr v. Aetna Life Ins. Co. of New York*, 83 Pac. 113, 41 Wash. 199, 4 L. R. A. (N. S.) 636.

Where a health insurance policy provided that the insurer should not be liable for disability resulting from bronchitis, and it was
(1268)

shown that a disabled member suffered from senile bronchitis and a catarrhal condition of the stomach and duodenum, the insurer was not relieved from liability, without proof that the bronchitis and not the affection of the digestive tract caused the disability (*Courtney v. Fidelity Mut. Aid Ass'n*, 94 S. W. 768, 101 S. W. 1098, 120 Mo. App. 110). If a health insurance contract provided that it should not cover disability resulting from any chronic disease or diseases other than in acute and fully developed form, insured, afflicted with chronic nephritis, could not recover (*Kingkade v. Continental Casualty Co.*, 35 Okl. 99, 128 Pac. 683). But where a health policy insured against certain named diseases, including blood poisoning, and a proviso declared that the policy should not apply to any disease which was the result of injury, the proviso was inoperative as to blood poisoning, which always results from injury (*Jones v. Pennsylvania Casualty Co.*, 52 S. E. 578, 140 N. C. 262, 5 L. R. A. [N. S.] 932, 111 Am. St. Rep. 843).

A policy may provide that there shall be no liability on the part of the insurer if the insured die within a year from certain diseases specified in the policy (*Red Men's Fraternal Acc. Ass'n v. Rippey*, 181 Ind. 454, 103 N. E. 345, 104 N. E. 641, 50 L. R. A. [N. S.] 1006).

3184-3187. (c) External and visible signs of injury

3184 (c). Accident policies usually provide that the insurance shall not extend to any bodily injury of which there shall be no external or visible signs upon the body of the insured. Under such a clause there can be no recovery in the absence of external or visible signs of injury.

Mutual Trust & Deposit Co. v. Travelers' Protective Ass'n of America (Ind. App.) 100 N. E. 451; *Peterson v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n*, 123 Minn. 505, 144 N. W. 160, 49 L. R. A. (N. S.) 1022, Ann. Cas. 1915A, 536; *Goodes v. Order of United Commercial Travelers of America*, 174 Mo. App. 330, 156 S. W. 995.

3185 (c). The exemption will, however, be construed strictly against the insurer, and it cannot escape liability where insured met with a violent accident, the results of which are discoverable by examination (*Mutual Trust & Deposit Co. v. Travelers' Protective Ass'n*, 57 Ind. App. 329, 104 N. E. 880, reversing on rehearing 100 N. E. 451). The "visible mark upon the body" required by the clause need not be a bruise, contusion, laceration, or broken limb, but may be any visible evidence of internal injury or any physical effect observable from an outward indication which reveals an in-

jured condition of the internal organs (*Royal Casualty Co. v. Nelson* [Tex. Civ. App.] 153 S. W. 674). So, in the case of injury from an accidental fall, death resulting from angina pectoris caused thereby, insured's pallor appearing immediately after the accident, and his emaciation and decline following, are visible marks on the body, within the provision of the policy (*Root v. London Guarantee & Accident Co.*, 72 N. E. 1150, 180 N. Y. 527, affirming 92 App. Div. 578, 86 N. Y. Supp. 1055). And where an insured locomotive engineer sustained only slight external injuries, but became mentally deranged and unfit for duty for nearly two years, he was entitled to recover against the insurer as for a "visible injury" (*Peterson v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n*, 123 Minn. 505, 144 N. W. 160, 19 L. R. A. [N. S.] 1022, Ann. Cas. 1915A, 536). There were external and visible marks within the clause, where the result of an accidental bruise was a felon on insured's finger (*Robinson v. Masonic Protective Ass'n*, 87 Vt. 138, 88 Atl. 531, 47 L. R. A. [N. S.] 924). Where the insured died in consequence of poisoning by poison ivy, with which he accidentally came in contact, it was sufficient that visible marks appeared before death (*Dent v. Railway Mail Ass'n* [C. C.] 183 Fed. 840). The issuance of blood from insured's ear and nostril after his death was held, in *Goodes v. Order of United Commercial Travelers of America*, 174 Mo. App. 330, 156 S. W. 995, to be a "visible sign" of external injury within the policy. And where the policy provided that there could be no recovery, unless the accident causing death should leave a visible mark on the body, the insurer is liable where the injury caused visible marks on the body, even though they were later obliterated, and did not appear after death (*Mutual Trust & Deposit Co. v. Travelers' Protective Ass'n*, 57 Ind. App. 329, 104 N. E. 880, reversing on rehearing 100 N. E. 451).

"Wounds," within the meaning of an accident policy requiring injury to result from external, etc., means leaving wounds visible to the naked eye, means injuries of every kind which affect the body, including bruises, contusions, fractures, luxations, etc., or any lesion of the body.

Thompson v. Loyal Protective Ass'n, 167 Mich. 31, 132 N. W. 554; *Robinson v. Masonic Protective Ass'n*, 87 Vt. 138, 88 Atl. 531, 47 L. R. A. (N. S.) 924.

In *Lewis v. Brotherhood Acc. Co.*, 194 Mass. 1, 79 N. E. 802, 17 L. R. A. (N. S.) 714, the policy provided in one place that the in-

(1270)

surance was against "personal bodily injury leaving upon the body external marks of contusion or wounds"; in another, that it was against "bodily injuries, such as dislocations, fractures, * * * drowning," etc.; and in another place limited the liability in case of drowning, when the facts of the accident are not established by testimony of eyewitnesses, and when the body is not recovered and identified; and "in case of injuries, whether fatal or disabling, of which there is no visible mark on the exterior of the body." It was held that, under the rule that any doubt arising upon the face of an insurance policy as to its meaning is to be resolved in favor of the insured, the provisions relating to contusions and wounds did not apply to a case of drowning, so as to exempt liability where insured was drowned and there were no marks on his body.

Where the complaint alleged that death was a result of an accident causing visible marks, and a copy of the by-laws, excepting liability, unless the injury produced a visible mark, was attached, a general denial put in issue the question whether there were such visible marks on the body. *Mutual Trust & Deposit Co. v. Travelers' Protective Ass'n*, 57 Ind. App. 329, 104 N. E. 880, reversing on rehearing 100 N. E. 451.

Where recovery was limited to visible injuries, the questions whether the injury was visible and resulted from the accident were for the jury. *Peterson v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n*, 123 Minn. 505, 144 N. W. 160, 49 L. R. A. (N. S.) 1022, Ann. Cas. 1915A, 536.

3187-3189. (d) Walking or being on railway roadbed or bridge

3187 (d). The object of the stipulation in an accident policy reducing the indemnity or exempting the insurer from liability for injuries received while on the roadbed of any railroad, except while crossing at a public highway, is not to guard against injury from a defective roadbed, but against dangers incident to the operation of trains thereon, and the condition is no more than an assurance that insured will not intrude on that part of the roadbed which is not also a part of the highway, and only on a showing that he did so, and was thereby injured, can the exception apply (*McClure v. Great Western Acc. Ass'n*, 141 Iowa, 350, 118 N. W. 269).

The clause is intended only to exempt the insurer from liability for injuries due to being struck by moving cars or engines.

Osgood v. United States Health & Accident Ins. Co., 76 N. H. 475, 84 Atl. 50, Ann. Cas. 1913C, 425; *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119.

The exception does not apply necessarily on a railway roadbed in attempting to enter a train (*Travelers' Ins. Co. v. Harris* [Tex. Civ. App.] 178 S. W. 816).

In the provision that the policy should not cover injuries sustained while insured was on any railroad bridge or "right of way," except at established crossings of such roads with public highways, the term "right of way" should be construed as meaning the way or track on which trains travel, and not the entire width of the railroad company's ground (*Starr v. Ætna Life Ins. Co. of New York*, 83 Pac. 113, 41 Wash. 199, 4 L. R. A. [N. S.] 636). So, too, facts which show that decedent was struck by an engine while walking upon a highway over a railroad crossing, do not show that he was killed in consequence of walking or being upon a roadbed of a railroad (*Phoenix Accident & Sick Ben. Ass'n v. Lathrop*, 41 Ind. App. 141, 81 N. E. 227). On the other hand, if the insured crossed the track where there was no public crossing, there can be no recovery (*Wilcox v. Central Accident Ins. Co. of Pittsburgh*, 234 Pa. 58, 82 Atl. 1093).

3189 (d). The fact that it was customary for other persons to walk on the track at the place where insured was walking is immaterial.

Powell v. Travelers' Protective Ass'n of America, 160 Mo. App. 571, 140 S. W. 939; *Osgood v. United States Health & Accident Ins. Co.*, 84 Atl. 50, 76 N. H. 475, Ann. Cas. 1913C, 425.

Where, in an action on a policy, insuring one as "contractor, office and traveling," the evidence showed that insured was killed by falling from an observation car while traveling as contractor, a verdict could not be directed for insurer on a ground which assumed that decedent was killed while walking on a railroad roadbed, with in an exemption in the policy (*Ward's Adm'r v. Preferred Acc. Ins. Co.*, 67 Atl. 821, 80 Vt. 321).

The insurer has the burden of proving that insured was at the time of the accident on a railroad roadbed, and not on a highway crossing. *McClure v. Great Western Acc. Ass'n*, 141 Iowa, 350, 118 N. W. 269.

The insurer makes out a defense by showing that insured was on a roadbed, and that his injury or death occurred from a cause inhering in the hazards peculiar to such place; plaintiff being left to show that insured's presence there was excusable. *Correll v. National Acc. Soc.*, 139 Iowa, 36, 116 N. W. 1046, 130 Am. St. Rep. 294.

3189-3193. (e) Entering or leaving or standing on platform of moving car

3189 (e). An agreement to insure against bodily injury, except injuries sustained while entering or leaving, or trying to enter or leave, a moving conveyance, excepts from the promised indemnity fatal injuries sustained while trying to enter a moving passenger car (*Standard Life & Accident Ins. Co. v. McNulty*, 157 Fed. 224, 85 C. C. A. 22). But of course there must appear to be some causal relation between the conduct of insured and the injury received (*Kirkpatrick v. Ætna Life Ins. Co.*, 141 Iowa, 74, 117 N. W. 1111, 22 L. R. A. [N. S.] 1255).

Where proofs of loss under an accident policy alleged that decedent was injured while stepping from a moving train, the burden was on plaintiff to show that such statement was erroneous in fact. *Hill v. Ætna Life Ins. Co.*, 150 N. C. 1, 63 S. E. 124.

In *Kirkpatrick v. Ætna Life Ins. Co.*, 141 Iowa, 74, 117 N. W. 1111, 22 L. R. A. (N. S.) 1255, the policy covered injuries sustained while traveling as a railway passenger; but did not cover injuries resulting from entering or leaving moving conveyances using steam or electricity as motive power, or being in any place in such conveyance not provided for passengers during transit. It was held that the exemption absolves the insurer from liability when insured was entering or leaving a moving conveyance, or was at the time of the injury at a place on a railway conveyance not provided for the use of passengers, but the policy covers accidents resulting to passengers on moving trains except when boarding or alighting from trains, and accidents to all others, save where they are in a place in such conveyance not provided for the occupation of passengers during transit. In this case it appeared that, while a train which blocked a public street was standing still, insured attempted to pass through it. He mounted one of the platforms of a car of the train, went to the steps on the other side, and, while in the act of alighting, the train suddenly started, throwing him to the ground with one arm across a rail, where a car wheel passed over it. It was held that, since the conditions in the policy referred to insured's conscious act in entering or leaving a moving conveyance and his being on the platform of a railway coach when injured, insured was entitled to a recovery.

3193-3196. (f) Poison

3194 (f). In *Railway Mail Ass'n v. Dent*, 213 Fed. 981, 130 C. C. A. 387, L. R. A. 1915A, 314, modifying judgment (C. C.) 183 Fed.

(1273)

840, it was held that, where decedent died as the result of accidentally coming in contact with poison ivy, such death did not result from poison "taken or administered," nor from disease, within exceptions in an accident policy. In *Beile v. Travelers' Protective Ass'n of America*, 155 Mo. App. 629, 135 S. W. 497, it was held that a clause exempting insurer from liability for injury resulting from any poison accidentally or otherwise taken, administered, etc., does not include medicine, though containing poison, administered in good faith, to alleviate pain, if it results in unexpected and unintentional death. On the other hand, it was held in *Riley v. Interstate Business Men's Accident Ass'n (Iowa)* 152 N. W. 617, that under a policy excepting liability for death from voluntary or involuntary taking of poison, insurer is not liable for death from strychnine, contained in medicine given insured by a doctor. But the judgment in this case was reversed on rehearing (*Riley v. Inter-State Business Men's Acc. Ass'n*, 177 Iowa, 449, 159 N. W. 203); the court holding that a certificate of accident insurance excluding death by voluntary or involuntary taking of poison did not exclude death by poison in any other way. In Illinois it has been held that, where it was stipulated that insured's death was due to "an overdose of morphine," such stipulation precluded plaintiff from recovering, it appearing that the application for such insurance, signed by plaintiff, expressly excepted, as grounds of liability of defendant thereunder, such injuries as insured might receive "while under the influence of * * * narcotics, or in consequence thereof" (*Pixley v. Illinois Commercial Men's Ass'n*, 195 Ill. App. 135).

3195 (f). Ptomaine poisoning was regarded as covered by the policy in *Johnson v. Fidelity & Casualty Co. of New York*, 184 Mich. 406, 151 N. W. 593, L. R. A. 1916A, 475; but in *Order of United Commercial Travelers of America v. Smith*, 192 Fed. 102, 112 C. C. A. 442, it was held that insured was bound by amendments to the constitution after he joined the society, under which he was not entitled to recover benefits for death from ptomaine poisoning, of which there was no external or visible mark on the body.

Where an embalmer accidentally punctured the palm of his hand with the point of an embalming needle while embalming a dead body, and blood poison set in, resulting in death a few weeks later, the death was not from "contact with poisonous substances" within a clause exempting insured from liability for injuries arising from "contact with poisonous substances" (*Simpkins v. Hawkeye Com-*

mercial Men's Ass'n, 148 Iowa, 543, 126 N. W. 192). And it has also been held that, where blood poisoning causing the disability sought to be recovered for resulted from an injury within the terms of the policy, a provision excepting blood poisoning has no application (*United States Health & Accident Ins. Co. v. Harvey*, 129 Ill. App. 104). Thus under an insurance policy covering death resulting "directly from the accident," death from blood poisoning caused by an accident, either external or internal, would be the direct result of the accident (*Thompson v. Columbian Nat. Life Ins. Co.*, 95 Atl. 229, 114 Me. 1). And where germs causing blood poisoning entered an abrasion caused by accident, death resulted directly and without intervening cause from bodily injury, within an accident policy (*Ballagh v. Interstate Business Men's Acc. Ass'n*, 176 Iowa, 110, 155 N. W. 241, L. R. A. 1917A, 1050, rehearing denied 176 Iowa, 110, 157 N. W. 726, L. R. A. 1917A, 1050). So, in *Cary v. Preferred Accident Ins. Co. of New York*, 127 Wis. 67, 106 N. W. 1055, 5 L. R. A. (N. S.) 926, 115 Am. St. Rep. 997, 7 Ann. Cas. 484, it appeared that insured accidentally fell and sustained an abrasion of the skin, which appeared somewhat red and inflamed on the second day, and on the eighth day, when a physician first saw the wound, he found insured suffering from blood poisoning, resulting from bacterial infection through the wound, from which insured died two days thereafter. It was held that such facts were sufficient to sustain a finding that insured's death was proximately and solely caused by the accident. In this case it was held that the exemption from liability in case the injury resulted from poison or infection, or from anything accidentally or otherwise administered, absorbed, or inhaled, applied only where the resulting injury was proximately caused in a manner so specified, and did not apply to a case of death from bacterial septicæmia immediately following an accidental injury.

Where the policy exempted insurer from liability for injuries or disability resulting, directly or indirectly, accidentally or otherwise from poison or infection, if insured sustained an accidental injury to one of the bones of his foot the original disability being within the terms of the policy, the fact that infection resulted did not bring the same within the terms of the limitation; the words, "injury or disability," being referable to the time of the accident (*Garvey v. Phoenix Preferred Acc. Ins. Co.*, 108 N. Y. Supp. 186, 123 App. Div. 106). But in *Gertz v. Clover Leaf Casualty Co.*, 197 Ill. App. 462, it was held that a clause providing that insurer should

not be liable "in the event of * * * injury due wholly or in part to or resulting directly or indirectly in or from * * * any disease or bodily infirmity, or * * * infection, in any form or manner, * * * expressly excepts death due to blood poisoning or infection through insured's foot, alleged to have been caused by an injury due to the fall of a piece of coal on the foot.

Provision in policy of accident insurance construed as if written "likewise subject to its terms, limits and conditions, this policy covers the assured in event of death * * * from * * * blood poisoning. * * *" *Doyle v. Maryland Casualty Co.*, 182 S. W. 946, 168 Ky. 795.

In *Herdic v. Maryland Casualty Co.*, 149 Fed. 198, 79 C. C. A. 156, affirming 146 Fed. 396, the policy recited that it insured against bodily injuries sustained through external, violent, and accidental means, and in a subsequent clause provided that it did not cover death from disability resulting from mineral, animal, vegetable, gaseous, or any other kind of poison, but, subject to its conditions, covered death or disability resulting from septicæmia, etc. It was held that the policy did not cover death from septicæmia ensuing from a surgical operation for appendicitis.

In *Central Acc. Ins. Co. v. Rembe*, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235, 5 Ann. Cas. 155, affirming 122 Ill. App. 507, a rider attached to a physician's accident policy extended the same to cover injuries known as septic wounds, caused by accident while performing any operation pertaining to the business of the insured, etc. It was held that such clause did not limit the insurer's liability to accidents occurring while the physician was in the act of performing an operation or administering treatment to a patient, but extended as well to the preparation of medicine to be taken by the patient as a part of a continuous course of treatment. In this case the insured, a physician, while preparing medicine for a patient suffering with syphilis, accidentally broke the neck of a glass bottle and wounded his finger with a piece of glass. He immediately dressed and bandaged it, but he contracted septicæmia, from which he died. It was held that the accidental wounding of the finger, and not the blood poisoning, was the proximate cause of his death, within the clause exempting the insurer from liability for death caused from the voluntary or involuntary taking of poison or contact with a poisonous substance.

In *Fidelity & Casualty Co. v. Thompson*, 154 Fed. 484, 83 C. C. A. 324, 11 L. R. A. (N. S.) 1069, 12 Ann. Cas. 181, the policy covered,

inter alia, blood poison sustained by physicians or surgeons resulting from septic matter introduced into the system through "wounds" suffered in professional operations. Plaintiff, a dentist, was operating on a patient, who suddenly coughed, and particles of septic matter from his mouth were thrown against the mucous membrane of plaintiff's eye. The septic matter, without abrading, penetrating or bruising the membrane, infected it and caused blood poisoning. It was held that plaintiff had not received any wound, within the meaning of the policy, and was not entitled to recover. It was held, moreover, that it was error for the court under such circumstances to charge that the term "wound" as used in the policy included any lesion of the body resulting from external violence, whether accompanied by a rupture of the skin or mucous membrane or not.

3196-3198. (g) Inhaling gas

3197 (g). A provision in an accident policy to the effect that the insurance should not cover death resulting wholly, partly, directly, or indirectly from any gas or vapor, does not exempt the company from liability for death by asphyxiation from gas escaping into the room in which the insured was asleep and unconsciously inhaled by him, causing death (*Travelers' Ins. Co. v. Ayers*, 75 N. E. 506, 217 Ill. 390, 2 L. R. A. [N. S.] 168, affirming 119 Ill. App. 402). And in *Travelers' Ins. Co. v. Allen*, 237 Fed. 78, 150 C. C. A. 280, it was held that, where one insured under an accident policy was suffocated in a hotel room by gas, recovery may be had, whether the escape of the gas was caused by insured's own accident or that of another. On the other hand, in *Porter v. Preferred Acc. Ins. Co.*, 109 App. Div. 103, 95 N. Y. Supp. 682, affirmed in 186 N. Y. 599, 79 N. E. 1114, it was held that where an accident policy by its express terms relieved the insurer of liability for injury caused by the "voluntary or involuntary inhalation of any gas or any anæsthetic," or "resulting from any poison or infection accidentally or otherwise taken, administered, absorbed, or inhaled," there could be no recovery where the insured died from the effects of gas inhaled by him while in a hotel, whether the accident occurred because of his mistake or the neglect of some other person. And it was held in Kansas that there could be no recovery for death of insured resulting from accidentally breathing illuminating gas which by accident escaped into his bedchamber on night before day of death (*Min-*

ner v. Great Western Acc. Ass'n, 99 Kan. 575, 162 Pac. 1160, L. R. A. 1917D, 738).

The sufficiency of the evidence to support a finding that insured died from the inhalation of gas is considered in *Da Rin v. Casualty Co. of America*, 41 Mont. 175, 108 Pac. 649, 27 L. R. A. (N. S.) 1164, 137 Am. St. Rep. 709.

3198-3203. (h) Bodily infirmities or disease

3198 (h). A condition in a policy exempting from liability for death caused wholly or partially from disease or bodily or mental infirmity operates only where the disease or infirmity contributes, either directly or indirectly, to the death (*Vernon v. Iowa State Traveling Men's Ass'n*, 158 Iowa, 597, 138 N. W. 696). If a diseased condition had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause; but, if the disease existed at the time of the accident and co-operated with the accident to cause an injury or death, the accident is not the sole cause (*Robison v. United States Health & Accident Ins. Co.*, 192 Ill. App. 475). So the fact that insured was suffering from disease contributing to his paralysis would prevent the paralysis from being the "direct, independent," and exclusive result of the fall, though the fall hastened the paralysis (*Western Indemnity Co. v. MacKechnie* [Tex. Civ. App.] 185 S. W. 615). But it was held in Georgia that the fact that the insured's death may have been merely accelerated by a fall, and that a chronic malady contributed to his death, did not necessarily preclude recovery (*Hall v. General Acc. Assur. Corp., Limited*, of Perth, Scotland, 16 Ga. App. 66, 85 S. E. 600). A disorder causing the giving way of a foot of the insured so that he fell and was injured by an approaching train, was not, as matter of law, a disease within the meaning of the policy, so as to preclude him from recovering for the injury (*Noyes v. Commercial Travelers' Eastern Acc. Ass'n*, 76 N. E. 665, 190 Mass. 171).

3199 (h). Under a policy permitting recovery for death from bodily injury from external, violent, and accidental means, which shall, independently of all other causes, result in death, the company is not liable where the death results from disease or bodily infirmity and not from the accident, or from both the accident and the disease (*Ætna Life Ins. Co. v. Bethel*, 131 S. W. 523, 140 Ky. 609).

And to the same effect are *Dunn v. Standard Life & Acc. Ins. Co.*, 197 Mo. App. 457, 196 S. W. 100; *Rathman v. New Amsterdam Cas-*

ualty Co., 186 Mich. 115, 152 N. W. 983, L. R. A. 1915E, 980, Ann. Cas. 1917C, 459.

So, too, if insured, after recovery from an accidental injury, succumbs to a disease which would not have been fatal but for his lowered vitality following such injury, the disease, and not the lowered vitality, is the cause of death within policy insuring against death resulting from accidental injury, and a recovery cannot be had (*Ward v. Ætna Life Ins. Co.*, 82 Neb. 499, 118 N. W. 70). In *Lehman v. Great Western Acc. Ass'n*, 155 Iowa, 737, 133 N. W. 752, 42 L. R. A. (N. S.) 562, the policy provided indemnity for loss of time from the effect of "personal bodily injury caused solely by external, violent and accidental means." The insured while bowling strained his side, and his physician found a tenderness of the muscles of the front and back of the abdomen on the right side, which could be ascertained by the touch; and in a few days the insured developed appendicitis, caused directly by the irregular working of the muscles and parts of the body around the abdominal region, which resulted from the strain, and insured was disabled from work for four months. It was held, in an action for disability benefits, that there was no "personal bodily injury caused solely by external, violent means," and that insured could not recover.

Where a coroner's verdict is admitted in evidence stating that the insured "came to his death by pulmonary hemorrhage, said hemorrhage being caused by natural causes," an instruction eliminating from the consideration of the jury that part of the verdict finding that the pulmonary hemorrhage was produced by natural causes was proper. *Franklin v. Continental Casualty Co.*, 184 Ill. App. 259.

3200 (h). Where death results from disease which follows as a natural, though not as a necessary, consequence of an accidental physical injury, the death is within the terms of an accident policy insuring one against bodily injuries sustained through external means, independently of all other causes; the death being the proximate result of the injury, and not of the disease as an independent cause.

Preferred Acc. Ins. Co. v. Fielding, 83 Pac. 1013, 35 Colo. 19, 9 Ann. Cas. 916; *Stanton v. Travelers' Ins. Co.*, 83 Conn. 708, 78 Atl. 317, 34 L. R. A. (N. S.) 445; *Ætna Life Ins. Co. v. Fitzgerald*, 75 N. E. 262, 165 Ind. 317, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232, 6 Ann. Cas. 551; *Caldwell v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 327, 136 N. W. 678; *Travelers' Ins. Co. v. Davies*, 153 S. W. 956, 152 Ky. 600; *General Accident Fire & Life Assur. Corp.*,

Limited, of Perth, Scotland v. Homely, 109 Md. 93, 71 Atl. 524; Skinner v. Commercial Travelers' Mut. Acc. Ass'n, 190 Mich. 353, 157 N. W. 105; Hickey v. Ministers' Casualty Union, 133 Minn. 215, 158 N. W. 45; Hooper v. Standard Life & Accident Ins. Co., 166 Mo. App. 209, 148 S. W. 116; Greenlee v. Kansas City Casualty Co., 192 Mo. App. 303, 182 S. W. 138; Penn v. Standard Life Ins. Co., 160 N. C. 399, 76 S. E. 262, 42 L. R. A. (N. S.) 597, dismissing petition for rehearing Same v. Standard Life & Accidental Ins. Co., 73 S. E. 99, 158 N. C. 29, 42 L. R. A. (N. S.) 593; Armstrong v. West Coast Life Ins. Co., 41 Utah, 112, 124 Pac. 518; French v. Fidelity & Casualty Co. of New York, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011.

The jury might find that injury was proximate cause of death, even if latent peritonitis became active after an operation, skillfully performed, necessitated by the injury. Jones v. Commonwealth Casualty Co., 255 Pa. 566, 100 Atl. 450.

All morbid changes in the exercise of vital functions or the texture of bodily organs resulting from or induced by an accidental injury should be regarded as the effect thereof, and death resulting from such morbid changes is caused by such accident (Ward v. Ætna Life Ins. Co., 82 Neb. 499, 118 N. W. 70). So, if insured dies of traumatic pneumonia or cerebral hemorrhage caused by a fall, his death results proximately and solely from an accident (Johnson v. Continental Casualty Co., 99 S. W. 473, 122 Mo. App. 369).

In a suit on an accident policy, though the death resulted from a ruptured artery, such fact alone would not authorize a recovery, in the absence of evidence that the ruptured artery was caused by an accident. Wright v. Order of United Commercial Travelers of America, 188 Mo. App. 457, 174 S. W. 833.

If blood poisoning results from an accidental abrasion of the skin or wound, the accident and not the disease is to be regarded as the proximate cause of death.

Maloney v. Maryland Casualty Co., 113 Ark. 174, 167 S. W. 845; Central Acc. Ins. Co. v. Rembe, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235, 5 Ann. Cas. 155, affirming 122 Ill. App. 507; Continental Casualty Co. v. Matthis, 150 S. W. 507, 150 Ky. 477; Rathjen v. Woodmen Acc. Ass'n, 93 Neb. 629, 141 N. W. 815; Rheinheimer v. Ætna Life Ins. Co., 77 Ohio St. 360, 83 N. E. 491, 15 L. R. A. (N. S.) 245; Cary v. Preferred Acc. Ins. Co. of New York, 106 N. W. 1055, 127 Wis. 67, 5 L. R. A. (N. S.) 926, 115 Am. St. Rep. 997, 7 Ann. Cas. 484; French v. Fidelity & Casualty Co. of New York, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011. And see Simpkins v. Hawkeye Commercial Men's Ass'n, 148 Iowa, 543, 126 N. W. 192; United States Health

& Accident Ins. Co. v. Harvey, 129 Ill. App. 104; Garvey v. Phoenix Preferred Acc. Ins. Co., 123 App. Div. 106, 108 N. Y. Supp. 186.

Death from ptomaine poisoning from eating mushrooms, supposed to be edible, is from accidental means, and not from disease (United States Casualty Co. v. Griffis [Ind.] 114 N. E. 83, L. R. A. 1917F, 481).

In Schumacher v. Great Eastern Casualty & Indemnity Co., 197 N. Y. 58, 90 N. E. 353, affirming 132 App. Div. 929, 117 N. Y. Supp. 1146, the policy insured against the effects of bodily injuries caused by external, violent, and accidental means, which bodily injuries or their effects shall not be caused wholly or in part by any bodily disease or infirmity, for loss of life, loss of both eyes, and other specified injuries or losses stated separately "when resulting from such injuries alone." Following the statement of specified injuries, a separate paragraph was as follows: "For loss of life only resulting wholly or in part from sunstroke, freezing, septicæmia, hydrophobia or the involuntary or unconscious inhalation of gas or other poisonous vapor, the company will pay one-half of the principal sum provided in Schedule A." It was held that the last paragraph insured against loss of life from septicæmia, though not the effect of bodily injury caused by external, violent, and accidental means. In Jiroch v. Travelers' Ins. Co., 145 Mich. 375, 108 N. W. 728, the policy stipulated that the insurance should not cover injury resulting wholly or partly from disease in any form. Insured's feet were burned. Gangrene developed, necessitating the amputation of one leg. There was evidence of sugar in the insured's urine before the issuance of the policy, indicating that he was suffering from diabetes, but of the curable kind, and he was pronounced cured at the time of the issuance of the insurance. After the amputation there was sugar in his urine. A shock such as that suffered by the insured was liable to cause diabetes. A physician of the insurer diagnosed the gangrene as being caused by the wound. It was held to authorize a finding in favor of insured on the theory that he was not afflicted with diabetes when he applied for his policy, and that the disease which developed subsequently to the accident was attributable to it.

That an injury causing an abrasion was the direct and proximate cause of death, so as to allow recovery under an accident policy, is sufficiently shown by evidence that erysipelas, from which the person died, manifested itself within the usual time, and that ery-

sipelas can be contracted only by introduction of the germ through an abrasion of the skin, though there is no other evidence as to how or when the germ was communicated (*McAuley v. Casualty Co. of America*, 102 Pac. 586, 39 Mont. 185).

See, also, *McAuley v. Casualty Co. of America*, 37 Mont. 256, 96 Pac. 131, where on former appeal in the case cited above the evidence failed to show that erysipelas could arise only through the introduction of germs from the outside.

3201 (h). Hernia is usually declared to be an excepted risk, but, this does not relieve the insurer if the hernia is the result of an accident. So it has been held that recovery might be had for a rupture caused by a fall, though insured, by reason of his physical structure, was predisposed to rupture (*Collins v. Casualty Co. of America*, 112 N. E. 634, 224 Mass. 327, L. R. A. 1916E, 1203). And under a policy excepting loss of time resulting from hernia, recovery could be had for loss of time resulting from hernia produced by a fall (*Berry v. United Commercial Travelers of America*, 172 Iowa, 429, 154 N. W. 598, L. R. A. 1916B, 617, Ann. Cas. 1918A, 706). Where a health and accident policy provided for an indemnity for surgeons' fees for an operation for hernia, the provision occurring in the health portion of the policy will be construed as classifying hernia as a disease (*Hilts v. United States Casualty Co.*, 176 Mo. App. 635, 159 S. W. 771).

An accident and health policy insuring against conditions suffered from boils does not cover disability from "ischio-rectal abscess." *Midland Casualty Co. v. Mason* (Okla.) 154 Pac. 1171.

Recovery on an accident policy for the death of the insured is not precluded because of a diseased condition of body existing when the accident occurred, if the accidental injury was the inciting, efficient, and predominant cause of his death.

Patterson v. Ocean Accident & Guarantee Corp., 25 App. D. C. 46; *Hooper v. Standard Life & Accident Ins. Co.*, 166 Mo. App. 209, 148 S. W. 116; *Moon v. Order of United Commercial Travelers of America*, 96 Neb. 65, 146 N. W. 1037, Ann. Cas. 1916B, 222; *Penn v. Standard Life Ins. Co.*, 160 N. C. 399, 76 S. E. 262, 42 L. R. A. (N. S.) 597, dismissing petition for rehearing *Same v. Standard Life & Accident Ins. Co.*, 158 N. C. 29, 73 S. E. 99, 42 L. R. A. (N. S.) 593.

But where the policy limits the liability to disability or death resulting solely from accidental injury "independently of all other causes," there can be no recovery for the death of the insured re-

sulting from the concurring effect of an injury and pre-existing diseases.

New Amsterdam Casualty Co. v. Shields, 155 Fed. 54, 85 C. C. A. 122; Maryland Casualty Co. v. Morrow, 213 Fed. 599, 130 C. C. A. 179, 52 L. R. A. (N. S.) 1213; Crandall v. Continental Casualty Co., 179 Ill. App. 330; Binder v. National Masonic Acc. Ass'n, 102 N. W. 190, 127 Iowa, 25; White v. Standard Life & Accident Ins. Co., 103 N. W. 735, 95 Minn. 77, 5 Ann. Cas. 83, judgment modified on rehearing 103 N. W. 884, 95 Minn. 77, 5 Ann. Cas. 83; Penn v. Standard Life Ins. Co., 160 N. C. 399, 76 S. E. 262, 42 L. R. A. (N. S.) 597, dismissing petition for rehearing Same v. Standard Life & Accidental Ins. Co., 73 S. E. 99, 158 N. C. 29, 42 L. R. A. (N. S.) 593.

So it was held that where an accident policy provided a specified insurance for the loss of sight, caused directly and independently of all other causes, through external, accidental, and violent means, insured was not entitled to recover for loss of sight due to an injury to an eye, caused by his accidentally falling from a train, such fall having merely hastened the loss of sight in the eye, which would have been ultimately lost independent of the accident because of a cataract (Penn v. Standard Life & Accidental Ins. Co., 158 N. C. 29, 73 S. E. 99, 42 L. R. A. [N. S.] 593, rehearing denied Same v. Standard Life Ins. Co., 160 N. C. 399, 76 S. E. 262, 42 L. R. A. [N. S.] 597). And in Stanton v. Travelers' Ins. Co., 83 Conn. 708, 78 Atl. 317, 34 L. R. A. (N. S.) 445, it was held that, where insured's appendix was in an abnormal condition from a prior attack of appendicitis, his death from a subsequent attack caused by a strain was caused partly by the strain and partly by the pre-existing attack of appendicitis, so that the company was not liable. On the other hand, in Fidelity & Casualty Co. v. Meyer, 106 Ark. 91, 152 S. W. 995, 44 L. R. A. (N. S.) 493, the insurer was held liable where death resulted from the aggravation of a disease by accidental injury, although the policy limited liability to accidental injuries resulting directly, independently and exclusively of all other causes in death. So, too, in National Life Ins. Co. v. Bean, 15 Ga. App. 661, 84 S. E. 152, it was said that the fact that a disease insured against was complicated by other diseases or physical disturbances does not preclude recovery on a health policy.

Sufficiency of the evidence on the issue whether accident or disease was the cause of disability or death, see Continental Casualty Co. v. Lloyd, 73 N. E. 824, 165 Ind. 52; United States Health & Accident Ins. Co. v. Bennett's Adm'r, 105 S. W. 433, 32 Ky. Law Rep.

235; *Travelers' Ins. Co. v. McInerney* (Ky.) 119 S. W. 171; *Beile v. Travelers' Protective Ass'n of America*, 155 Mo. App. 629, 135 S. W. 497; *Ætna Life Ins. Co. of Hartford, Conn., v. Griffin*, 58 Tex. Civ. App. 198, 123 S. W. 432; *Armstrong v. West Coast Life Ins. Co.*, 41 Utah, 112, 124 Pac. 518.

Propriety of instruction on the question of proximate cause is considered in *Coulter v. Travelers' Protective Ass'n of America*, 144 Ill. App. 255; *Continental Casualty Co. v. Semple* (Ky.) 112 S. W. 1122; *Continental Casualty Co. v. Peltier*, 51 S. E. 209, 104 Va. 222.

3203 (h). Whether disability or death was the result of accident or disease is for the jury.

McCormack v. Illinois Commercial Men's Ass'n, 159 Fed. 114, 86 C. C. A. 304; *Binder v. National Masonic Acc. Ass'n*, 102 N. W. 190, 127 Iowa, 25; *First Texas State Ins. Co. v. Jones* (Tex. Civ. App.) 167 S. W. 9.

Whether the evidence warranted a submission to the jury is considered in *New Amsterdam Casualty Co. v. Shields*, 155 Fed. 54, 85 C. C. A. 122; *Illinois Commercial Men's Ass'n v. Parks*, 179 Fed. 794, 103 C. C. A. 286; *Kenny v. Bankers' Accident Ins. Co. of Des Moines*, 136 Iowa, 140, 113 N. W. 566; *Brinsmaid v. Order of United Commercial Travelers of America*, 157 Iowa, 651, 138 N. W. 465; *Continental Casualty Co. v. Semple* (Ky.) 112 S. W. 1122.

3203-3206. (i) Intoxication

3204 (i). The words "intemperate habit," as used in an accident policy, merely means the use of intoxicants to excess, that is, with considerable frequency and to an apparent degree, and it was erroneous to instruct that the word "habit" implied regularity (*Andrews v. United States Casualty Co.*, 142 N. W. 487, 154 Wis. 82). And the words "under the influence of any intoxicant" in a casualty policy, providing that only a certain amount should be paid in case an "accidental injury is sustained while the assured is insane, delirious or under the influence of any intoxicant or narcotic," meant such degree of influence as would materially impair insured's ability to care for himself and guard against casualties; such degree of influence being equivalent to intoxication in the ordinary meaning of the word (*Bakalars v. Continental Casualty Co.*, 141 Wis. 43, 122 N. W. 721, 25 L. R. A. [N. S.] 1241, 18 Ann. Cas. 1123).

The provision of an accident policy limiting the liability of the insurer if injury is sustained while insured is intoxicated, applies without regard to whether the intoxication causes the injury, though another clause provides for the same result where the injury is caused by intoxication (*Mossop v. Continental Casualty Co.*,

118 S. W. 680, 137 Mo. App. 399). In such case the evidence must show that he was actually intoxicated at the time of accident (Beard v. Indemnity Ins. Co., 65 W. Va. 283, 64 S. E. 119).

A provision in an accident policy that insurer is not liable unless the accident results in death directly, independently and exclusively of all other causes, does not relieve the company from liability for a death because of the use of intoxicating liquors by insured rendering him less able to withstand disease, unless the proof warrants a conclusion that the abnormal condition contributed to the disease; the clause being inapplicable where the accident is the direct, natural and proximate cause of the death (Fidelity & Casualty Co. of New York v. Cooper, 126 S. W. 111, 137 Ky. 544).

3205 (i). The burden is on the insurer to show that insured received his injuries while intoxicated within the exception.

McDermott v. Hawkeye Commercial Men's Ass'n, 158 Iowa, 544, 139 N. W. 472; Thompson v. Bankers' Mut. Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180, Ann. Cas. 1916A, 277; Reddick v. Northern Accident Co., 180 Mo. App. 277, 165 S. W. 354.

Evidence tending to cast doubt on the insurer's theory that deceased was intoxicated is admissible, though insufficient in itself to disprove intoxication (Thompson v. Bankers' Mut. Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180, Ann. Cas. 1916A, 277).

The sufficiency of the evidence to show that insured was intoxicated is considered in Empire Mut. Life Ins. Co. v. Allen, 141 Ga. 413, 81 S. E. 120; Little v. Iowa State Traveling Men's Ass'n, 154 Iowa, 440, 134 N. W. 1087; Bakalars v. Continental Casualty Co., 141 Wis. 43, 122 N. W. 721, 25 L. R. A. (N. S.) 1241, 18 Ann. Cas. 1123.

Whether insured was intoxicated when injured is for the jury.

McDermott v. Hawkeye Commercial Men's Ass'n, 158 Iowa, 544, 139 N. W. 472; Thompson v. Bankers' Mut. Casualty Ins. Co., 128 Minn. 474, 151 N. W. 180, Ann. Cas. 1916A, 277.

The evidence was held to require the submission to the jury of the issue whether insured was at the time he received the fatal injuries intoxicated in Fenton v. Iowa State Traveling Men's Ass'n, 139 Iowa, 166, 117 N. W. 251.

3206-3207. (j) Violation of law—Fighting

3207 (j). The insured in an accident policy cannot recover for an injury resulting from a voluntary fight with another (Hutton v. States Accident Ins. Co., 267 Ill. 267, 108 N. E. 296, L. R. A. 1915E, 127, Ann. Cas. 1916C, 577). So, where deceased was shot by C. during an altercation, after having approached C. in a menacing

(1285)

männer and threatened to kill him, deceased's death resulted from fighting, within the exception (*Gaines v. Fidelity & Casualty Co. of New York*, 97 N. Y. Supp. 836, 111 App. Div. 386). And where it is proved that insured's death was caused by external and violent means, to overcome this prima facie case by the defense that insured was killed in course of assault upon another, insurer must show that felonious assault was first made by insured upon other, and that he met death at hands of assaulted person in self-defense (*Georgia Casualty Co. v. Shaw* [Tex. Civ. App.] 197 S. W. 316).

For other instances involving injuries received in assaults, see *Prudential Casualty Co. v. Curry*, 65 South. 852, 10 Ala. App. 642; *Hutton v. States Accident Ins. Co.*, 186 Ill. App. 499; *Continental Casualty Co. v. Fleming* (Ky.) 124 S. W. 331; *Erb v. Commercial Mut. Accident Co.*, 81 Atl. 207, 232 Pa. 215; *Railway Mail Ass'n v. Moseley*, 211 Fed. 1, 127 C. C. A. 427. And see generally the discussion and cases cited on page 3149.

Where the insured committed an assault and battery on a person who made no resistance, and, in striking such person in the face, injured his hand and a few days later died from the effects of blood poisoning which developed in the wound, such injury, which was the direct means causing the death of the insured, being the natural result of a voluntary act committed when he was in full possession of his mental faculties, was not "accidental," within the meaning of the policy, and did not give a right of action thereon to recover for the resulting disability or death (*Fidelity & Casualty Co. of New York v. Stacey's Ex'rs*, 143 F. 271, 74 C. C. A. 409, 5 L. R. A. [N. S.] 657, reversing 137 Fed. 1012).

A clause in an accident insurance policy, limiting liability in case of injury or death "resulting * * * from exposure to obvious risk of injury or known danger, * * * or while violating law," does not limit liability, where the insured was killed in a collision between a motorcycle, which he was riding, and another motorcycle, though he had not procured a registration certificate or license number as required by law (*Fischer v. Midland Casualty Co.*, 189 Ill. App. 486).

3207-3213. (k) Intentional injuries

3207 (k). So far as insured is concerned, an injury intentionally inflicted by another, without insured's connivance, may be an accident, within the terms of the policy.

Maloney v. Maryland Casualty Co., 113 Ark. 174, 167 S. W. 845; *Gaynor v. Travelers' Ins. Co.*, 12 Ga. App. 601, 77 S. E. 1072; *Trav-*

Travelers' Protective Ass'n of America v. Fawcett, 56 Ind. App. 111, 104 N. E. 991; Union Accident Co. v. Willis, 44 Okl. 578, 145 Pac. 812, L. R. A. 1915D, 358.

3208 (k). Under a condition limiting, or exempting from, liability for disability or death resulting from injuries intentionally inflicted, mere carelessness on the part of insured is not included (Fidelity & Casualty Co. v. Morrison, 129 Ill. App. 360).

But the insured cannot recover if the injuries are intentionally inflicted.

Fidelity & Casualty Co. of New York v. Morrison, 129 Ill. App. 360; Washington v. Union Casualty & Surety Co., 91 S. W. 988, 115 Mo. App. 627; Strother v. Business Men's Accident Ass'n of America, 188 S. W. 314, 193 Mo. App. 718.

The form of the condition varies in different policies, giving rise to decisions that, unless the wording of the clause is carefully considered, are apparently conflicting. Generally the clause covers both fatal and nonfatal injuries. But where the policy limits the amount of recovery for disability and provides for the payment of a specified sum for death, and that an injury received by insured in an attempt to rob him shall be considered an accident, the limitation applies only to nonfatal injuries inflicted in an attempt to rob, and not to fatal injuries (Travelers' Protective Ass'n of America v. Fawcett, 56 Ind. App. 111, 104 N. E. 991). On the other hand, in Continental Casualty Co. v. Morris, 46 Tex. Civ. App. 394, 102 S. W. 773, where the policy limited the amount of recovery where the "accidental injury" was the result of an intentional act, it was held that the word "injury" included fatal injuries. And in Andrews v. United States Casualty Co., 154 Wis. 82, 142 N. W. 487, it was held that a policy excluding recovery for death from injury "intentionally inflicted" or resulting from any act which, if done by assured while in possession of all mental faculties, would be deemed intentional or self-inflicted, did not include death by homicide.

3209 (k). Since self-inflicted injuries are excepted by the condition, the insurer can show that insured was in straitened pecuniary circumstances and needed money when he took out the policy, on the question whether the policy was fraudulently procured and the injuries voluntarily inflicted (Everson v. Casualty Co. of America, 94 N. E. 459, 208 Mass. 214).

3210 (k). It was held in Union Accident Co. v. Willis, 44 Okl. 578, 145 Pac. 812, L. R. A. 1915D, 358, that the clause would not exempt the insurer where insured died from the effect of a fall due

to a blow struck by another, if the result was unintentional, though the blow was intentional. On the other hand, in *Travelers' Protective Ass'n of America v. Weil*, 40 Tex. Civ. App. 629, 91 S. W. 836, it was held that the loss of an eye from a blow struck by another, with intent to injure, but not to put out an eye, is within the clause of an accident policy exempting the insurer from liability for intentional injuries.

If the issue is whether an injury to insured in an accident policy was intentionally inflicted by a third person, the intention of the third person is alone controlling (*Travelers' Protective Ass'n of America v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991). So, though an accident policy excepts the insurer from injuries intentionally inflicted upon the insured by any other person, it is liable for injuries inflicted by another who mistook the insured for his enemy (*Newsome v. Travelers' Ins. Co. of Hartford*, 85 S. E. 1035, 143 Ga. 785).

3211 (k). Where one causing a physical injury to a person insured in a policy limiting liability for injury caused by the intentional act of another had intelligence enough to understand the nature and consequences of his act, and the act was voluntary, the injury was the result of an intentional act within the policy, and the question of the capacity of such person to do an intentional act is for the jury (*Continental Casualty Co. v. Cunningham*, 188 Ala. 159, 66 South. 41, L. R. A. 1915A, 538). If the policy provides that no recovery shall be had for an injury "intentionally inflicted upon the insured by any other person, sane or insane," no recovery can be had for an injury by an intoxicated person; the words "sane or insane" covering the whole field of mental condition, including intoxication (*Gaynor v. Travelers' Ins. Co.*, 12 Ga. App. 601, 77 S. E. 1072).

3212 (k). It is recognized that an insured who is killed by robbers meets death by "external, violent, and accidental means" (*Interstate Business Men's Accident Ass'n v. Ford*, 161 Ky. 163, 170 S. W. 525). Policies excepting injuries intentionally inflicted often exclude from the exception injuries inflicted on the insured in an attempt to rob him. Under such a policy recovery may be had where insured was killed in an affray with a burglar (*Allen v. Travelers' Protective Ass'n of America*, 163 Iowa, 217, 143 N. W. 574, 48 L. R. A. [N. S.] 600). In *Weidner v. Standard Life & Accident Ins. Co.*, 130 Wis. 10, 110 N. W. 246; the policy limited the recovery in event of death due to injuries intentionally inflicted upon

insured by any other person, except assaults committed for the sole purpose of robbery. Insured was riding in a wagon with other persons, and as they approached a toll gate they met two men, one of whom asked for a ride and exhibited a ticket. One of the persons in the wagon returned the ticket, as the driver did not desire to give them a ride, whereupon the other man took from the wagon a pair of rubber boots belonging to insured and started off with them. Insured then demanded his boots, and the man having possession of them struck him, knocking him down, and then beat insured in the face with the boots, inflicting injuries from which he died. It was held, in an action on the policy, that the question whether the assault on insured was committed for the sole purpose of robbery was for the jury. And the court approved an instruction to the effect that the word "robbery" was used in its ordinary meaning, that to constitute the offense it was not necessary that the obtaining possession of property must be accomplished through violence or fear, but that it was sufficient if the violence or fear was concomitant with the taking, though the instruction was defective for failing to more sharply point out the question whether or not the assault was committed for the sole purpose of robbery.

That question whether insured was assaulted for the purpose of robbery is for the jury is also held in *Kennedy v. Ætna Life Ins. Co.*, 90 N. E. 292, 242 Ill. 396.

Where the issue is whether the injury was purely accidental or intentional, the presumption is that it was accidental.

Gaynor v. Travelers' Ins. Co., 12 Ga. App. 601, 77 S. E. 1072; *Bernick v. Illinois Commercial Men's Ass'n*, 175 Ill. App. 511; *Caldwell v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 327, 136 N. W. 678; *Allen v. Travelers' Protective Ass'n of America*, 163 Iowa, 217, 143 N. W. 574, 48 L. R. A. (N. S.) 600.

But where it appeared that a person approached the insured and deliberately shot and killed him at a distance of eight or ten feet, the conclusive presumption was that the slayer intended to take insured's life, though there were other persons in close proximity who might have been injured by the shot (*Gaynor v. Travelers' Ins. Co.*, 12 Ga. App. 601, 77 S. E. 1072).

3213 (k). The burden of proof is on the insurer to show that the injury was intentional.

Gaynor v. Travelers' Ins. Co., 12 Ga. App. 601, 77 S. E. 1072; *Travelers' Protective Ass'n of America v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991; *Kirkpatrick v. Ætna Life Ins. Co.*, 141 Iowa, 74,

117 N. W. 1111, 22 L. R. A. (N. S.) 1255; *Allen v. Travelers' Protective Ass'n of America*, 163 Iowa, 217, 143 N. W. 574, 48 L. R. A. (N. S.) 600. But see *Bernick v. Illinois Commercial Men's Ass'n*, 175 Ill. App. 511.

The sufficiency of the evidence to show that the injury was intentional is considered in *Casualty Co. of America v. Taylor*, 164 Ky. 786, 176 S. W. 194; *Ætna Life Ins. Co. v. Rustin*, 151 S. W. 366, 151 Ky. 103, rehearing denied 153 S. W. 14, 152 Ky. 42.

Whether the injury was purely accidental or intentional is a question for the jury.

Wilkinson v. Ætna Life Ins. Co., 88 N. E. 550, 240 Ill. 205, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269, affirming 144 Ill. App. 38; *Allen v. Travelers' Protective Ass'n of America*, 163 Iowa, 217, 143 N. W. 574, 48 L. R. A. (N. S.) 600.

The propriety of certain instructions, where the issue was whether death was caused by accident or intentionally by the administering of drugs by insured's husband is considered in *Fisher v. Travelers' Ins. Co.*, 124 Tenn. 450, 138 S. W. 316, Ann. Cas. 1912D, 1246.

3213-3215. (1) Failure to exercise due diligence

3213 (1). A provision in an accident policy relieving the insurer of liability if the member was not in the exercise of "due diligence" for his self-protection is very general, and does not mean that the assured must guarantee himself against accidents; nor that he shall not recover for any accident to which some want of care on his part may have contributed. He is not required to use all possible diligence, but only all due diligence. The due diligence or care is sometimes said to be the ordinary care of prudent persons. It is not a precise term, but a relative one. In an accident policy it would not be reasonable to hold that this clause requires of the assured a higher degree of diligence than prudent persons are accustomed habitually to use. The due diligence required is not inconsistent with inadvertence nor with running such risks as prudent and cautious persons habitually run. Whether the insured has observed "due diligence" is to be determined from a consideration of all the circumstances, surroundings, and obvious conditions which go to show that he must in the exercise of ordinary prudence have appreciated, or, on the other hand, might reasonably not have appreciated, the danger which confronted him at the time of the accident which resulted in his death (*Illinois Commercial Men's Ass'n v. Tinsman*, 139 Ill. App. 307, affirmed in 85 N. E. 913, 235 Ill. 635).

(1290)

3214 (1). The rule which will not permit one to be charged with contributory negligence when injured in an effort to escape sudden peril does not apply in determining liability under an accident policy for injuries to insured in jumping from a street car in danger of collision with a vehicle (*Banta v. Continental Casualty Co.*, 113 S. W. 1140, 134 Mo. App. 222).

3215 (1). In an action on an accident policy for death by drowning while insured was attempting to cross a river on a trolley cable ferry, the cables of which sagged so that the car was struck by the rapidly moving current and broken and insured swept into the river, whether insured was in the exercise of due diligence for his self-protection, as required by the policy, was for the jury (*Tinsman v. Illinois Commercial Men's Ass'n*, 85 N. E. 913, 235 Ill. 635, affirming 139 Ill. App. 307).

3216-3224. (m) Voluntary exposure to unnecessary danger

3216 (m). Policies of accident insurance usually exempt the insurer from liability, or limit the liability if the injury is due to a voluntary exposure to unnecessary danger. The rights of the parties under such a stipulation are fixed by the contract, and are not determined by the law of negligence, though some of the general principles recognized in the law of negligence are also recognized here (*Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. [N. S.] 779). Yet it was said in *Pacific Mut. Life Ins. Co. v. Adams*, 27 Okl. 496, 112 Pac. 1026, that the clause includes exposure attributable to the negligence of the insured. Such an expression is, however, far from saying that mere negligence constitutes a voluntary exposure within the condition. And even where the exception is in the form "voluntary or negligent exposure to unnecessary danger," the word "negligent" is cumulative or redundant and the clause means no more than "voluntary exposure" (*Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119).

The clause does not refer to an inadvertent or accidental exposure (*Whalen v. Peerless Casualty Co.*, 75 N. H. 297, 73 Atl. 642, 139 Am. St. Rep. 695), nor to a danger to which the insured was involuntarily exposed (*National Life & Acc. Ins. Co. v. Logan*, 166 Ala. 174, 52 South. 45). The word "voluntary," as used in the condition, means intentional (*Empire Mut. Life Ins. Co. v. Allen*, 141 Ga. 413, 81 S. E. 120), and would therefore seem to imply conscious knowledge of danger. However that may be, mere unconscious-

ness of danger at the moment of injury does not relieve the insured from the operation of the clause, except when he is ignorant of the danger and under no duty from the obviousness thereof to know its existence. If the danger is obvious and there is nothing in the situation confronting the insured, such as sudden peril, to preclude deliberation, freedom of action, or choice of conduct and he encounters it and is injured, the exposure is voluntary within the stipulation (*Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. [N. S.] 779). The term "voluntary or unnecessary exposure to danger" means a realization that an accident will in all probability result and an injury follow from an action about to be taken, and the danger of injury must be obvious (*Hunt v. United States Accident Ass'n*, 109 N. W. 1042, 146 Mich. 521, 7 L. R. A. [N. S.] 938, 117 Am. St. Rep. 655, 10 Ann. Cas. 449). Before recovery on an accident policy can be denied on the theory that deceased voluntarily exposed himself to unnecessary danger, he must have apprehended the danger and entered the position of peril with the intention of exposing himself (*Travelers' Ins. Co. v. Harris* [Tex. Civ. App.] 178 S. W. 816).

To come within the exception the danger must have been one so logically attending the act that insured must have been conscious of it (*Continental Casualty Co. v. Deeg*, 59 Tex. Civ. App. 35, 125 S. W. 353). The danger must either be known, or one which in the exercise of ordinary prudence should be known, to insured (*Correll v. National Acc. Soc.*, 139 Iowa, 36, 116 N. W. 1046, 130 Am. St. Rep. 294). If it is of this character, the insured will be held to have known what an ordinarily prudent man of ordinary intelligence in the same situation would have known (*Dillon v. Continental Casualty Co.*, 130 Mo. App. 502, 109 S. W. 89).

To the same effect, see *Powell v. Travelers' Protective Ass'n of America*, 160 Mo. App. 571, 140 S. W. 939; *Hickman v. Ohio State Life Ins. Co.*, 110 N. E. 542, 92 Ohio St. 87; *Rebman v. General Acc. Ins. Co.*, 66 Atl. 859, 217 Pa. 518, 10 L. R. A. (N. S.) 957.

The fact that insured himself, or other people, have repeatedly done the act that resulted in injury, does not affect the question, if there was in fact a voluntary exposure to danger, obvious to the ordinarily prudent man.

Garcelon v. Commercial Travelers' Eastern Acc. Ass'n, 195 Mass. 531, 81 N. E. 201, 10 L. R. A. (N. S.) 961; *Powell v. Travelers' Protective Ass'n*, 160 Mo. App. 571, 140 S. W. 939. But compare *Hunt v. United States Accident Ass'n*, 146 Mich. 521, 109 N. W. 1042, 7 L. R. A. (N. S.) 938, 117 Am. St. Rep. 655, 10 Ann. Cas. 449.

3217 (m). Where the exemption covers exposure to "obvious risk of injury or obvious danger," the word "obvious" bears its common meaning, to wit, easily discovered, readily perceived, plain, evident, apparent, and would cover the case of one who attempted to cross a railroad track immediately in front of a rapidly approaching train, though he was not conscious of his danger (*Combs v. Colonial Casualty Co.*, 73 W. Va. 473, 80 S. E. 779, 50 L. R. A. [N. S.] 1218).

3218 (m). The exception does not apply to every act of negligence of which the assured may be guilty, but only to such as are wanton or grossly imprudent. It is not such exposure as men usually are going to take, and such as is incident to the ordinary habits and customs of life (*Biehl v. General Accident Assur. Corp.*, 38 Pa. Super. Ct. 110). Of course, a reckless or deliberate encountering of known danger, or danger so obvious that a reasonably prudent person would have observed and avoided it, is within the condition (*Diddle v. Continental Casualty Co.*, 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. [N. S.] 779).

Compare *Pacific Mut. Life Ins. Co. v. Adams*, 27 Okl. 496, 112 Pac. 1026, holding that the clause includes exposure attributable to negligence of insured; the provision being intended to hold insured to the exercise of ordinary care and to exempt insurer from liability from injury occurring through a failure to exercise such care.

It does not follow, because the act of the insured was voluntary, that the exposure to danger was voluntary. So an insurer cannot as a matter of law escape liability on the theory that the insured's death was caused by his voluntary act in entering the pool where he was drowned while bathing (*Clark v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 201, 135 N. W. 1114, 42 L. R. A. [N. S.] 631). In *Hunt v. United States Accident Ass'n*, 146 Mich. 521, 109 N. W. 1042, 7 L. R. A. (N. S.) 938, 117 Am. St. Rep. 655, 10 Ann. Cas. 449, the insured was injured while playing indoor baseball, while running to first base. He ran beyond the base, put out his foot and hand against the wall to stop himself, and his ankle was broken. He did not anticipate injury from doing what he did. He did what he had done before, and what others had repeatedly done. It was held that these facts authorized a finding that the injury did not result from a voluntary exposure to danger.

The purpose for which the danger is incurred is an important factor. Thus a danger incurred in acting in accordance with the legal

right of self-defense is not within the condition (*Empire Life Ins. Co. v. Johnson*, 142 Ga. 330, 82 S. E. 893, Ann. Cas. 1916B, 267). Danger incurred for the purpose of saving life is not within the exception. The law has so high a regard for human life that it will not impute negligence to one who attempts to save it, unless the attempt be made under such circumstances as to constitute it rashness in the estimation of prudent persons, and the rule covers not only an attempt to save life under spontaneous impulse, aroused by sudden perception of the peril, and without thought of the chances of injury or loss of life to him who makes the attempt, but also an attempt made after such calculation as the circumstances permit, the rescuer believing that he can save the life without the loss of his own, the exposure in the latter case being voluntary in a sense. So, where an injured miner and his companions, knowing that a fellow workman was in danger, went to his rescue, and found him lying about five feet from the entrance of the drift, unconscious from gas, and hurried up a ladder to reach the place, insured apparently thinking that he could go that distance with safety, and in attempting to drag the man out was overcome by the gas, and died from the injuries, the danger he encountered was not as matter of law unnecessary, within the condition (*Da Rin v. Casualty Co. of America*, 41 Mont. 175, 108 Pac. 649, 27 L. R. A. [N. S.] 1164).

3219 (m). To constitute a voluntary exposure to unnecessary danger within the exception, there must be a real, substantial danger, which is recognized to exist, and a voluntary assumption of the risk accompanying such danger.

National Life & Accident Ins. Co. v. Lokey, 166 Ala. 174, 52 South. 45; *Empire Mut. Life Ins. Co. v. Allen*, 141 Ga. 413, 81 S. E. 120; *Whalen v. Peerless Casualty Co.*, 73 Atl. 642, 75 N. H. 297, 139 Am. St. Rep. 695; *Continental Casualty Co. v. Deeg*, 59 Tex. Civ. App. 35, 125 S. W. 353; *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119; *Bakalars v. Continental Casualty Co.*, 141 Wis. 43, 122 N. W. 721, 25 L. R. A. (N. S.) 1241, 18 Ann. Cas. 1123.

So in *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119, it was held that sitting or lying on a bench at the side of a building, near the top of an unguarded wall, on a dark night, it not appearing that insured had knowledge of his surroundings or of the danger, is not a voluntary exposure to unnecessary danger.

3220 (m). Risks connected with the ordinary occupation of the insured, or incurred in the performance of duties connected with such occupation, are not within the exception. Thus in *Alloway v.*

General Acc. Ins. Co., 35 Pa. Super. Ct. 371, it appeared that the insured was described as a "clerk in a store, not doing porter's work," and that the store was a general store in a mining region. It was one of the clerk's duties to go to a powder house about $1\frac{1}{4}$ miles away from the store, and deliver the powder to customers. It was held that the insurer was not exempt from liability because the insured was killed by an explosion at the powder house while in the ordinary performance of his duties. In such a case the mere handling of explosives either in the store or in the powder house was not an unnecessary exposure to obvious danger within the meaning of the policy. In *Bakalars v. Continental Casualty Co.*, 141 Wis. 43, 122 N. W. 721, 25 L. R. A. (N. S.) 1241, 18 Ann. Cas. 1123, it was held that evidence that insured, a locomotive fireman, whose duties took him about the tracks in railroad yards, took an entirely usual route and the shortest one from his home to his place of employment at the roundhouse through the railroad yard, and in the vicinity of tracks, and that his injuries indicated that he had been struck and run over by a passing engine, was insufficient to show a violation of the clause.

In view of the clause, there could be no recovery where insured, who ventured upon a lake in a canoe, was drowned after being warned of the danger. *Morse v. Commercial Travelers' Eastern Accident Ass'n*, 98 N. E. 599, 212 Mass. 140, 40 L. R. A. (N. S.) 135. But there is not as a matter of law a voluntary exposure to unnecessary and obvious danger, where insured, whose business is the repairing of the wires of electric lines, is at the time of the accident out on a limb of a pecan tree 50 feet from the ground, knocking off nuts with a pole. *Continental Casualty Co. v. Jennings*, 45 Tex. Civ. App. 14, 99 S. W. 423.

It is a voluntary exposure to danger to attempt to board a moving freight train by climbing up the ladder on the side of a freight car. *Garcelon v. Commercial Travelers' Eastern Acc. Ass'n*, 195 Mass. 531, 81 N. E. 201, 10 L. R. A. (N. S.) 961; or for a man 66 years of age, and with an umbrella under his arm, to attempt to get on a train running 6 or 8 miles an hour. *Rebman v. General Acc. Ins. Co.*, 66 Atl. 859, 217 Pa. 518, 10 L. R. A. (N. S.) 957. On the other hand, stepping from a moving train, irrespective of the speed at which it was moving, is not, as a matter of law, an "obvious danger," within the exception. *National Life & Accident Ins. Co. v. Lokey*, 166 Ala. 174, 52 South. 45; *Continental Casualty Co. v. Deeg*, 59 Tex. Civ. App. 35, 125 S. W. 353. A passenger on railway train did not as matter of law expose himself to obvious risk of injury by going on platform of moving car preparatory to getting off at station. *Gillis v. Duluth Casualty Ass'n*, 133 Minn. 238, 158 N. W. 252. And whether at-

tempting to descend to the running board of a street car when in motion constitutes a wanton exposure to obvious danger is for the jury. *Biehl v. General Accident Assur. Corp.*, 38 Pa. Super. Ct. 110.

Walking on a railroad track is not gross or wanton negligence as a matter of law, so as to charge insured with unnecessary exposure to obvious risk of injury or danger. *Walter v. People's Health & Accident Ins. Co.*, 173 Mich. 581, 139 N. W. 865. But see *Powell v. Travelers' Protective Ass'n*, 160 Mo. App. 571, 140 S. W. 939. One who attempts to cross a railroad track immediately in front of a rapidly approaching train exposes himself to "obvious risk of injury or obvious danger," within the exception. *Combs v. Colonial Casualty Co.*, 73 W. Va. 473, 80 S. E. 779, 50 L. R. A. (N. S.) 1218. There is a voluntary exposure to danger where insured crossed a track where there was no public crossing. *Wilcox v. Central Accident Ins. Co. of Pittsburg*, 82 Atl. 1093, 234 Pa. 58.

3223 (m). The burden of proving that the injury was due to voluntary exposure to unnecessary danger is on the insurer.

Empire Life Ins. Co. v. Johnson, 142 Ga. 330, 82 S. E. 893, Ann. Cas. 1916B, 267; *Correll v. National Acc. Soc.*, 139 Iowa, 36, 110 N. W. 1046, 130 Am. St. Rep. 294; *McClure v. Great Western Acc. Ass'n*, 141 Iowa, 350, 118 N. W. 269; *Garcelon v. Commercial Travelers' Eastern Acc. Ass'n*, 195 Mass. 531, 81 N. E. 201, 10 L. R. A. (N. S.) 961; *Price v. National Accident Society*, 37 Pa. Super. Ct. 299; *Bakalars v. Continental Casualty Co.*, 141 Wis. 43, 122 N. W. 721, 25 L. R. A. (N. S.) 1241, 18 Ann. Cas. 1123.

The sufficiency of the evidence was considered in *Continental Casualty Co. v. Brüttner*, 81 Ark. 568, 99 S. W. 1100; *Continental Casualty Co. v. Todd*, 82 Ark. 214, 101 S. W. 168; *Continental Casualty Co. v. Johnson*, 119 Ill. App. 93; *Little v. Iowa State Traveling Men's Ass'n*, 154 Iowa, 440, 134 N. W. 1087; *Dillon v. Continental Casualty Co.*, 109 S. W. 89, 130 Mo. App. 502.

Evidence was sufficient to show that act of setting off fireworks in usual way was not voluntary exposure to danger within provision of accident policy. *Bulkeley v. Brotherhood Accident Co.*, 91 Conn. 727, 101 Atl. 92.

Whether there was a voluntary exposure to unnecessary danger is ordinarily a question for the jury.

Empire Life Ins. Co. v. Johnson, 142 Ga. 330, 82 S. E. 893, Ann. Cas. 1916B, 267; *Continental Casualty Co. v. Hagerty*, 90 S. W. 561, 28 Ky. Law Rep. 925; *Noyes v. Commercial Travelers' Eastern Acc. Ass'n*, 76 N. E. 665, 190 Mass. 171; *Putnam v. Phoenix Preferred Acc. Ins. Co.*, 155 Mich. 134, 118 N. W. 922; *Powell v. Travelers' Protective Ass'n of America*, 160 Mo. App. 571, 140 S.

W. 939; *Whalen v. Peerless Casualty Co.*, 73 Atl. 642, 75 N. H. 297, 139 Am. St. Rep. 695; *Pacific Mut. Life Ins. Co. v. Adams*, 112 Pac. 1026, 27 Okl. 496; *Biehl v. General Accident Assur. Corp.*, 38 Pa. Super. Ct. 110; *Continental Casualty Co. v. Deeg*, 59 Tex. Civ. App. 35, 125 S. W. 353.

In an action on a policy exempting an insurer from liability for an accident caused by voluntary or unnecessary exposure to apparent danger, "or" by walking or being on the roadbed of a railway, an instruction that insurer must show that insured intentionally exposed himself to danger by being or walking on a roadbed, and that voluntarily being or walking on the roadbed does not of itself show that he voluntarily or unnecessarily exposed himself to danger, was erroneous, as recognizing the several exceptions in the policy as presenting a single defense, and as applying to it rules respecting proof separately applicable to each, and not in all respects applicable to both (*Correll v. National Acc. Soc.*, 139 Iowa, 36, 116 N. W. 1046, 130 Am. St. Rep. 294).

By-law of insurer construed as ambiguous, so that fact that death was due to voluntary exposure to damage or obvious risk of injury or death did not warrant instruction for insurer. *International Travelers' Ass'n v. Votaw* (Tex. Civ. App.) 197 S. W. 237.

4. SUICIDE AS AN EXCEPTED RISK IN LIFE AND ACCIDENT INSURANCE

3224-3227. (a) In general

3225 (a). A condition excepting suicide while sane from the risks assumed is implied in policies payable to insured, his estate, representatives, or assigns (*Security Life Ins. Co. v. Dillard*, 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917D, 1187). There is no difference in law between a contract of insurance which expressly provides against recovery in case of suicide and one where such a provision is implied. The prohibition is in the contract in both instances. The one forbids recovery as effectually as the other, and in neither case can the contract be enforced (*Rudolph v. United States*, 36 App. D. C. 379).

As a general rule it may also be said that in the case of mutual benefit associations, where insured has full power to change the beneficiary, the exception will also be implied.

Supreme Council Royal Arcanum v. Wishart, 192 Fed. 453, 112 C. C. A. 591; *Davis v. Supreme Council Royal Arcanum*, 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722, 11 Ann. Cas. 777.

And even when a by-law of the association avoids the policy if insured commits suicide within five years, no implication arises that suicide would not be an excepted risk after five years, irrespective of the sanity of the insured (*Supreme Council Royal Arcanum v. Wishart*, 192 Fed. 453, 112 C. C. A. 591).

3226 (a). Where the policy is payable to the wife or child, or other third person expressly designated as beneficiary, the suicide of the insured while sane is not an excepted risk, in the absence of a stipulation to that effect; and this is true, though the contract is that of a mutual benefit association, under which the insured has a right to change the beneficiary.

Mutual Life Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295; *Grand Legion of Illinois, Select Knights of America, v. Beaty*, 117 Ill. App. 657, affirmed 79 N. E. 565, 224 Ill. 346, 8 L. R. A. (N. S.) 1124, 8 Ann. Cas. 160; *Lange v. Royal Highlanders*, 110 N. W. 1110, 10 L. R. A. (N. S.) 666, affirming on rehearing 106 N. W. 224; *Briggs v. Royal Highlanders*, 122 N. W. 69, 84 Neb. 834; *Marcus v. Heralds of Liberty*, 88 Atl. 678, 241 Pa. 429; *White v. Empire State Degree of Honor*, 47 Pa. Super. Ct. 52.

3227 (a). Where the policy was procured with intent to commit suicide, there can be no recovery, irrespective of any statutory provision or stipulation in the policy (*Mutual Life Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295).

3228-3230. (b) Validity of conditions declaring suicide an excepted risk

3228 (b). A stipulation in an accident policy that insurer shall not be liable for intentional suicide will be enforced (*Layton v. Interstate Business Men's Accident Ass'n*, 158 Iowa, 356, 139 N. W. 463); and so, too, will a provision exempting the insured from liability if insured "dies by his own hand" (*De Voney v. Modern Woodmen of America*, 148 Ill. App. 68). In this last case it was said, further, that if the certificate contained such exception the action of a clerk of the society, after the self-inflicted injury, but before death, in suggesting the payment of delinquent dues and in receiving such payment, did not operate to waive such condition or to estop the society from availing of such provision by way of defense; such condition being a vital and fundamental part of the contract.

In *Pold v. North American Union*, 261 Ill. 433, 104 N. E. 4, affirming 180 Ill. App. 448, it was said that, under a mutual benefit association's general power to contract with its members for death

benefits, it was authorized to provide for forfeiture in case of suicide, where such clause was authorized by a regularly adopted by-law; and under Laws Ill. 1893, p. 130, prescribing the powers of mutual benefit associations, such associations have power to provide for forfeiture of benefits where the member dies as the result of suicide, whether sane or insane. Such a by-law is consistent with the purposes of the association, and imposes a reasonable condition on which the parties to the contract may agree (*Tisch v. Protected Home Circle*, 74 N. E. 188, 72 Ohio St. 233).

To the same effect, see *Kunse v. Knights of the Modern Maccabees*, 45 Ind. App. 30, 90 N. E. 89; *Mauch v. Supreme Tribe of Ben Hur*, 100 App. Div. 49, 91 N. Y. Supp. 367, affirmed in 76 N. E. 1100, 184 N. Y. 527.

3229 (b). A provision against liability in case of suicide is valid, though not authorized by the by-laws, where it was not violative of the articles of organization or the statute under which the association was organized (*Hewson v. Royal Highlanders*, 97 Neb. 774, 151 N. W. 312).

A provision in the policy, or in the by-laws of a benefit association, declaring the contract void, if the insured shall commit suicide within a designated period from the date thereof, is valid and reasonable, and relieves the insurer from liability if insured commits suicide within the time specified (*Silliman v. International Life Ins. Co.*, 131 Tenn. 303, 174 S. W. 1131, L. R. A. 1915F, 707). And under such provision, if insured commits suicide after the period designated, the company is liable (*Mutual Life Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295). In *Sexton v. National Life Ins. Co.*, 40 Colo. 60, 90 Pac. 58, 12 L. R. A. (N. S.) 504, the policy provided that it should be void if the insured committed suicide within two years from the date thereof. After two payments had been made by the insured the company made a change in that form of policy, limiting the nonliability for suicide to one year and increasing the premium rate \$1 per \$1,000. After one year, but prior to two years from the date of his policy, the insured committed suicide. It was held that the change in form of policies did not affect the provision in the policy of the insured.

Where a benefit certificate, executed as a substitute for the original certificate bearing the date of the original certificate, stipulated that it should be invalid on the suicide of a member within three years from the date of the certificate, the date referred to the time specified in the original certificate, the word "date" indicating the

time fixed; and hence the suicide of the member more than three years from the date of the original certificate did not invalidate the substituted certificate (*Wood v. Brotherhood of American Yeomen*, 148 Iowa, 400, 126 N. W. 949). So, too, in *Silliman v. International Life Ins. Co.*, 131 Tenn 303, 174 S. W. 1131, L. R. A. 1915F, 707, it was held that an insurance policy, taken in exchange for a former policy under the provisions thereof, is, in effect, the same contract, so that the insurance began, within the suicide clause, at the date of the original policy. On the other hand, in *Gans v. Aetna Life Ins. Co.*, 214 N. Y. 326, 108 N. E. 443, L. R. A. 1915F, 703, a second policy, issued after the expiration of the first, was held to be a separate contract, so that whether decedent's suicide was within one year from the date of the policy was determinable by the date of the second policy.

3231-3236. (c) Effect of subsequent by-laws

3233 (c). Where a benefit certificate was conditioned on the insured complying with the laws then in force and those thereafter adopted, and a plea alleged that after the issuance of the certificate a new law, providing that no benefit should be paid to the beneficiary of any member committing suicide, sane or insane, etc., was enacted, a demurrer admitted the regular enactment of the new law so that it became operative retrospectively except as to rights which had become vested (*Plunkett v. Supreme Conclave, Improved Order of Heptasophs*, 55 S. E. 9, 105 Va. 643).

In *Tisch v. Protected Home Circle*, 72 Ohio St. 233, 74 N. E. 188, the certificate was silent as to suicide by the insured, but the application contained agreements, signed by the insured, to conform in all respects to the laws and rules of the order then in force, or which might thereafter be adopted, and that such compliance was the express condition on which the insured should be entitled to participate in the beneficiary fund. The application was made a part of the contract, and the benefit association afterwards, and before the death of the insured, adopted a by-law providing that the certificate issued to a member should be void and all benefits thereunder forfeited if the insured died by suicide. It was held that the by-law became a condition in the contract which if broken by the insured defeated a recovery thereunder.

3234 (c). Even under an agreement to be bound by subsequent by-laws, the by-law must be reasonable. But it has been held that a subsequent by-law legally enacted, providing for the forfeiture

of a fraternal benefit certificate when the death of the member is occasioned by suicide, whether sane or insane, is a reasonable by-law, and will be upheld (*Lange v. Royal Highlanders*, 106 N. W. 224, 75 Neb. 188, 10 L. R. A. [N. S.] 666, 121 Am. St. Rep. 786, affirmed on rehearing, 75 Neb. 188, 110 N. W. 1110, 10 L. R. A. [N. S.] 666, 121 Am. St. Rep. 786). So, too, it has been held that a by-law limiting the amount to be paid if the insured commits suicide is reasonable.

Fraternal Union of America v. Zeigler, 39 South. 751, 145 Ala. 287;
Knights of Maccabees of the World v. Nelson, 77 Kan. 629, 95 Pac. 1052.

On the other hand, in *Olson v. Court of Honor*, 100 Minn. 117, 110 N. W. 374, 8 L. R. A. (N. S.) 521, 117 Am. St. Rep. 676, 10 Ann. Cas. 622, it appeared that a by-law of the association, at the time it issued a certificate, provided that it would not pay the benefit of a member who committed suicide, whether sane or insane, unless he was at the time under treatment for insanity. The right to change the laws was reserved by the association. After the certificate was issued, and before the death of the member, the association amended the by-laws so as to limit the benefit in the case of suicide to 5 per cent. of the face of the certificate for each year the member "shall have been continuously a member of the society." It was held that the consent to be bound by any changes in the by-laws is subject to the implied condition that they must be reasonable, and that the change in the by-laws referred to was unreasonable and void as to then existing members.

3236 (c). As a general rule a by-law making suicide, sane or insane, an excepted risk, does not impair any vested right, and is not objectionable as destroying the contract.

Tisch v. Protected Home Circle, 74 N. E. 188, 72 Ohio St. 233; *Plunkett v. Supreme Conclave, Improved Order of Heptasophs*, 55 S. E. 9, 105 Va. 643.

And the same rule has been declared where the by-law limits the amount to be recovered in case of suicide.

Seymour v. Mutual Protective League, 171 Ill. App. 114; *Scow v. Supreme Council of Royal League*, 79 N. E. 42, 223 Ill. 32.

On the other hand, in Missouri by-laws of this character, are regarded as impairing a vested right of the insured, and therefore ineffectual as to existing contracts.

Zimmermann v. Supreme Tent of Knights of the Maccabees of the World, 99 S. W. 817, 122 Mo. App. 591; *Lewine v. Supreme Lodge*

Knights of Pythias of the World, 99 S. W. 821, 122 Mo. App. 547; Smail v. Court of Honor, 117 S. W. 116, 136 Mo. App. 434; Umbarger v. Supreme Council of the Royal League (Mo. App.) 118 S. W. 1199; Kavanaugh v. Supreme Council of Royal League, 158 Mo. App. 234, 138 S. W. 359.

And the same view has been taken in Indiana.

Court of Honor v. Hutchens, 43 Ind. App. 321, 82 N. E. 89; Court of Honor v. Rausch, 50 Ind. App. 161, 95 N. E. 1018. But compare Court of Honor v. Hutchens (Ind. App.) 79 N. E. 409.

In New Jersey it has been held that a stipulation of a benefit certificate requiring insured to comply with the laws, rules, and regulations then governing, or that might thereafter be enacted for the government of, the association, does not authorize the association to limit its original contract with insured by a subsequently enacted by-law providing that no benefits shall be paid in case insured shall commit suicide, and an attempted limitation to that effect is nugatory (Sautter v. Supreme Conclave Improved Order of Heptasophs, 62 Atl. 529, 72 N. J. Law, 325, writ of error dismissed 65 Atl. 990, 74 N. J. Law, 608, and affirmed 76 N. J. Law, 763, 71 Atl. 232).

In Scow v. Supreme Council of Royal League, 223 Ill. 32, 79 N. E. 42, the certificate provided that the members should comply with all laws, rules, and regulations governing the society which might thereafter be enacted by the Supreme Council to govern the council and fund, all of which were made a part of the contract. At the time the certificate was issued, a by-law provided that if any member, within two years after his admission, should die by his own hand, sane or insane, his beneficiary should receive only one-half the face value of the certificate. This by-law was subsequently amended by striking the two-year clause. It was held that the by-law, as amended, was applicable to the member's previously issued certificate. In Fargo v. Supreme Tent Knights of Maccabees, 96 App. Div. 491, 89 N. Y. Supp. 65, affirmed in 185 N. Y. 578, 78 N. E. 1103, it appeared that when deceased was insured the by-laws provided that no benefits should be paid when death was the result of suicide within one year after admission. Such provision was amended so as to provide that no benefits should be paid when death was the result of suicide, whether deceased was sane or insane, within five years after admission, except that in such case all assessments should be repaid. Thereafter deceased's certificates were canceled, and new certificates issued in the same amount, after which the by-laws were again amended so as to provide that

no benefits should be paid when death resulted from suicide whether the member was sane or insane, but that in such case twice the amount of all assessments paid should be repaid to the beneficiary. Deceased died as the result of suicide, while insane, after having been a member for more than five years. It was held that the association had no power, as against deceased, to pass the last amendment, striking out all time limit as to suicide, and that decedent's beneficiary was therefore entitled to recover the face value of the certificates.

In *Supreme Council Royal Arcanum v. Wishart*, 192 Fed. 453, 112 C. C. A. 591, the by-laws at the time of the member's initiation declared suicide within five years an excepted risk. Fourteen years thereafter the by-laws were amended, by adding a provision that suicide by a member "after five years from the date of his initiation, and within five years from and including the date of his changing from a lower to a higher certificate, shall cancel" and render void the certificate to the extent of the increased amount. The member died by suicide 18 years after his initiation, but less than 5 years after taking out a new certificate. The new certificate was, however, for the same amount as the original, being taken merely to change the beneficiary. It was held that neither the original nor the amended by-law was applicable to the case, and consequently, as insured was sane when he committed suicide, there could be no recovery.

3236-3239. (d) Statutory provisions

3237 (d). The exclusion of suicide as a defense in suits on policies of life insurance, which is effected by the Missouri statute, unless suicide was contemplated at the time application was made for the policy, is a legitimate exertion of power by the state (*Whitfield v. Aetna Life Ins. Co.*, 27 S. Ct. 578, 205 U. S. 489, 51 L. Ed. 895, reversing 144 Fed. 356, 75 C. C. A. 358). Under the Missouri statute, a provision in accident insurance policy against liability in case of suicide is not a defense, where insured did not contemplate suicide at the time of his application (*Iowa State Traveling Men's Ass'n v. Ruge*, 242 Fed. 762, 155 C. C. A. 350). It has been held in *Indiana*, referring to the Missouri statute, that the word "suicide" is not used in its technical sense, but means death by one's own hand, irrespective of mental condition (*Travelers' Protective Ass'n of America v. Smith*, 183 Ind. 59, 107 N. E. 283, Ann. Cas. 1917E, 1088). The statute is more than a declaration of legislative policy

affecting the remedy merely, but is a substantive law entering into the contract itself.

Schmidt v. Supreme Court, United Order of Foresters, 228 Mo. 675, 129 S. W. 653, reversing 124 Mo. App. 165, 101 S. W. 625; Tennent v. Union Cent. Life Ins. Co., 112 S. W. 754, 133 Mo. App. 345.

Rev. St. 1909, § 6945, is intended to eliminate suicide as a defense to insurance policies, and was not intended to authorize a recovery of any amount, or to increase the amount of a policy because of suicide. Scales v. National Life & Accident Ins. Co. (Mo. App.) 186 S. W. 948.

The statute applies to accident policies issued by a foreign insurance company (Applegate v. Travelers' Ins. Co., 153 Mo. App. 63, 132 S. W. 2). But of course the applicability of the statute depends on whether the contract is a Missouri contract or not. In Tuttle v. Iowa State Traveling Men's Ass'n, 132 Iowa, 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223, the facts were these: An accident insurance association, organized under the laws of Iowa, with its principal place of business there, employed no agents, but relied on the good offices of its members. A member induced a resident in Missouri to apply for membership. The member mailed the application, with the membership fee, at a post office in that state to the association in Iowa. A certificate of membership was issued and mailed to the applicant in Missouri. There was nothing to indicate that the certificate was to be delivered through the member. The by-laws of the association provided that no person should be considered as a member until the directors had accepted the application and a certificate had been issued. It was held that, though the member might have been in a sense the agent of the association, within Rev. St. Mo. 1889, § 5915, providing that one who shall receive money from others to be transmitted to an insurance association for a policy shall be its agent, the association had implied authority to use the mails in delivering the certificate to the applicant, and the certificate was issued to him when executed and mailed, making it an Iowa contract, so as to relieve the association from liability in case of the suicide of the applicant, notwithstanding Rev. St. Mo. 1889, § 5855, which declares that suicide of the insured shall be no defense in an action on life policies.

Fraternal beneficiary associations are not within the purview of the statute as to suicide.

Tice v. Supreme Lodge Knights of Pythias, 123 Mo. App. 85, 100 S. W. 519, affirmed in 204 Mo. 349, 102 S. W. 1013. And see Trav-

elers' Protective Ass'n of America v. Smith, 183 Ind. 59, 107 N. E. 283, Ann. Cas. 1917E, 1088, construing the Missouri statute.

In the Tice Case, just cited, it was held that the uniformed rank of the Knights of Pythias, which issued insurance only to members of its various lodges, had a representative form of government, worked according to ritual, and paid death benefits, etc., from a fund accumulated from assessments, dues, and a reserve fund, was a fraternal beneficiary association within the statute, and not an old line life insurance company, and was therefore not subject to the statute making the defense of suicide unavailable to regular life companies.

3238 (d). The Kansas City Court of Appeals, in *Dennis v. Modern Brotherhood of America*, 119 Mo. App. 210, 95 S. W. 967, held that the statute is not confined to insurance on the old line life plan, but is broad enough to cover any life insurance not withdrawn from its application by some other statute. The court held, therefore, that a foreign association organized under a statute including legatees and legal representatives of the member as classes who may be beneficiaries, in contravention of Rev. St. 1899, § 1408, was not entitled to the defense of suicide. The St. Louis Court of Appeals in *Armstrong v. Modern Brotherhood of America*, 132 Mo. App. 171, 112 S. W. 24, however, held that a foreign fraternal beneficiary association, coming in all particulars within the definition, by Rev. St. 1899, § 1408 (Ann. St. 1906, p. 1111), of such associations, and rightfully doing business in the state by virtue of section 1410 (Ann. St. 1906, p. 1113), authorizing nonresident associations coming within the description of section 1408 so to do business, is not taken out of the provisions of section 1408, exempting such associations from the operation of general laws, by the fact that, by the laws of its domicile, its members are authorized to designate as beneficiaries their personal representatives, one class additional to those mentioned in section 1408; and hence a member contracting against suicide, sane or insane, could not recover by virtue of the provisions of Rev. St. 1899, § 7896 (Ann. St. 1906, p. 3750), governing old-line insurance companies, which render the defense of suicide of no avail unless suicide was contemplated at the time the policy was taken out. On a certificate of conflict the Supreme Court of Missouri (*Armstrong v. Modern Brotherhood*, 245 Mo. 153, 149 S. W. 459) held that a fraternal benefit association is not deprived of its character as such by a provision of its by-laws author-

izing the payment of benefits to a class not covered by Rev. St. 1909, § 7109, and is entitled to rely on suicide as a defense, notwithstanding section 6945. Pending the decision in this case, the St. Louis Court of Appeals, in *Ordelheide v. Modern Brotherhood*, 158 Mo. App. 677, 139 S. W. 269, held, distinguishing the *Armstrong Case*, because in that case the beneficiary named was within the classes designated in the Missouri statute, that a foreign association, which issues a certificate not authorized by the Missouri statute defining beneficiaries, is, so far as that certificate is concerned, subject to the suicide statute. And the Supreme Court, in affirming the judgment, held that a certificate payable to "legal representatives" is not a benefit certificate to which suicide was a defense under Rev. St. 1909, § 7109, but an insurance policy to which suicide was no defense under Rev. St. 1909, § 6945 (*Ordelheide v. Modern Brotherhood of America*, 268 Mo. 339, 187 S. W. 1193, affirming judgment 158 Mo. App. 677, 139 S. W. 269).

3239 (d). In *Huff v. Sovereign Camp Woodmen of the World*, 85 Mo. App. 96, the Kansas City Court of Appeals held that Laws 1897, p. 132, providing that on compliance with certain requirements therein foreign companies will be exempt from Rev. St. 1889, § 5855, declaring that in actions on insurance policies suicide shall not be a defense unless the policy was taken out with a view to suicide, does not act retrospectively, so as to affect a contract made previous to the passage of such act. Subsequently the St. Louis Court of Appeals, in *Schmidt v. Supreme Court, United Order of Foresters*, 124 Mo. App. 165, 101 S. W. 625, held, where the society became authorized to do business after the contract of insurance was entered into, the exemption from the operation of the suicide statute related back to the issuance of the contract. On a certificate of conflict, the Supreme Court, in *Schmidt v. Supreme Court, United Order of Foresters*, 228 Mo. 675, 129 S. W. 653, reversed the judgment of the St. Louis Court of Appeals, and held that the exemption would not apply to certificates issued prior to the date when the association was authorized to do business in Missouri.

In *Tice v. Supreme Lodge K. P.*, 204 Mo. 349, 102 S. W. 1013, affirming 123 Mo. App. 85, 100 S. W. 519, the defendant, a mutual benefit society, organized for fraternal and benevolent purposes with an "endowment rank" issuing death benefits to beneficiaries of deceased members, was licensed to do business in Missouri, under Act 1897, governing fraternal societies, providing (Rev. St. 1899, § 1408 [Ann. St. 1906, p. 1101]) that such associations should be

governed by that act and be exempt from the insurance laws of the state, and that no law thereafter passed should apply to them unless they are expressly designated therein. It was held that section 7896 [Ann. St. 1906, p. 3750], providing that suicide should not be a defense to a life insurance policy unless insured contemplated suicide when he made the application, was not applicable to such fraternal society in a suit against it on a certificate issued after section 1408 became effective.

See, also, *Loyal Americans of the Republic v. McClanahan*, 50 Tex. Civ. App. 256, 109 S. W. 973, construing and applying the Missouri statute. And see, also, *Travelers' Protective Ass'n v. Smith* (Ind.) 101 N. E. 817.

A foreign benefit association, issuing policy excepting suicide, when it had not complied with the state laws, and afterwards complying with them, is not entitled to the exemption (*Schmidt v. Supreme Court, United Order of Foresters*, 177 S. W. 706, 191 Mo. App. 415, transferred from Supreme Court, 168 S. W. 626, 259 Mo. 491).

Colorado also has a statute (Acts 1903, c. 119) declaring that, after the passage of the act, suicide of a policy holder of any insurance company shall not be a defense. It was held in *Modern Brotherhood of America v. Lock*, 22 Colo. App. 409, 125 Pac. 556, that the statute does not contravene either the state or federal Constitutions, that the statute becomes a part of every contract of life insurance issued after its passage, and that the contract, so read, is not contrary to public policy. Moreover, the provision of the statute cannot be waived or abrogated by agreement made prior to or contemporaneous with the contract of insurance. The statute applies to mutual benefit associations, as well as to old line companies.

Head Camp, Pacific Jurisdiction, Woodmen of the World v. Sloss, 49 Colo. 177, 112 Pac. 49, 31 L. R. A. (N. S.) 831; *Modern Brotherhood of America v. Lock*, 125 Pac. 556, 22 Colo. App. 409.

Under the Colorado statute, a provision of a certificate of fraternal benefit association that if the member committed suicide within one year from date of its issuance it should be void, and that if he committed suicide thereafter the insurer should pay only 50 per cent. of the amount otherwise payable, was void (*Weber v. Head Camp, Pacific Jurisdiction, Woodmen of the World*, 60 Colo. 529, 154 Pac. 728).

A Georgia statute (Civ. Code 1910, § 2500) provides that death by suicide releases the insurer from the obligation of his contract.

Under this statute, the term "suicide" means intentional self-destruction while sane. An accidental act, or one done by an insane person, is not suicide within the statute.

Fraternal Relief Ass'n v. Edwards, 9 Ga. App. 43, 70 S. E. 265;
Mutual Life Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295.

Where a life policy provides that the company shall not be liable in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of the policy, the benefit of the statute is waived (*Mutual Life Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295).

A North Dakota statute (Rev. Codes 1905, § 6064; Comp. Laws 1913, § 6633) declares that suicide shall be no defense after the policy has been in force one year. In *Harrington v. Mutual Life Ins. Co.*, 21 N. D. 447, 131 N. W. 246, 34 L. R. A. (N. S.) 373, it was held, in computing the period of one year, the date of the policy marks the beginning of the period; and, moreover, if insured commits suicide more than one year from the date of the policy, the company is liable, though he may have contemplated suicide before the expiration of such year.

Under the Texas statute (Vernon's Sayles' Ann. Civ. St. 1914, art. 4742), suicide of the insured cannot be set up as a complete bar to an action on the policy (*Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.* [Tex. Civ. App.] 192 S. W. 607).

The evidence, in a beneficiary's action, was held to show that the business transacted by the defendant order, an Alabama corporation, in Pennsylvania, was that of life insurance; and hence under the express provisions of Act May 11, 1881 (P. L. 20), failure to attach its by-laws to the certificate sued on defeated its right to set up the defense of suicide. *Marcus v. Heralds of Liberty*, 88 Atl. 678, 241 Pa. 429.

3239-3241. (c) Effect of clause declaring policy incontestable

3240 (c). A provision in a benefit certificate that it shall be incontestable after it has been in force for two years for any cause except fraud, violation of the constitution and laws of the order, or a failure to pay the assessments for the benefit and general fund, as provided by law, precludes the defense of suicide, after it goes into effect, where suicide is not specifically excepted from its operation.

Mutual Protective League v. McKee, 122 Ill. App. 376, affirmed in 223 Ill. 364, 79 N. E. 25; *Seymour v. Mutual Protective League*, 155 Ill. App. 21.

But an incontestable clause does not preclude the defense of suicide where the suicide clause in the policy is a part of the contract to pay, providing how much shall be due and payable in the event of death by self-destruction (*North American Union v. Trenner*, 138 Ill. App. 586). And in *Kammer v. Supreme Lodge K. P.*, 91 S. C. 572, 75 S. E. 177, it was held that a provision in a benefit certificate insuring a member of a particular class making it noncontestable after three years from date is not controlled by a by-law restricting the benefits where a member of that class commits suicide, etc., except as to members who have been in good standing for three years before their death, thus restricting recovery on a certificate which had not been in force three years, though the member had been in continuous good standing in the insurance department for three years, having been transferred from another class when the certificate issued.

Rules of a fraternal benefit society which provide that certificates in force two years shall be incontestable except for fraud, violation of the constitution and laws, or failure to pay assessments, and also that benefits of a member who commits suicide will not be paid except in certain cases, are contradictory and should be construed most favorably to the insured permitting the incontestable clause to prevail (*Seymour v. Mutual Protective League*, 171 Ill. App. 114).

A beneficiary, on suicide of the insured, has no claim except for the amount paid to the fund by insured, where the certificate provides that the member shall comply with the laws in force or that may be in force thereafter, and thereafter a clause providing that certificates shall be incontestable after two years, except for certain causes, is duly repealed and a clause is left in force which provides that only the amount paid to the fund shall be paid in case of suicide except in certain cases (*Seymour v. Mutual Protective League*, 171 Ill. App. 114). The rule would seem to be otherwise in Indiana. In *Court of Honor v. Rausch*, 50 Ind. App. 161, 95 N. E. 1018, the by-laws of the order at the time of the issuance of a certificate provided that the certificate should be incontestable after two years, and thereby made the defense of suicide, committed two years after the issuance of the certificate, unavailable. Before the expiration of the two years, the order repealed the incontestable clause, and adopted a percentage basis, in case of violations of the laws of the order. The member lived for more than five years after the issuance of the certificate. It was held that under the rule that

amendments of by-laws may not change contracts made, so as to modify the obligations created thereby, the order could not repeal the incontestable clause, so as to make the defense of suicide available.

To the same effect is *Court of Honor v. Hutchens*, 43 Ind. App. 321, 82 N. E. 89. But see *Id.*, 79 N. E. 409.

The date of the year during which the risk of suicide was not insured against begins to run from the beginning of term insurance indorsed on the policy, not the subsequent date of the policy itself (*Krebs v. Philadelphia Life Ins. Co.*, 95 Atl. 91, 249 Pa. 330, Ann. Cas. 1917D, 1184). Where a policy was issued with a rider for preliminary short-term insurance to the date of the principal policy, on the same terms as the policy, the "first policy year, within the meaning of the suicide clause," began at the date of the issuance of the policy with the short-term insurance (*American Nat. Ins. Co. v. Thompson* [Tex. Civ. App.] 186 S. W. 254).

Where the constitution of the association contains a clause making the certificate incontestable after two years except for a violation of the constitution or laws of the order, where insured did not die within the two years, to sustain a defense on the ground of suicide it is necessary to allege and prove that suicide is a violation of the constitution or laws of the order in force at the time of insured's death (*Sebesta v. Supreme Court of Honor*, 80 Neb. 760, 115 N. W. 300).

3241-3242. (f) What constitutes suicide in general

3241 (f). Suicide, within the clause declaring suicide an excepted risk, is the act of designedly destroying one's own life.

Sebesta v. Supreme Court of Honor, 77 Neb. 249, 109 N. W. 166; *Benard v. Protected Home Circle*, 161 App. Div. 59, 146 N. Y. Supp. 232; *Cady v. Fidelity & Casualty Co. of New York*, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260.

A provision in the contract that insurer shall not be liable if the insured die by his own hand is equivalent to the provision excepting suicide.

Woodmen of the World v. Wright, 7 Ala. App. 255; 60 South. 1006; *De Voney v. Modern Woodmen of America*, 148 Ill. App. 68; *North American Union v. Oleske* (Ind. App.) 116 N. E. 68; *Wood v. Sovereign Camp of Woodmen of the World*, 166 Iowa, 391, 147 N. W. 888; *Thaxton v. Metropolitan Life Ins. Co.*, 143 N. C. 33, 55 S. E. 419.

One who intentionally takes his own life by taking a poisonous drug, being of sufficient mental capacity to comprehend the nature and consequences of his act, commits deliberate suicide within the meaning of the exception (*Zearfoss v. Switchmen's Union of North America*, 102 Minn. 56, 112 N. W. 1044).

3242-3244. (g) Involuntary self-destruction

3242 (g). The clause relieving the insurer from liability if the insured commits "suicide," or shall "die by his own hand," does not include killing by accident or mistake, though an act of the insured may have been the unintended means of causing death.

Mutual Life Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295; *Wood v. Sovereign Camp of Woodmen of the World*, 166 Iowa, 391, 147 N. W. 888; *Benard v. Protected Home Circle*, 161 App. Div. 59, 146 N. Y. Supp. 232; *Thaxton v. Metropolitan Life Ins. Co.*, 143 N. C. 33, 55 S. E. 419; *Cady v. Fidelity & Casualty Co. of New York*, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260.

Though the clause of the constitution and laws of a beneficial association providing that the death of a member "by his own hands, whether sane or insane at the time, whether the act be voluntary or involuntary," is a risk not assumed, may not exempt from liability in every case of death by accident, it does exempt from liability for involuntary suicide from causes other than those proceeding from the act of an insane mind (*Campbell v. Order of Washington*, 102 Pac. 410, 53 Wash. 398).

3244-3248. (h) Effect of insanity

3244 (h). "Suicide," as used in a suicide clause, implies a mental appreciation of the act of self-killing which an insane person could not have (*Benard v. Protected Home Circle*, 146 N. Y. Supp. 232, 161 App. Div. 59). Hence the general rule that, when suicide is not expressly made an excepted risk, or when the exception is in general terms only, without qualification, suicide while insane will not relieve the insurer from liability.

Fraternal Relief Ass'n v. Edwards, 9 Ga. App. 43, 70 S. E. 265; *Mutual Life Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295; *Gavin v. Des Moines Life Ins. Co.*, 149 Iowa, 152, 126 N. W. 906; *Tuttle v. Iowa State Traveling Men's Ass'n*, 104 N. W. 1131, 132 Iowa, 652, 7 L. R. A. (N. S.) 223; *Mauch v. Supreme Tribe of Ben Hur*, 76 N. E. 1100, 184 N. Y. 527, affirming 100 App. Div. 49, 91 N. Y. Supp. 367. Where insurer, when sued on a life policy, proved suicide of insured while sane, the beneficiary could prove that insured was insane and thereby defeat the defense. Security

Life Ins. Co. of America v. Dillard, 117 Va. 401, 84 S. E. 856, Ann. Cas. 1917D, 1187.

3245 (h). Where an insured intentionally takes his life at a time when his mind is so far gone as to render him unconscious that he is taking his life, the death will be regarded as accidental, and not within a provision of the policy exempting the insurer from liability in case of suicide (*Masonic Life Ass'n of Western New York v. Pollard's Guardian*, 89 S. W. 219, 121 Ky. 349, 28 Ky. Law Rep. 301, 123 Am. St. Rep. 198). And to the same effect is *Modern Woodmen of America v. Neeley*, 111 S. W. 282, 33 Ky. Law Rep. 758.

Under an accident policy, excepting liability for injury self-inflicted while insane, construed in connection with Rev. St. 1909, § 5945, the suicide of insured is to be regarded as an accident, permitting a recovery on the policy (*Brunswick v. Standard Acc. Ins. Co. of Detroit, Mich.*, 195 Mo. App. 651, 187 S. W. 802).

3246 (h). Where the reasoning faculties of insured are so impaired that he does not understand the consequences of the act he is about to commit when taking his own life, or if he is impelled thereto by an insane impulse which he has not the power to resist, such death is not suicide within the exception (*Knapp v. Order of Pendo*, 79 Pac. 209, 36 Wash. 601). The test is not whether insured had power to distinguish right from wrong but the ability to entertain and act on an intelligent purpose (*Peterson v. Time Indemnity Co.*, 140 N. W. 286, 152 Wis. 562). And though the mind of insured may have been deranged when he took his life, if he had mind enough to know that the act would probably result in death, it is suicide, within the clause (*Masonic Life Ass'n of Western New York v. Pollard's Guardian*, 89 S. W. 219, 121 Ky. 349, 28 Ky. Law Rep. 301, 123 Am. St. Rep. 198).

A clause in an accident insurance policy exempting the insurer from liability for injuries occurring while the insured was insane bars recovery for suicide while he was so insane as not to understand the nature of his act. *Interstate Business Men's Accident Ass'n, of Des Moines, Iowa, v. Atkinson*, 177 S. W. 254, 165 Ky. 532, L. R. A. 1915E, 656; *Sovereign Camp, Woodmen of the World v. Ethridge*, 179 S. W. 1022, 166 Ky. 795.

3247 (h). Of course, the effect of suicide depends on the wording of the condition. It has been held that a beneficiary, suing on a certificate stipulating that the member committing suicide shall forfeit all benefits which his beneficiary would otherwise have, and

providing that on it being established that the member was a lunatic, and recognized as such, and the secretary of the order notified thereof, his suicide shall not operate as a forfeiture of the benefits, and that the burden of proof shall be on the beneficiary, must, on showing that the member committed suicide, prove that he was at the time a lunatic, and prior thereto recognized as such; the word "suicide" including an act committed by any one, whether sane or insane, though ordinarily the word when used in a contract of insurance does not include a case of suicide by an insane person (*Schack v. Supreme Lodge of the Fraternal Brotherhood*, 99 Pac. 989, 9 Cal. App. 584). And where the by-laws of the society precluded a recovery of benefits in case insured committed suicide, except in case the society's executive council or supreme court was satisfied that the deceased, at the time of the suicide, was of unsound mind, and that prior thereto he was known and reported to the supreme secretary as such, it was error for the court to permit a recovery in a case of suicide, in the absence of any evidence that deceased was ever reported to the supreme secretary as insane, or that any such claim was made in the case or in the tribunals of the order (*Post v. Supreme Court I. O. F.*, 103 N. W. 841, 146 Mich. 666).

3248-3252. (i) Same—Under "sane or insane" clause

3248 (i). When the condition in the policy declares that "suicide, sane or insane," is an excepted risk, some jurisdictions hold that there can be no recovery, though the insured was insane at the time the act of self-destruction was committed.

Zerulla v. Supreme Lodge, Order of Mut. Protection, 118 Ill. App. 191, affirmed 79 N. E. 160, 223 Ill. 518; *Kiesewetter v. Supreme Tent, Knights of Maccabees of the World*, 227 Ill. 48, 81 N. E. 19, affirming 112 Ill. App. 48; *Power v. Modern Brotherhood of America*, 158 Pac. 870, 98 Kan. 487, 701; *Sovereign, Camp of Woodmen of the World v. Valentine*, 190 S. W. 712, 173 Ky. 182; *Moore v. Northwestern Mut. Life Ins. Co.*, 78 N. E. 488, 192 Mass. 468, 7 Ann. Cas. 656; *Attorney General v. Colonial Life Ass'n*, 194 Mass. 527, 80 N. E. 455.

The question of sanity or insanity of insured may, however, be of material weight in determining whether he committed suicide. *Van Norman v. Modern Brotherhood of America*, 143 Iowa, 536, 121 N. W. 1080.

So, too, where the contract provides that it should be void if the member holding it should die by any means or act which if used or

done by him while in the possession of his natural faculties will be self-destruction, a death by suicide avoids the policy, whether the holder was sane or insane (*Clemens v. Royal Neighbors of America*, 103 N. W. 402, 14 N. D. 116, 8 Ann. Cas. 1111).

3250 (i). In some jurisdictions the degree of insanity is regarded as a controlling factor, even under the "sane or insane" clause, as was said in *Cady v. Fidelity & Casualty Co. of New York*, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260. The distinction between suicide by a sane person and suicide by an insane person, within a policy clause "death by suicide, sane or insane," lies in the mental capability in the one case and the absence of it in the other to appreciate the moral nature and quality of the purpose. The term "death by suicide, sane or insane," does not include death by the act of the assured without any mental purpose of self-destruction. And the court held that if one in a fit of delirium or other condition of irresponsibility, without intent to take his own life, does some act from which his death ensues, such death is by accident, not by suicide. And in Kentucky it has been held that there may be a recovery on a policy excepting suicide "sane or insane," if the insured was so insane that he did not know that he was taking his life, or that his act would probably result in death (*Vicars v. Ætna Life Ins. Co.*, 164 S. W. 106, 158 Ky. 1). So an insurer in a life policy stating that on the death of insured by self-destruction, sane or insane, the insurer shall be liable only for the return of the premiums paid, is liable for the face of the policy where insured at the time he killed himself was so insane that he did not know that he was taking his life, or did not know that the act he was committing would probably result in death (*Inter-Southern Life Ins. Co. v. Boyd* [Ky.] 124 S. W. 333).

Conversely, the exception as to suicide, "sane or insane," will be enforced, if insured at the time of his self-destruction, though mentally deranged, had mind enough to know the physical nature of his act and that it would probably result in death.

Metropolitan Life Ins. Co. v. Thomas, 106 S. W. 1175, 32 Ky. Law Rep. 770; *Sovereign Camp Woodmen of the World v. Landrum*, 166 S. W. 598, 158 Ky. 841; *Brown v. United Moderns*, 87 S. W. 357, 39 Tex. Civ. App. 343.

3253-3255. (k) Questions of practice—Pleading

3253 (k). In *Vicars v. Ætna Life Ins. Co.*, 158 Ky. 1, 164 S. W. 106, it was held that a petition containing no allegation as to suicide is demurrable where the policy sued on provides that the in-

sured shall not be liable in case of death by suicide. But in Philadelphia Life Ins. Co. v. Farnsley's Adm'r, 162 Ky. 27, 171 S. W. 1004, it was held that plaintiff is not required to negative death by suicide in pleading, whether liability is excluded by a proviso or an exception, and by a distinct clause, or by a provision in the principal clause.

An insurer, relying on the defense that the insured came to his death by suicide, must allege the fact affirmatively.

Vicars v. Aetna Life Ins. Co., 158 Ky. 1, 164 S. W. 106; Copple v. Life & Annuity Ass'n (Mo. App.) 196 S. W. 399.

An answer that insured committed suicide was demurrable, if it did not allege that the member was not insane at the time, where a by-law, providing that no full benefit would be paid where the member committed suicide, was not binding on such beneficiary if the member committed suicide while insane (Supreme Conclave Improved Order of Heptasophs v. Rehan, 85 Atl. 1035, 119 Md. 92, 46 L. R. A. [N. S.] 308, Ann. Cas. 1914D, 58). An answer, "that the death proofs furnished by claimants showed the cause of death to have been suicide," followed by the statement "that the cause of the death was in fact suicide," does not sufficiently plead estoppel of plaintiffs to prove that death was not due to suicide (Osburn v. Court of Honor, 133 S. W. 87, 152 Mo. App. 652).

A demurrer to a plea in an action on a benefit certificate, alleging that the insured committed suicide, and died from the effects of a pistol wound inflicted by himself with suicidal intent, admits that the insured committed suicide while sane (Plunkett v. Supreme Conclave, Improved Order of Heptasophs, 55 S. E. 9, 105 Va. 643).

In Commonwealth Life Ins. Co. v. Hughes, 145 Ky. 650, 140 S. W. 1014, modifying on rehearing 144 Ky. 608, 139 S. W. 769, the answer pleaded insured's suicide as a release from liability, except for premiums paid, repayment of which was also pleaded. The reply denied the affirmative pleas and pleaded that the settlement was without consideration. The reply was uncontroverted. It was held that the only issue presented was as to the question of suicide, on which the burden of proof was on defendant. Under the Texas statute (Rev. St. 1895, art. 1193), declaring it unnecessary for plaintiff to deny any special matter of defense, but that it shall be regarded as denied unless expressly admitted, the allegation of the answer in an action for a death benefit that the member committed suicide, whereby the benefit certificate became void, is put in issue

perforce the statute, notwithstanding a mere implied admission of the reply (*Brown v. United Moderns*, 87 S. W. 357, 39 Tex. Civ. App. 343).

Defense of suicide, being based on public policy, cannot be waived intentionally or unintentionally by stipulations or defects in pleadings. *Security Life Ins. Co. of America v. Dillard*, 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917D, 1187.

3255-3257. (1) Same—Presumptions

3255 (1). When the circumstances of the death of insured are such that it might have resulted from negligence, accident, or suicide, the presumption is against death by suicide.

Grand Lodge A. O. U. W. v. Wood, 113 Ark. 502, 168 S. W. 1070; *Mutual Life Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295; *American Home Circle v. Schneider*, 134 Ill. App. 600, 604; *Same v. Fromm*, Id. 605; *Equitable Life Ins. Co. of Iowa v. Hebert*, 37 Ind. App. 373, 76 N. E. 1023, 117 Am. St. Rep. 324; *Modern Woodmen of America v. Kincheloe* (Ind. App.) 91 N. E. 976; *Modern Woodmen of America v. Craiger*, 175 Ind. 30, 92 N. E. 113, reversing (Ind. App.) 90 N. E. 84; *Tackman v. Brotherhood of American Yeomen*, 106 N. W. 350, 132 Iowa, 64, 8 L. R. A. (N. S.) 974; *Van Norman v. Modern Brotherhood of America*, 111 N. W. 992, 134 Iowa, 575; *Klumb v. Iowa State Traveling Men's Ass'n*, 141 Iowa, 519, 120 N. W. 81; *Tomlinson v. Sovereign Camp Woodmen of the World*, 160 Iowa, 472, 141 N. W. 950; *Michalek v. Modern Brotherhood of America* (Iowa) 161 N. W. 125; *Masonic Life Ass'n of Western New York v. Pollard's Guardian*, 89 S. W. 219, 121 Ky. 349, 28 Ky. Law Rep. 301, 123 Am. St. Rep. 198; *Interstate Business Men's Accident Ass'n v. Ford*, 161 Ky. 163, 170 S. W. 525; *Lindahl v. Supreme Court I. O. F.*, 110 N. W. 358, 100 Minn. 87, 8 L. R. A. (N. S.) 916, 117 Am. St. Rep. 666; *Clover v. Woodmen of the World*, 152 Mo. App. 155, 133 S. W. 153; *Cornell v. Travelers' Ins. Co. of Hartford, Conn.*, 104 N. Y. Supp. 999, 120 App. Div. 459, affirmed in 192 N. Y. 587, 85 N. E. 1107; *White v. Prudential Ins. Co. of America*, 105 N. Y. Supp. 87, 120 App. Div. 260; *Christy v. American Temperance Life Ins. Ass'n*, 68 Misc. Rep. 178, 123 N. Y. Supp. 740; *Paulsen v. Modern Woodmen of America*, 21 N. D. 235, 130 N. W. 231; *Grand Fraternity v. Melton* (Tex. Civ. App.) 111 S. W. 967; *Mutual Life Ins. Co. v. Ford*, 61 Tex. Civ. App. 412, 130 S. W. 769, writs of error denied 108 Tex. 522, 131 S. W. 406; *Grand Fraternity v. Green*, 62 Tex. Civ. App. 366, 131 S. W. 442; *First Texas State Ins. Co. v. Jiminez* (Tex. Civ. App.) 163 S. W. 656; *Sovereign Camp W. O. W. v. McCulloch* (Tex. Civ. App.) 192 S. W. 1154; *South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 115 Va. 398, 79 S. E. 401; *Krogh v. Modern Brotherhood of America*, 153 Wis. 397, 141 N. W. 276, 45 L. R. A. (N. S.) 404; *Pagel v. United States Casualty Co.*, 158 Wis. 278, 148 N. W. 878.

In *Bohaker v. Travelers' Ins. Co.*, 215 Mass. 32, 102 N. E. 342, 46 L. R. A. (N. S.) 543, it was said that the presumption against suicide, which is a crime involving a high degree of moral turpitude, stands as a presumption of fact until overthrown by evidence, and sustains the burden of proof resting on plaintiff, suing on the policy, in the absence of compelling circumstances showing suicide, and where the court could find that insured came to his death through weakness, and not through suicide, a recovery was justified. The presumption arises only where the circumstances leave the cause of death in doubt (*Supreme Tent Knights of Maccabees of the World v. King*, 142 Fed. 678, 73 C. C. A. 668). So the presumption that death by drowning was accidental, and not suicidal, arises only after evidence of the circumstances surrounding the death compatible either with the theory of accidental death, or with suicide, and cannot be based on mere proof of drowning (*Farnsley's Adm'r v. Philadelphia Life Ins. Co.*, 161 S. W. 1111, 156 Ky. 699).

3256 (1). Since the presumption is one of fact, though very strong, it is rebuttable.

Prudential Ins. Co. of America v. Dolan, 46 Ind. App. 40, 91 N. E. 970;
Richey v. Woodmen of the World, 146 S. W. 461, 163 Mo. App. 235; *Pagel v. United States Casualty Co.*, 148 N. W. 878, 158 Wis. 278.

The insanity of insured, who has taken his own life, will not be presumed (*Ledy v. National Council of Knights and Ladies of Security*, 129 Minn. 137, 151 N. W. 905, Ann. Cas. 1916E, 486). And if the fact that a death was intentionally self-inflicted is proved, and that deceased was in a normal condition of mind, there can be no presumption that the act was unintentional, or the result of that insanity which deprives the mind of its knowledge of the probable effect of the act upon life (*Masonic Life Ass'n of Western New York v. Pollard's Guardian*, 89 S. W. 219, 28 Ky. Law Rep. 301, 121 Ky. 349, 123 Am. St. Rep. 198). The mere fact of suicide is of itself insufficient to remove the presumption of sanity of insured at the time of his death (*Supreme Council of Royal Arcanum v. Wishart*, 192 Fed. 453, 112 C. C. A. 591). In *Wilkinson v. Ætna Life Ins. Co.*, 88 N. E. 550, 240 Ill. 205, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269, affirming 144 Ill. App. 38, it was held that if it appeared that just before insured sustained the injuries, resulting in his death, he was in good health and of a cheerful and hopeful disposition, the jury, in determining whether the injuries were self-inflict-

ed, could consider the presumption that men in such condition do not ordinarily commit suicide.

Where defendant claimed that deceased committed suicide, an instruction that a man's natural instinct is to preserve his life and not destroy it, so that it was presumable that deceased did not commit suicide, was not erroneous for failure to limit the presumption to natural conditions, where there was no evidence that deceased's condition at the time of his death was not natural. *Tackman v. Brotherhood of American Yeomen*, 106 N. W. 350, 132 Iowa, 64, 8 L. R. A. (N. S.) 974.

3257-3259. (m) Same—Burden of proof

3257 (m). As a defense based on the condition making suicide an excepted risk is an affirmative one, the burden of proof is on the insurer to show death by suicide.

National Union v. Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524; *Sovereign Camp, Woodmen of the World, v. Hackworth* (Ala.) 75 South. 463; *Grand Lodge A. O. U. W. v. Banister*, 96 S. W. 742, 80 Ark. 190; *Sovereign Camp W. O. W. v. Hodges*, 72 Fla. 467, 73 South. 347; *Mutual Life Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295; *Georgia Life Ins. Co. v. McCranie*, 78 S. E. 1115, 12 Ga. App. 855; *American Home Circle v. Schneider*, 134 Ill. App. 600; *Same v. Fromm*, 134 Ill. App. 605; *Miles v. Court of Honor*, 173 Ill. App. 187; *Equitable Life Ins. Co. of Iowa v. Hebert*, 76 N. E. 1023, 37 Ind. App. 373, 117 Am. St. Rep. 324; *Modern Woodmen of America v. Kincheloe* (Ind. App.) 91 N. E. 976; *Hodson v. Great Camp Knights of the Modern Maccabees*, 47 Ind. App. 113, 93 N. E. 861; *Modern Woodmen of America v. Kincheloe* (Ind. App.) 94 N. E. 228; *Sovereign Camp W. O. W. v. Porch*, 184 Ind. 92, 110 N. E. 659; *Van Norman v. Modern Brotherhood of America*, 111 N. W. 992, 134 Iowa, 575; *Scott v. Sovereign Camp of Woodmen of the World*, 149 Iowa, 562, 129 N. W. 302; *Scott v. The Homesteaders*, 149 Iowa, 541, 129 N. W. 310; *Tomlinson v. Sovereign Camp of Woodmen of the World*, 160 Iowa, 472, 141 N. W. 950; *Wood v. Sovereign Camp of Woodmen of the World*, 166 Iowa, 391, 147 N. W. 888; *Vicars v. Aetna Life Ins. Co.*, 164 S. W. 106, 158 Ky. 1; *Sovereign Camp W. O. W. v. Valentine*, 190 S. W. 712, 173 Ky. 182; *Ruterbusch v. Supreme Court I. O. F.*, 162 Mich. 213, 127 N. W. 288; *Lindahl v. Supreme Court I. O. F.*, 100 Minn. 87, 110 N. W. 358, 8 L. R. A. (N. S.) 916, 117 Am. St. Rep. 666; *Kornig v. Western Life Indemnity Co.*, 102 Minn. 31, 112 N. W. 1039; *Ferris v. Court of Honor*, 116 N. W. 448, 152 Mich. 322; *Clawer v. Woodmen of the World*, 133 S. W. 153, 152 Mo. App. 155; *Richey v. Woodmen of the World*, 163 Mo. App. 235, 146 S. W. 461; *Cummings v. Sovereign Camp of Woodmen of the World*, 155 S. W. 488, 170 Mo. App. 194; *Castens v. Supreme Lodge Knights and Ladies of Honor*, 190 Mo. App. 57, 175 S. W. 264; *Hoette v. North American Union* (Mo. App.) 187

S. W. 790; *Hardinger v. Modern Brotherhood of America*, 103 N. W. 74, 72 Neb. 860, reversing on rehearing 72 Neb. '860, 101 N. W. 983; *Walden v. Bankers' Life Ass'n*, 89 Neb. 546, 131 N. W. 962; *Schrader v. Modern Brotherhood of America*, 90 Neb. 683, 134 N. W. 267; *Christy v. American Temperance Life Ins. Ass'n*, 123 N. Y. Supp. 740, 68 Misc. Rep. 178; *Benard v. Protected Home Circle*, 146 N. Y. Supp. 232, 161 App. Div. 59; *Baker v. Massachusetts Mut. Life Ins. Co.*, 168 N. C. 87, 83 S. E. 16; *Paulsen v. Modern Woodmen of America*, 21 N. D. 235, 130 N. W. 231; *Hildebrand v. United Artisans*, 50 Or. 159, 91 Pac. 542; *Sovereign Camp of Woodmen of the World v. Boehme*, 49 Tex. Civ. App. 159, 97 S. W. 847; *Grand Fraternity v. Melton* (Tex. Civ. App.) 111 S. W. 967; *Grand Fraternity v. Melton*, 102 Tex. 399, 117 S. W. 788, reversing (Tex. Civ. App.) 111 S. W. 967; *First Texas State Ins. Co. v. Jiminez* (Tex. Civ. App.) 163 S. W. 656; *Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989; *South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 115 Va. 398, 79 S. E. 401; *Cady v. Fidelity & Casualty Co. of New York*, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260; *Krogh v. Modern Brotherhood of America*, 153 Wis. 397, 141 N. W. 276, 45 L. R. A. (N. S.) 404; *Andrews v. United States Casualty Co.*, 142 N. W. 487, 154 Wis. 82.

The burden is on a fraternal benefit order interposing suicide as a defense to a certificate to show that the circumstances are inconsistent with any other reasonable cause of death than suicide. *Bircher v. Modern Brotherhood of America*, 25 S. D. 325, 126 N. W. 583.

3258 (m). In Pennsylvania it has been held that, if the proofs of death gave suicide as the cause of the death, the burden is shifted to plaintiff to show that the death was not caused by suicide (*Jenken v. Supreme Tent, Knights of Maccabees of the World*, 90 Atl. 73, 243 Pa. 281). On the other hand, in North Dakota the general rule prevails, and the burden is still on the insurer to show that insured came to his death through suicide, though the proof of death stated on information and belief that insured committed suicide, if such proof was submitted by the local lodge without being authorized to do so by the beneficiary as her agent (*Soules v. Brotherhood of American Yeomen*, 19 N. D. 23, 120 N. W. 760).

In *Commonwealth Life Ins. Co. v. Hughes*, 144 Ky. 608, 139 S. W. 769, modified on rehearing 145 Ky. 650, 140 S. W. 1014, the policy provided that, if insured committed suicide within a year, the insurer's liability should be limited to the amount of premium paid. The insured died within a year, and insurer, claiming she had committed suicide, settled with the beneficiary by paying the premium paid on the policy, taking a receipt in full of all claims. Thereafter the beneficiary brought suit thereon, rescinding the settlement.

The pleadings presented no controversy as to the facts that the contract of insurance, including the suicide clause, was all contained in the policy delivered to insured, that she died within a year, and that there had been paid but \$7.56 in premiums, which amount had been repaid, for which the beneficiary had executed a receipt in full, but raised two issues of fact: as to whether insured committed suicide, and as to the question of fraud and no consideration for the settlement. It was held that the burden of proof of such issues was on the beneficiary under Civ. Code Prac. § 526, providing that the burden of proof is on the party who would be defeated, if no evidence were given on either side.

3259 (m). If suicide of the insured is pleaded in defense, and the plaintiff, to avoid the defense, relies on the insanity of the insured at the time the act of self-destruction took place, the burden is on him to show that the insured was afflicted with such kind and degree of insanity as will excuse the act (*Supreme Council Royal Arcanum v. Wishart*, 192 Fed. 453, 112 C. C. A. 591).

3259-3263. (n) Same—Admissibility of evidence

3260 (n). The general rule seems to be that the record of proceedings and verdict of a coroner's jury are not admissible to show that insured committed suicide.

Craiger v. Modern Woodmen of America, 40 Ind. App. 279, 80 N. E. 429; *Kane v. Supreme Tent Knights of Maccabees of the World*, 87 S. W. 547, 113 Mo. App. 104; *Walden v. Bankers' Life Ass'n*, 89 Neb. 546, 131 N. W. 962; *Boehme v. Sovereign Camp Woodmen of the World*, 84 S. W. 422, 98 Tex. 376, 4 Ann. Cas. 1019. And see *Mittelstadt v. Modern Woodmen of America*, 143 Iowa, 186, 121 N. W. 803, 136 Am. St. Rep. 765.

Proofs of death, showing that the cause of death was suicide, were admissible as prima facie evidence thereof (*Felix v. Fidelity Mut. Life Ins. Co. of Philadelphia*, 64 Atl. 903, 216 Pa. 95). But it has been held that proofs of death, stating that death was caused by morphine or opium not taken or administered by deceased's own volition in an effort to commit suicide, are not admissible to prove that fact and to contradict evidence tending to show that the death was caused by suicide; the proofs being admissible on behalf of the plaintiff only to show a compliance with the terms of the policy (*Metropolitan Life Ins. Co. v. People's Trust Co.*, 177 Ind. 578, 98 N. E. 513, 41 L. R. A. [N. S.] 285).

3261 (n). Testimony as to the business condition and family relations of insured is admissible on the issue of suicide.

Georgia Life Ins. Co. v. McCranie, 78 S. E. 1115, 12 Ga. App. 855; *Provident Sav. Life Assur. Soc. v. Wayne's Adm'r*, 93 S. W. 1049, 29 Ky. Law Rep. 160; *Goldschmidt v. Mutual Life Ins. Co. of New York*, 119 N. Y. Supp. 233, 134 App. Div. 475; *Messersmith v. Supreme Lodge K. P.*, 31 N. D. 163, 153 N. W. 989. It was competent for defendant to show that at the time of his death the insured was short in his account with a church, of which he was financial secretary. *Rohloff v. Aid. Ass'n for Lutherans in Wisconsin and Other States*, 109 N. W. 989, 130 Wis. 61. Where defendant contested liability on a benefit certificate on the ground that insured committed suicide, and claimed that his motive was a certain defalcation discovered against him, it was not reversible error for the court to permit insured's father-in-law to answer whether, with his property and credit, witness could have borrowed the sum specified. *National Union v. Fitzpatrick*, 133 Fed. 694, 66 C. C. A. 524.

-As tending to show insured committed suicide, as he said he would in a letter at time of his disappearance, his attempted suicide seven months before may be shown (*Benjamin v. District Grand Lodge No. 4, Independent Order B'Nai B'rith*, 171 Cal. 260, 152 Pac. 731).

3262 (n). Evidence of a physician as to the physical and mental condition of the insured just prior to his death is admissible on the issue of suicide (*Metropolitan Life Ins. Co. v. Maddox* [Ky.] 127 S. W. 503). And in an action on an accident policy, evidence of the state of health of the insured for a considerable time before his death, where it is claimed he died by suicide, is proper as bearing on whether he came to his death as the result of a suicidal intent (*Cady v. Fidelity & Casualty Co. of New York*, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. [N. S.] 260). So, too, insured's habits and temperament can be shown as bearing upon his mental condition at the time of the accident resulting in his death (*Wilkinson v. Ætna Life Ins. Co.*, 88 N. E. 550, 240 Ill. 205, 25 L. R. A. [N. S.] 1256, 130 Am. St. Rep. 269, affirming 144 Ill. App. 38).

Matters connected with the admissibility of evidence are considered in *Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 South. 1006; *Kiesewetter v. Supreme Tent of Knights of Maccabees of the World*, 81 N. E. 19, 227 Ill. 48, affirming 112 Ill. App. 48; *Tackman v. Brotherhood of American Yeomen*, 106 N. W. 350, 132 Iowa, 64, 8 L. R. A. (N. S.) 974; *Scott v. Sovereign Camp of Woodmen of the World*, 149 Iowa, 562, 129 N. W. 302; *Tomlinson v. Sovereign Camp*

(1321)

of Woodmen of the World, 160 Iowa, 472, 141 N. W. 950; Kornig v. Western Life Indemnity Co., 102 Minn. 31, 112 N. W. 1039.

3263-3267. (o) Same—Weight and sufficiency of evidence

3263 (o). The defense that insured committed suicide must be established by a preponderance of evidence (Mutual Life Ins. Co. v. Durden, 9 Ga. App. 797, 72 S. E. 295). The evidence should be clear and satisfactory (South Atlantic Life Ins. Co. v. Hurt's Adm'x, 115 Va. 398, 79 S. E. 401), and the preponderance of the evidence should be such as to overcome the presumption of innocence of moral turpitude (Life Ins. Co. of Virginia v. Hairston, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989).

When the question of suicide is put in issue, it devolves upon the party affirming such fact to establish it, and this issue may be proved like any other fact in a civil action by a preponderance of the evidence on the question, and, if the evidence is equally balanced, the party having the burden must fail, not because of a presumption of law against suicide, but because he has not sustained his defense.

Modern Woodmen of America v. Craiger, 175 Ind. 30, 92 N. E. 113, reversing (Ind. App.) 90 N. E. 84; Modern Woodmen of America v. Kincheloe, 175 Ind. 563, 94 N. E. 228, Ann. Cas. 1913C, 1259.

If the proof of suicide is wholly circumstantial, an instruction that, to find that insured committed suicide from the circumstances, they must all point "clearly" to the fact of suicide, and be inconsistent with any other reasonable hypothesis, merely required that the circumstances must "clearly" point to suicide, and did not require the fact of suicide to be "clearly" proved, especially in view of the charge that the burden was on insurer to prove by the greater weight of the evidence that the member committed suicide (Scott v. The Homesteaders, 149 Iowa, 541, 129 N. W. 310). Though the general rule seems to be that it is not necessary that suicide should be proved beyond a reasonable doubt, but it is sufficient if the fact is shown by a fair preponderance of evidence, it was held in Mutual Life Ins. Co. v. Ford, 61 Tex. Civ. App. 412, 130 S. W. 769, writ of error denied 103 Tex. 522, 131 S. W. 406, that a finding that insured did not commit suicide must stand, unless the evidence establishes that the shooting causing his death was intentional to that degree of conclusiveness which precludes a reasonable doubt to the contrary, and there must be no room for fair and reasonable minds to reach different conclusions from the evidence.

Where circumstantial evidence is relied on to show suicide as a defense to an action on an insurance policy, facts must be proved which preclude any reasonable hypothesis of natural or accidental death.

Parrish v. Order of United Commercial Travelers of America, 232 Fed. 425, 146 C. C. A. 419; *Grand Lodge A. O. U. W. of Arkansas v. Wood*, 113 Ark. 502, 168 S. W. 1070; *Sovereign Camp W. O. W. v. Hodges*, 72 Fla. 467, 73 South. 347; *Prudential Ins. Co. of America v. Dolan*, 46 Ind. App. 40, 91 N. E. 970; *Modern Woodmen of America v. Craiger*, 175 Ind. 30, 92 N. E. 113, reversing (Ind. App.) 90 N. E. 84; *Connell v. Iowa State Traveling Men's Ass'n*, 139 Iowa, 444, 116 N. W. 820; *Lindahl v. Supreme Court I. O. F.*, 110 N. W. 358, 100 Minn. 87, 8 L. R. A. (N. S.) 916, 117 Am. St. Rep. 666; *Kornig v. Western Life Indemnity Co.*, 102 Minn. 31, 112 N. W. 1039; *Walden v. Bankers' Life Ass'n*, 89 Neb. 546, 131 N. W. 962; *Schrader v. Modern Brotherhood of America*, 90 Neb. 683, 134 N. W. 267; *Metropolitan Life Ins. Co. v. De Vault's Adm'x*, 109 Va. 392, 63 S. E. 982, 17 Ann. Cas. 27; *South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 115 Va. 398, 79 S. E. 401.

The burden is on the insurer to establish the suicide, not by evidence sufficient to establish a prima facie case only, but by such proof as would withstand and overthrow all the evidence to the contrary. *Hodson v. Great Camp, Knights of Modern Maccabees*, 47 Ind. App. 113, 93 N. E. 861.

Competent proof of facts surrounding the death of the assured which point unmistakably to the conclusion that he took his own life and exclude all reasonable probability of death by murder or accident is sufficient to overcome the presumption that a sane person will not destroy his own life, and establishes prima facie the defense of suicide (*Hardinger v. Modern Brotherhood of America*, 103 N. W. 74, 72 Neb. 860, reversing on rehearing 72 Neb. 860, 101 N. W. 983). But if the evidence did not show a single circumstance surrounding the death of the member that was not as consistent with accident as with suicide, a finding that the member did not commit suicide would not be disturbed on appeal (*Cosmopolitan Life Ins. Co. v. Koegel*, 52 S. E. 166, 104 Va. 619). So the mere fact that a revolver was found in the hand of insured is not conclusive that he committed suicide (*Kornig v. Western Life Indemnity Co.*, 102 Minn. 31, 112 N. W. 1039).

3264 (o). The presumption against suicide is not overcome by the introduction at the trial of the proofs of death in one of the affidavits composing which the cause of death is stated to be suicide (*Mutual Life Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295).

Proofs of death are, at most, mere prima facie evidence of the facts therein stated (*Rohloff v. Aid Ass'n for Lutherans in Wisconsin and Other States*, 109 N. W. 989, 130 Wis. 61). They are not conclusive, unless the beneficiary fails to show that the statements made therein were erroneous, or were given through mistake (*Almond v. Modern Woodmen of America*, 113 S. W. 695, 133 Mo. App. 382).

Though it has been held in Iowa that the verdict of a coroner's jury that an insured committed suicide, if admissible, is prima facie evidence of the manner of death (*Mittelstadt v. Modern Woodmen of America*, 143 Iowa, 186, 121 N. W. 803, 136 Am. St. Rep. 765), and would overcome the presumption that death was accidental, yet it has been recognized that the case must stand on the testimony on the issue of suicide, and the insurer has at all times the burden of proving suicide (*Tomlinson v. Sovereign Camp of Woodmen of the World*, 160 Iowa, 472, 141 N. W. 950). In Arkansas it has been held that the verdict of a coroner's jury, finding that insured committed suicide, is not sufficient to establish a prima facie case of death from suicide (*Grand Lodge A. O. U. W. v. Banister*, 96 S. W. 742, 80 Ark. 190).

The entire absence of motive, adequate or inadequate, inciting to self-destruction, may be considered in determining whether an insurer has sustained the burden of proof of suicide (*Kornig v. Western Life Indemnity Co.*, 102 Minn. 31, 112 N. W. 1039).

Where the circumstances surrounding the death of a person all point to death by suicide, and there are no facts from which a different conclusion might reasonably be reached, a directed verdict of suicide will be sustained.

The rule is illustrated in *Supreme Tent, Knights of Maccabees of the World, v. King*, 142 Fed. 678, 73 C. C. A. 668; *Bernick v. Illinois Commercial Men's Ass'n*, 175 Ill. App. 511; *Newland v. Modern Woodmen of America*, 153 S. W. 1097, 168 Mo. App. 311; *Hardinger v. Modern Brotherhood of America*, 103 N. W. 74, 72 Neb. 860, reversing on rehearing 72 Neb. 860, 101 N. W. 983; *Clemens v. Royal Neighbors of America*, 14 N. D. 116, 103 N. W. 402, 8 Ann. Cas. 1111.

3265 (o). Where the evidence as to suicide is conflicting, and is such that reasonable men might differ as to their conclusions, the question should be submitted to the jury.

The rule is illustrated and applied in *National Union v. Fitzpatrick*, 133 Fed. 694, 66 C. C. A. 524; *Metropolitan Life Ins. Co. v. Williamson*, 174 Fed. 116, 98 C. C. A. 90; *Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 South. 1006; *Industrial Mut. Indem-*

nity Co. v. Watt, 95 Ark. 456, 130 S. W. 532; Connell v. Iowa State Traveling Men's Ass'n, 139 Iowa, 444, 116 N. W. 820; Kane v. Supreme Tent, Knights of Maccabees of the World, 87 S. W. 547, 113 Mo. App. 104; Soules v. Brotherhood of American Yeomen, 19 N. D. 23, 120 N. W. 760; Bircher v. Modern Brotherhood of America, 25 S. D. 325, 126 N. W. 583; First Texas State Ins. Co. v. Jiminez (Tex. Civ. App.) 163 S. W. 656.

The evidence was held to warrant a submission to the jury in *Equitable Life Ins. Co. v. Hebert*, 76 N. E. 1023, 37 Ind. App. 373, 117 Am. St. Rep. 324; *Hodson v. Great Camp, Knights of Modern Maccabees*, 47 Ind. App. 113, 93 N. E. 861; *Tackman v. Brotherhood of American Yeomen*, 106 N. W. 350, 132 Iowa, 64, 8 L. R. A. (N. S.) 974; *Van Norman v. Modern Brotherhood of America*, 143 Iowa, 536, 121 N. W. 1080; *Scott v. Sovereign Camp of Woodmen of the World*, 149 Iowa, 562, 129 N. W. 302; *Wood v. Sovereign Camp of Woodmen of the World*, 166 Iowa, 391, 147 N. W. 888; *Almond v. Modern Woodmen of America*, 113 S. W. 695, 133 Mo. App. 382; *Claver v. Woodmen of the World*, 133 S. W. 153, 152 Mo. App. 155; *McCarthy v. Metropolitan Life Ins. Co.*, 75 N. J. Law, 887, 69 Atl. 170; *Benard v. Protected Home Circle*, 146 N. Y. Supp. 232, 161 App. Div. 59; *Paulsen v. Modern Woodmen of America*, 21 N. D. 235, 130 N. W. 231; *Jenkner v. Supreme Tent, Knights of Maccabees of the World*, 90 Atl. 73, 243 Pa. 281; *South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 115 Va. 398, 79 S. E. 401; *Rohloff v. Aid Ass'n for Lutherans in Wisconsin and Other States*, 109 N. W. 989, 130 Wis. 61.

The evidence was sufficient to show that insured committed suicide in *Parrish v. Order of United Commercial Travelers of America*, 232 Fed. 425, 146 C. C. A. 419; *Industrial Mut. Indemnity Co. v. Watt*, 95 Ark. 456, 130 S. W. 532; *Gavin v. Des Moines Life Ins. Co.*, 149 Iowa, 152, 126 N. W. 906; *Power v. Modern Brotherhood of America*, 158 Pac. 870, 98 Kan. 487, 701; *Metropolitan Life Ins. Co. v. Thomas*, 106 S. W. 1175, 32 Ky. Law Rep. 770; *Moore v. Northwestern Mut. Life Ins. Co.*, 78 N. E. 488, 192 Mass. 468, 7 Ann. Cas. 656; *Fidelity Mut. Life Ins. Co. v. Blain*, 107 N. W. 877, 144 Mich. 218; *Richey v. Woodmen of the World*, 146 S. W. 461, 163 Mo. App. 235; *Newland v. Modern Woodmen of America*, 153 S. W. 1097, 168 Mo. App. 311; *Hoette v. North American Union* (Mo. App.) 187 S. W. 790; *Christy v. American Temperance Life Ins. Ass'n*, 123 N. Y. Supp. 740, 68 Misc. Rep. 178; *Felix v. Fidelity Mut. Life Ins. Co. of Philadelphia*, 64 Atl. 903, 216 Pa. 95; *Loyal Americans of the Republic v. McClanahan*, 50 Tex. Civ. App. 256, 109 S. W. 973; *Metropolitan Life Ins. Co. v. Wagner*, 50 Tex. Civ. App. 233, 109 S. W. 1120; *Grand Fraternity v. Melton*, 102 Tex. 399, 117 S. W. 788, reversing (Tex. Civ. App.) 111 S. W. 967; *Ziebell v. Fraternal Reserve Ass'n of Oshkosh*, 158 Wis. 612, 149 N. W. 475.

The evidence was insufficient to show that insured committed suicide in *Grand Lodge of A. O. U. W. v. Banister*, 96 S. W. 742, 80 Ark.

190; *Modern Woodmen of America v. Kincheloe* (Ind. App.) 91 N. E. 976; *Modern Woodmen of America v. Craiger* (Ind. App.) 90 N. E. 84, judgment reversed 175 Ind. 30, 92 N. E. 113; *Sovereign Camp Woodmen of the World v. Bridges*, 7 Ind. T. 433, 104 S. W. 672; *Tonlinson v. Sovereign Camp of Woodmen of the World*, 160 Iowa, 472, 141 N. W. 950; *Heath v. Bankers' Life Ass'n of Des Moines, Iowa*, 132 Pac. 147, 89 Kan. 634; *Same v. North American Life Ins. Co. of Newark, N. J.*, 132 Pac. 148, 89 Kan. 637; *Metropolitan Life Ins. Co. v. Maddox* (Ky.) 127 S. W. 503; *Interstate Business Men's Accident Ass'n v. Ford*, 161 Ky. 163, 170 S. W. 525; *Ferris v. Loyal Americans of the Republic*, 116 N. W. 445, 152 Mich. 314; *Kornig v. Western Life Indemnity Co.*, 102 Minn. 31, 112 N. W. 1039; *Zearfoss v. Switchmen's Union of North America*, 102 Minn. 56, 112 N. W. 1044; *Peterson v. Prudential Ins. Co. of America*, 115 Minn. 232, 132 N. W. 277; *Norman v. Order of United Commercial Travelers of America*, 145 S. W. 853, 163 Mo. App. 175; *Cummings v. Sovereign Camp of Woodmen of the World*, 155 S. W. 488, 170 Mo. App. 194; *Sebesta v. Supreme Court of Honor*, 80 Neb. 760, 115 N. W. 300; *Thaxton v. Metropolitan Life Ins. Co.*, 143 N. C. 33, 55 S. E. 419; *Grand Fraternity v. Green*, 62 Tex. Civ. App. 366, 131 S. W. 442; *Knights of Maccabees of the World v. Johnson* (Tex. Civ. App.) 143 S. W. 718; *Rohloff v. Aid Ass'n for Lutherans in Wisconsin and Other States*, 109 N. W. 989, 130 Wis. 61; *Krogh v. Modern Brotherhood of America*, 141 N. W. 276, 153 Wis. 397, 45 L. R. A. (N. S.) 404.

3267 (o). In the absence of evidence of any demeanor, act, or word on the part of insured indicating insanity, the fact that he had insane relatives was insufficient to show that he was insane at the time of his death (*South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 115 Va. 398, 79 S. E. 401).

The sufficiency of the evidence to show insanity of insured at time of death is considered in *Supreme Council of Royal Arcanum v. Wishart*, 192 Fed. 453, 112 C. C. A. 591; *Layton v. Interstate Business Men's Accident Ass'n*, 158 Iowa, 356, 139 N. W. 463; *Bankers' Fraternal Union v. Donahue*, 109 S. W. 878, 33 Ky. Law Rep. 196; *Inter-Southern Life Ins. Co. v. Boyd* (Ky.) 124 S. W. 333; *Sovereign Camp Woodmen of the World v. Landrum*, 166 S. W. 598, 158 Ky. 841. As to sufficiency of the evidence to warrant submitting to the jury the question of insanity of accused at the time he committed suicide, see *Switchmen's Union of North America v. Johnson*, 105 S. W. 1193, 32 Ky. Law Rep. 583; *Sovereign Camp, Woodmen of the World, v. Ethridge*, 179 S. W. 1022, 166 Ky. 795.

3267-3269. (p) Same—Trial

3268 (p). Whether insured was insane when he committed suicide is a question for the jury.

Van Norman v. Modern Brotherhood of America, 143 Iowa, 536, 121 N. W. 1080; Bankers' Fraternal Union v. Donahue, 109 S. W. 878, 33 Ky. Law Rep. 196; Moran v. Knights of Columbus, 46 Utah, 397, 151 Pac. 353. And see Wilcox v. Court of Honor, 114 S. W. 1155, 134 Mo. App. 547.

The issue of the suicide of insured is for the jury. Messersmith v. Supreme Lodge K. P., 31 N. D. 163, 153 N. W. 989.

In an action on a policy which made the policy void if insured died by his own hand or act, whether sane or insane, and in which defendant claimed suicide, the jury should have been instructed on the effect of such provision of the policy as requested (Gavin v. Des Moines Life Ins. Co., 149 Iowa, 152, 126 N. W. 906). And where the defense is that insured committed suicide, an instruction that, in determining whether insured died from suicide or from natural or accidental causes, the jury must consider first what facts are established by preponderance of the evidence, and, having ascertained what facts are established, the jury must further consider whether there is any reasonable hypothesis consistent with death from natural or accidental causes, and if such facts are inconsistent with death from natural or accidental causes, they must find for insurer, properly submits the issue (Life Ins. Co. of Virginia v. Hairston, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989).

The propriety of certain instructions where the question of suicide is in issue is considered in the following cases: Miles v. Court of Honor, 173 Ill. App. 187; Modern Woodmen of America v. Craiger (Ind. App.) 90 N. E. 84, judgment reversed 175 Ind. 30, 92 N. E. 113; Mittelstadt v. Modern Woodmen of America, 143 Iowa, 186, 121 N. W. 803, 136 Am. St. Rep. 765; Van Norman v. Modern Brotherhood of America, 143 Iowa, 536, 121 N. W. 1080; Wood v. Sovereign Camp of Woodmen of the World, 166 Iowa, 391, 147 N. W. 888; Grimme v. General Council of Fraternal Aid Ass'n, 167 Mich. 240, 132 N. W. 497; Wilcox v. Court of Honor, 114 S. W. 1155, 134 Mo. App. 547; Life Ins. Co. of Virginia v. Hairston, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989.

(1327)

XXIII. EXTENT OF LOSS AND LIABILITY OF INSURER —LIFE AND ACCIDENT INSURANCE

1. EXTENT OF LIABILITY IN LIFE INSURANCE

3270-3272. (a) Amount payable at death in general

3270 (a). A life insurance policy is not merely a contract of indemnity, but is a contract to pay to the beneficiary the sum stated in the event of the insured's death; and if valid at its inception, and so continues until its maturity, the beneficiary is entitled to the whole stipulated sum (*Keckley v. Coshocton Glass Co.*, 99 N. E. 299, 86 Ohio St. 213, Ann. Cas. 1913D, 607). The relation of a policy holder in a life policy to the insurance company issuing it is purely contractual. The contract involves the risk which terminates on the death of insured, and the obligation to pay in accordance with the policy then becomes a liquidated debt (*McDonnell v. Mutual Life Ins. Co. of New York*, 116 N. Y. Supp. 35, 131 App. Div. 643). If, however, the full liability provided for by a certificate is \$5,000, such amount should not be allowed if, prior to death, benefits with respect to the accident which caused the death of the member had been paid to him (*Coulter v. Travelers' Protective Ass'n of America*, 144 Ill. App. 255).

Where a benefit certificate for \$500 contained a provision that in case of death not more than one-fifth of the amount otherwise due should be payable for each full year of membership, plaintiff, seeking to be relieved from such provision on the ground that the policy had not been approved by the insurance commissioner as required by Revisal 1908, § 4773a, was bound to allege and prove such fact. *Blount v. Royal Fraternal Ass'n*, 79 S. E. 299, 163 N. C. 167.

Under a combination life and endowment policy, if insured dies within the period claimed, the beneficiary will take the face value of the policy without any portion of the surplus (*Breard v. New York Life Ins. Co.*, 70 South. 799, 138 La. 774). But under policy participating in profits, insurer is a trustee, required to account in respect to the trust fund, and to render an account to the insured (*Equitable Life Assur. Soc. v. Hardin*, 166 Ky. 51, 178 S. W. 1155).

Where an insurance company in a written "illustration" attested by its officers, which it attached to plaintiff's policy, stated a definite

amount of surplus payable at end of 20 years, the policy being silent as to this the company is bound to pay amount stipulated. *Forman v. Mutual Life Ins. Co.*, 191 S. W. 279, 173 Ky. 547.

3271 (a). The laws and practices of a society in ascertaining the amount of death benefits prevailing during membership of a decedent, and which were an integral part of its contract with him should be followed in computing the amount due, though an existing by-law apportioned a less amount of assessments to the mortuary fund (*Hatcher v. National Annuity Ass'n of Kansas City*, 164 S. W. 188, 177 Mo. App. 278). Under a by-law of a society providing for an endowment of \$100 when a member's wife dies, and for \$300 to the heirs when a member dies, except when he leaves a second wife, or no wife, then \$200, it was held that, though plaintiff was a member's second wife, yet, as she became so before her husband became a member, the heirs were entitled to the \$300 (*Berger v. Independent Brothers of Nieshwis* [Sup.] 147 N. Y. Supp. 934). In *Dusseault v. Association Canado-Americaine*, 74 N. H. 407, 68 Atl. 461, the constitution of the association provided for the payment of \$1,000 on the death of a member, and that the "High Court" of the association should have the right to admit to the association "societies already existing," and to fix the "price of admission." At a meeting of the society it voted to accept a proposition to join the association, one of the terms of the proposition being that members over 55 years of age should pay the regular assessment, but be entitled to a death benefit of only \$500. It was held that the beneficiary of a member of the society who was over 55 years of age at the time of the union, and who had received from the association a certificate for \$500, was entitled to only that amount.

By-laws of a mutual benefit society construed, and held to entitle the widow to death benefit as of right, and not to provide for discretionary charity. *Wilkins v. Price* (Sup.) 142 N. Y. Supp. 574.

In *Attorney General v. Supreme Council American Legion of Honor*, 206 Mass. 186, 92 N. E. 148, it was held that a member of a fraternal beneficiary corporation, who protested against a by-law reducing certificates from \$5,000 to \$2,000, thereby preserved his rights under the original certificate, and on his death the beneficiary was entitled to full payment under the original certificate, unless the claim has been released or is barred by limitations. The court, held, further, that where the beneficiary, after the member's death,

took the reduced sum and surrendered the certificate, and 7½ months later sued out a writ against the corporation, without filing any declaration or statement of claim, or without taking any action thereunder, and then, on the appointment of a receiver of the corporation in 1904, she claimed full payment under the certificate, her right to full payment was not barred by acquiescence. On the other hand, in *McCloskey v. Supreme Council American Legion of Honor*, 109 App. Div. 309, 96 N. Y. Supp. 347, it was held that where a member of a beneficial association, for 17 months after his certificate was scaled from \$5,000 to \$2,000 by a by-law duly enacted, paid reduced assessments, which were much less than he would have paid for benefits of \$5,000, during which time 26 assessments were paid, without making any protest indicating his dissent from the action of the society, he would be held to have assented thereto.

Where a change was made in the constitution of defendant benefit society, raising the amount of death benefits from \$3,000 to \$4,000 subsequent to the time insured met with an accident but before he died as a result thereof, his beneficiary, in an action on the policy for death benefit was entitled to recover the increased amount (*Dent v. Railway Mail Ass'n* [C. C.] 183 Fed. 840).

Where, in an action by the representative of a deceased member of a mutual benefit society for \$100 benefits, and for funeral expenses provided for by the by-laws of the society, binding it to pay funeral expenses, not to exceed \$75, there was no evidence of funeral expenses of the member, the rendition of a verdict for \$75 as funeral expenses was erroneous. *Cardinale v. Society of Civility and Labor* (Sup.) 102 N. Y. Supp. 471.

Under provisions of endowment policy issued by fraternal order, where insured was suspended, reinstated, and died within 12 months thereafter, he was to be classed as a new member and beneficiary was entitled to recover only \$300 (*Grand Lodge, Colored Knights of Pythias, v. Horace* [Tex. Civ. App.] 191 S. W. 398).

Provisions of fraternal beneficiary certificate as to member's delinquency in dues and subsequent reinstatement construed not to refer to death benefits, so that beneficiary was entitled to the graduated amount of the policy from the date of its issuance. *Continental Beneficial Ass'n v. Holt*, 181 S. W. 648, 167 Ky. 806.

Under provision of membership certificate of fraternal insurance society, making approval of its examiner on applications for loans or decision of council on appeal therefrom final, where plaintiff did not appeal from the examiner's action, but accepted the

amount allowed, she could not thereafter sue for additional benefits. *Messing v. Order of the Golden Seal* (Sup.) 154 N. Y. Supp. 475.

3272-3273. (b) Limitation of liability

3272 (b). Where a benefit association's certificate agrees to pay \$2,000 if insured lives out his expectancy of life, and states the amount due him if he dies during the first year, which he does, such amount only is recoverable (*Watkins v. Brotherhood of American Yeomen*, 188 Mo. App. 626, 176 S. W. 516). So, too, where the by-laws provide that no liability should attach until after 30 days, if insured died within 30 days, a peremptory instruction for defendant should have been given (*Grand Lodge of Colored Knights of Pythias v. Seay*, 106 Miss. 264, 63 South. 571). An insurer may lawfully limit its liability to recovery of the premiums paid, if insured was not in sound health on the date of the policy (*Gregoric v. Prudential Ins. Co.*, 165 Ill. App. 570).

3273 (b). The limitation may make the amount payable dependent on the occupation of insured at the time of death. Thus, in *Solomon v. American Guild*, 151 Ala. 297, 44 South. 387, it was held that insured was a saloon keeper, within a policy limiting the death benefits to be paid, though his wife was the owner of the saloon and he never served drinks, where she never had anything to do with its control, and he employed the bartenders, purchased the stock, deposited the money, made up the cash, paid the bills, performed a saloon keeper's duties; was commonly known as "Zeke," and the sign "Zeke's Place" was on the saloon.

An insurer cannot avail itself of the fact that it was liable only for a specified sum because insured changed his occupation to one more hazardous, unless it gives notice of the defense under the plea of general issue. *Hare v. Workingmen's Mutual Protective Ass'n*, 151 Mich. 225, 114 N. W. 1009.

Under Rev. Civ. St. Tex. art. 4742, subd. 3, a provision in a policy that, if insured should die from heart disease within one year from its date liability would be limited to one-fourth of principal sum named, is not enforceable and presents no defense to claim for full amount (*First Texas State Ins. Co. v. Bell* [Tex. Civ. App.] 184 S. W. 277).

3274-3277. (c) Same—Amount dependent on cause of death

3275 (c). A provision in the contract limiting the insurer's liability in case the insured commits suicide is reasonable and valid.

Scow v. Supreme Council, Royal League, 79 N. E. 42, 223 Ill. 32; Thaxton v. Metropolitan Life Ins. Co., 143 N. C. 33, 55 S. E. 419.

But under the Missouri statute declaring that suicide shall not be a defense (Rev. St. 1889, § 5855), a stipulation in a life policy that in case insured committed suicide the insurer would be liable for only one-fifth of the amount of the policy is of no effect.

Harms v. Fidelity & Casualty Co., 172 Mo. App. 241, 157 S. W. 1046;
Whitfield v. Aetna Life Ins. Co. of Hartford, 205 U. S. 489, 27
Sup. Ct. 578, 51 L. Ed. 895, reversing 144 Fed. 356, 75 C. C. A.
358.

Under the Texas statute (Vernon's Sayles' Ann. Civ. St. 1914, art. 4742), which permits the insurer to pay a less sum if the insured dies by his own hand, it is not necessary that the policy state specifically what sum will be paid in such case (Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill. [Tex. Civ. App.] 192 S. W. 607).

3278-3279. (d) Amount of mortuary fund

3278 (d). Under Rev. Laws Mass. c. 119, §§ 7, 8, authorizing a fraternal beneficiary corporation to hold an emergency fund, no part of which shall be used except for the payment of death or disability benefits, the emergency fund is a trust fund limited to the payment of benefits, and where a judgment for a death benefit and for attorney's fees and statutory penalty is recovered, only so much of the judgment as represents the death benefit is payable out of the emergency fund (Attorney General v. Supreme Council, American Legion of Honor, 92 N. E. 134, 206 Mass. 131). Where a policy provides for payment to the beneficiary, out of the mortuary fund of the division to which the member belongs, of an amount not exceeding a named sum, or the full amount of one mortuary assessment, not in excess of such sum, the beneficiary is prima facie entitled to recover the amount stipulated; but the insurance company may show in defense that it has made an assessment and has not raised the amount stated, and thus diminish the recovery to the amount actually realized, the burden being on the company to show how many members there were in the division, and whether the assessment would have produced the amount named (Southern Life Ins. Co. v. Logan, 9 Ga. App. 503, 71 S. E. 742).

Act of Parliament of Dominion of Canada, authorizing benefit society incorporated by it to apportion deficiency in fund for payment of certificates issued prior to a specified year among the holders thereof, authorizes the society to assess the proportionate share of the deficiency against a certificate delivered and accepted in New York and constituting a New York contract. *Stockwell v. Supreme Court I. O. F. (D. C.)* 216 Fed. 205.

3279-3285. (e) Limitation of liability to amount of assessment

3281 (e). When the amount recoverable is limited to the amount of one assessment, not exceeding a designated amount, the burden is on the insurer to show that one assessment would not produce the amount designated in the contract.

Maloney v. North American Union, 177 Ill. App. 658; *Spande v. Western Life Indemnity Co.*, 68 Or. 171, 136 Pac. 1189; *Krogh v. Modern Brotherhood of America*, 141 N. W. 276, 153 Wis. 397, 45 L. R. A. (N. S.) 404.

Where a benefit certificate provided for reduction of the amount of the certificate when one-half of one assessment would not produce that amount, the burden is on the company to prove what the amount, if less, would be. *Meyerson v. United States Grand Lodge, Independent Order Sons of Benjamin (Sup.)* 151 N. Y. Supp. 932.

The insured is not obliged to allege and prove the number of members in the association (*Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 South. 1006). The amount which the beneficiary is entitled to recover is presumed to be the full amount of the certificate, in the absence of evidence that an assessment would not realize such amount (*Pegram v. Mutual Protective League*, 159 Ill. App. 214); and in the absence of evidence showing what an assessment would produce, plaintiff is entitled to recover the full amount of his policy.

Wasson v. American Patriots, 148 Iowa, 142, 126 N. W. 778; *Kroge v. Modern Brotherhood of America*, 105 S. W. 685, 126 Mo. App. 693; *Hicks v. Northwestern Aid Ass'n*, 117 Tenn. 203, 96 S. W. 962.

Under the Wisconsin statute (Laws 1899, p. 460, c. 270) empowering assessment life associations previously organized to exercise an election to thereafter make contracts to accept from their members as the price of their insurance a stipulated sum at fixed periods instead of fixed sums at indefinite periods, as assessments might become necessary, but providing that the contract with their mem-

bers should not be annulled by the change, a member of an assessment life association which took advantage of the act is entitled to payment in full on an endowment policy calling for an amount not to exceed \$2,000 to be paid from an assessment in a certain sum on each of the members, where at the time of the adoption of the privilege conferred by the act, as well as at the time of its reinsurance with another company, the association's membership was sufficiently large to produce the \$2,000 by an assessment on each of the members who remained members of the reinsurer, though the members accepting the new form of contract would have reduced the producing power of an assessment made only on the persistent assessment membership to \$188.60 (*Smith v. Northwestern Nat. Life Ins. Co.*, 102 N. W. 57, 123 Wis. 586).

3284 (e). It is held in Iowa that, though the remedy is at law when the contract is to pay a fixed amount the remedy is in equity only if the certificate provides for the payment of the amount realized from one assessment, not exceeding a specified sum.

Wood v. Brotherhood of American Yeomen, 148 Iowa, 400, 126 N. W. 949; *Frank v. Interstate Business Men's Accident Ass'n*, 151 Iowa, 684, 132 N. W. 49; *Johnson v. Hawkeye Commercial Men's Ass'n*, 171 Iowa, 425, 152 N. W. 561.

But in *Van Norman v. Modern Brotherhood of America*, 134 Iowa, 575, 111 N. W. 992, the certificate entitled the beneficiary, in case of the death of the member, to participate in the mortuary fund to the amount of one full assessment on all members in good standing, not to exceed \$2,000, to be paid to such beneficiary. The petition alleged that defendant had always on hand in the mortuary fund, to pay death losses, an amount equal to one full assessment on all members in good standing, and that, at the date of the death of the member named in plaintiff's certificate, the society had on hand a sum largely in excess of the amount to be paid on such certificate, which had been collected and was in its possession. It was held that such facts entitled plaintiff to sue at law to recover the amount due on the certificate, and that she was not required to sue in equity to compel defendant to levy an assessment to pay such loss.

3285 (e). In other jurisdictions it is held that an action at law is maintainable on a mutual benefit certificate, and it is not necessary to go into a court of equity to enforce it.

Moshenz v. Independent Order Ahawas Israel, 102 N. E. 324, 215 Mass. 185; *Thompson v. Piedmont Mut. Ins. Co.*, 58 S. E. 341, 77 S. C.

486; *Batson & Walsh v. South Carolina Mut. Ins. Co.*, 58 S. E. 936, 78 S. C. 309; *Krogh v. Modern Brotherhood of America*, 153 Wis. 397, 141 N. W. 276, 45 L. R. A. (N. S.) 404.

A court of equity is without jurisdiction to entertain a bill to enforce an alleged balance due from a fraternal benefit society to the beneficiary of a member which consists of the difference between the face of the benefit certificate and the amount accruing from the collection of the assessment made. *Northwestern Traveling Men's Ass'n v. Crawford*, 126 Ill. App. 468, decree affirmed *Crawford v. Northwestern Traveling Men's Ass'n*, 80 N. E. 736, 226 Ill. 57, 10 L. R. A. (N. S.) 264.

If a policy on the assessment plan stipulates that the beneficiary shall be paid \$1 for each member in good standing at the death of insured, and no legal reason is offered for failing to collect an assessment at his death, it is error to grant a nonsuit, where the insured has complied with all the conditions precedent except those waived by the insurer (*Stanley v. Sterling Mut. Life Ins. Co.*, 12 Ga. App. 475, 77 S. E. 664). Where the certificate provides that its payment will be based on one assessment on the entire beneficiary membership of the order, the full amount so paid not to exceed the amount of one assessment, evidence of the membership and financial condition of the order was admissible to show that one assessment was sufficient to raise the amount called for by the certificate (*Sovereign Camp, Woodmen of the World, v. Carrington*, 90 S. W. 921, 41 Tex. Civ. App. 29). The question whether the opinion of the insured's secretary and treasurer that the assessment would not be paid was a good reason for failure to levy same is for the jury (*Sterling Mutual Life Ins. Co. v. Stanley*, 15 Ga. App. 263, 82 S. E. 826).

3285-3287. (f) Deductions and offsets

3285 (f). In *Keenan v. Mutual Life Ins. Co.*, 77 N. J. Law, 64, 71 Atl. 37, the policy provided that, if the age of the insured should be understated, the amount of the insurance or other benefit will be equitably adjusted. It was discovered after insured's death that he was in fact 46, instead of 45, years of age, as stated. It was held that equitable adjustment would consist in paying the beneficiary such an amount as the premiums actually paid would have insured at the true age. Where an Illinois insurer, which assumed the liability of an association through mistake treated the insured's age as being less than it really was, it could not reduce the amount of

recovery because the premiums were assessed on the incorrect age; neither Hurd's Rev. St. Ill. 1911, c. 73, § 208u, or the laws of the forum allowing a reduction in cases of the mistake of the insurer (*Lowenstein v. Old Colony Life Ins. Co.*, 166 S. W. 889, 179 Mo. App. 364).

For the construction of particular contract relating to deduction for misstatement of age, see *Central Trust Co. v. Fidelity Mut. Life Ins. Co.*, 45 Pa. Super. Ct. 313; *Erickson v. Ladies of the Macca-bees of the World*, 25 S. D. 183, 126 N. W. 259.

Sufficiency of the evidence to show a waiver of the provision as to misstatement of age, see *Metropolitan Life Ins. Co. v. Lennox*, 103 Tex. 133, 124 S. W. 623.

3286 (f). Policies usually provide for the deduction, from the amount payable in case of loss, of the amount of unpaid premiums or premium notes. This refers to the unpaid balance of the premiums for the current year, which are considered earned and due, or notes given for such premiums.

Union Cent. Life Ins. Co. v. Spinks, 84 S. W. 1160, 119 Ky. 261, 27 Ky. Law Rep. 325, 69 L. R. A. 264, 7 Ann. Cas. 913, modifying 119 Ky. 261, 83 S. W. 615, 26 Ky. Law Rep. 1205, 69 L. R. A. 264, 7 Ann. Cas. 913; *Kulberg v. National Council of Knights and Ladies of Security*, 145 N. W. 120, 124 Minn. 437; *Reiter v. National Council of Knights and Ladies of Security*, 154 N. W. 665, 131 Minn. 82; *Wayland v. Western Life Indemnity Co.*, 166 Mo. App. 221, 148 S. W. 626; *Southwestern Ins. Co. v. Woods Nat. Bank* (Tex. Civ. App.) 107 S. W. 114; *Laue v. Grand Fraternity*, 132 Tenn. 235, 177 S. W. 941, L. R. A. 1915F, 1056, Ann. Cas. 1917A, 376.

Where constitution of mutual benefit association, which assumed liability of another for benefits, provided for deduction from benefits on account of difference in rates, and certificate issued by another association, which in turn assumed liability, limited such liability to that of its predecessor, the last association was entitled to the deduction provided by the former. *Continental Beneficial Ass'n v. Arbogast* (Okla.) 163 Pac. 512.

Under a policy providing for the deduction of the balance of dues for the current year of insured's death, the current year commenced on October 1st, and not on January 1st, though insured, after paying a quarterly premium, thereafter paid annual premiums for one year from January 1st, and hence, insured having died in December, the company was entitled to deduct the balance of the premium

for the year ending the following October (Fidelity Mut. Life Ins. Co. v. Zapp [Tex. Civ. App.] 160 S. W. 139).

See, also, Northern Central Trust Co. v. Security Mut. Life Ins. Co., 58 Pa. Super. Ct. 425, for determination of the time when "current year" commenced for advance payment of yearly premiums.

In Sheppard v. Bankers' Union of the World, 77 Neb. 85, 108 N. W. 188, the constitution and by-laws of the society provided for the ascertainment of an amount due on certificate of a member at his death by deducting from its face value the monthly assessments from the death of the member to the expiration of his life expectancy with interest. The constitution and by-laws were changed, increasing the assessments by providing that such increase should be collected only from members thereafter joining, the old members to pay the old rate, and on their death the increase to be deducted from their certificate. It was held that, in settling with beneficiaries of a deceased member, the association could deduct the difference between the monthly assessments when the certificate was issued and the increased rate from the time it went into effect up to the date of the death of the member, but not for the balance of his life expectancy.

In Hoar v. Union Mut. Life Ins. Co., 118 App. Div. 416, 103 N. Y. Supp. 1059, the policy provided that, after two annual premiums had been paid, the policy became nonforfeitable for an amount equal to one-tenth of the insurance for each and any premium so paid, and that, if the amount of any annual premium or interest due on any note taken in part payment of a former annual premium was not fully paid as provided, then the policy should be forfeited, except as to annual payments for prior years which shall have been fully made, and that, if any note given in payment of any premium should not be paid according to its terms, the policy should become immediately void, except as respects prior payments. The policy called decedent the "insured," and the beneficiary the "assured," and declared that defendant might set off any demand against the "assured" arising in connection with the insurance against any claim for which it should be liable. Decedent gave notes in part payment for the first and subsequent premiums, until five premiums had accrued on one policy and four on another; none of such premiums ever having been paid. It was held that the clause relating to set-off did not limit the company's right to claims against the beneficiary only.

If the premium is payable in semiannual or quarterly install-

ments, and insured dies after payment of the first installment, the insurer is entitled to deduct the remaining installments for the year. Thus, in *Bracher v. Equitable Life Assur. Soc. of United States*, 186 N. Y. 62, 78 N. E. 714, 116 Am. St. Rep. 533, reversing 103 App. Div. 269, 92 N. Y. Supp. 1105, the policy, providing for semi-annual premium payments on the 9th day of February and August in every year during insured's life, contained a condition that, though "the contract is based on the receipt of premiums annually in advance," the premiums might be paid in semiannual or quarterly installments in advance, but that, if premiums were paid in semiannual installments, any installment which at the maturity of the contract was necessary to complete the full year premium should be deducted from the amount of the claim. The policy also declared that this provision should form a part of the contract. It was held that such provision was applicable to the policy in question, and that where insured died November 16, 1902, in the first half of the policy year, insurer was entitled to deduct the premium which would have become payable on February 9, 1903, had insured lived.

3287 (f). Policies may also provide for the deduction of all indebtedness due the company. Under such provision, a loan made to insured may be deducted (*Hay v. Meridian Life & Trust Co.*, 57 Ind. App. 536, 101 N. E. 651, 105 N. E. 919).

And see *Breard v. New York Life Ins. Co.*, 70 South. 799, 138 La. 774; *Ruane v. Manhattan Life Ins. Co.*, 194 Mo. App. 214, 186 S. W. 1188.

▲ life insurance policy issued under Rev. St. 1899, § 7897, was not affected by amendment of the section in 1903 (Laws 1903, p. 208) authorizing the deduction of all loans on the policy. *Liebing v. Mutual Life Ins. Co. of New York*, 269 Mo. 509, 191 S. W. 250.

▲ note, secured by a pledge of an endowment policy given when the policy was issued and authorizing deduction of amount due from the proceeds of the policy is not invalid as reducing the recovery by beneficiary below the amount guaranteed. *Cowles v. Provident Life Assur. Society of New York*, 170 N. C. 368, 87 S. E. 119.

It has been held in Missouri that the provision would include advances made to insured on a running account (*Webb v. Missouri State Life Ins. Co.*, 115 S. W. 481, 134 Mo. App. 576); and in Kentucky that the insurer was entitled to deduct from the proceeds of the policy any indebtedness of the insured, however incurred (*Citizens' Nat. Life Ins. Co. v. Rutherford*, 164 S. W. 107, 157 Ky. 820). On the other hand, in Illinois it is held that the provision is not

applicable to an indebtedness which arose with respect to matters outside of the policy (*Anson v. New York Life Ins. Co.*, 162 Ill. App. 505, affirmed 252 Ill. 369, 96 N. E. 846, 37 L. R. A. [N. S.] 555).

Where a privilege of electing to take paid-up insurance or extended insurance is guaranteed by the policy, and insured dies after default in the payment of a loan and premiums but before expiration of the election period, his executor, on proof of death, and demand, may recover the amount of extended insurance, less the amount of the loan (*McEachern v. New York Life Ins. Co.*, 15 Ga. App. 222, 82 S. E. 820).

Where an insurance company was not entitled to recover dividends alleged to have been wrongfully paid to policy holders, it could not charge such dividends as a liability against the policies on which they were paid (*Berryman v. Bankers' Life Ins. Co.*, 102 N. Y. Supp. 695, 117 App. Div. 730).

In an action on a life policy, it is not necessary to plead or prove payment or tender of a loan as security for which the policy was pledged to the insurer; any such debt being subject of counterclaim or set-off (*Palmer v. Mutual Life Ins. Co. of New York*, 114 Minn. 1, 130 N. W. 250, Ann. Cas. 1912B, 957).

2. EXTENT OF LIABILITY IN ACCIDENT AND HEALTH INSURANCE

3287-3288. (a) Death resulting from accident

3288 (a). To warrant a recovery on an accident policy insuring against death only when it results alone from an accidental injury, the plaintiff must establish two fundamental propositions: First, that there was an accidental injury; and, second, that it alone caused the death (*National Ass'n of Ry. Postal Clerks v. Scott*, 155 Fed. 92, 83 C. C. A. 652).

The word "disability" does not mean the same as the word "death," and is not ordinarily used to signify the same, and is defined as a want of competent power, strength, or physical ability, weakness, incapacity, impotence; and so a policy of insurance against loss on account of "temporary or permanent disability" without other words from which it was claimed liability for death was incurred, except a printed indorsement on the back stating it was a "limited health policy on the life" of insured, does not insure against death (*Hill v. Travelers' Ins. Co.*, 146 Iowa, 133, 124

N. W. 898, 28 L. R. A. [N. S.] 742). But it has been held that, under a policy providing an indemnity for injuries which should wholly disable insured, injuries causing loss of life must be taken as wholly disabling him (*National Life Ins. Co. of United States v. Fleming*, 96 Atl. 281, 127 Md. 179). And if an accident policy provided for the payment of a monthly sum if the insured were disabled, to the extent described, solely by external, violent, and accidental means, and also providing for a payment "if death should result solely from such injuries" the words "such injuries" have no regard to the extent of disablement that immediately followed the injury (*Driskell v. United States Health & Accident Ins. Co.*, 93 S. W. 880, 117 Mo. App. 362).

That death was caused by strain does not limit recovery of beneficiary to amount provided for as disability indemnity to assured in case of strain (*Massachusetts Bonding & Insurance Co. v. Duncan*, 179 S. W. 472, 166 Ky. 515). In case of immediately fatal accident, difference in insured's appearance just before and that of his body immediately thereafter is a sufficient visible mark on exterior of body of insured to prevent reduction of indemnity under provision that an injury of which there is no visible mark on body insurer's liability shall be only one-fifth of that otherwise payable (*Parker v. North American Acc. Ins. Co.*, 79 W. Va. 576, 92 S. E. 88, L. R. A. 1917D, 1174).

3288-3293. (b) Total disability

3288 (b). An accident policy requiring payment for total disability is not one of indemnity against loss of income, but against loss of capacity to work (*Bachman v. Travelers' Ins. Co.*, 78 N. H. 100, 97 Atl. 223). The insured is not entitled to recover for total disability except in the event of total loss of time (*Workingmen's Mut. Protective Ass'n v. Roos* [Ind. App.] 113 N. E. 760).

The term "total disability," as used in accident policies, means generally, such disability as prevents the insured from following his usual vocation in which he was engaged when he was injured.

Jennings v. Brotherhood Acc. Co., 44 Colo. 68, 96 Pac. 982, 18 L. R. A. (N. S.) 109, 130 Am. St. Rep. 109; *Foglesong v. Modern Brotherhood of America*, 97 S. W. 240, 121 Mo. App. 548; *Taylor v. Southern States Life Ins. Co.*, 106 S. C. 356, 91 S. E. 326, L. R. A. 1917C, 910; *North American Accident Ins. Co. v. Miller* (Tex. Civ. App.) 193 S. W. 750. But compare *Brotherhood of Railway Trainmen v. Dee* (Tex. Civ. App.) 108 S. W. 492, reversed in 101 Tex. 597, 111 S. W. 396.

If the policy entitles insured to recover if he becomes totally and permanently disabled from performing any kind of manual labor upon which he depends for a livelihood, insured can recover if he became totally and permanently disabled from following any business by which he might reasonably earn a livelihood (*Indiana Life Endowment Co. v. Reed*, 54 Ind. App. 450, 103 N. E. 77).

The contract in *Switchmen's Union of North America v. Colehouse*, 131 Ill. App. 349, affirmed in 227 Ill. 561, 81 N. E. 696, provided that "any member suffering by means of physical separation the loss of four fingers of one hand at or above the second joint or three fingers and thumb of one hand at or above the second joint, or the loss of one foot at or above the instep, or who shall become totally blind or totally deaf, shall be considered totally and permanently disabled and shall receive the full amount of his beneficiary certificate, likewise any physical disability that may permanently disqualify a member from performing the duties of a switchman, provided that such permanent disability occurred after he became a member of this department or was not caused improperly or through negligence." It was held that the words "totally and permanently disabled" were not limited to a total and permanent disablement arising from the injury specified, but referred to any injury which produced a total and permanent disablement. In *Knipp v. United Benev. Ass'n*, 45 Tex. Civ. App. 357, 101 S. W. 273, the by-laws of the society provided that, "whenever any member * * * shall become permanently and totally disabled from pursuing the ordinary vocations of life, * * * he shall be entitled to receive one-half of his certificate." One form of permanent total disability was declared to be "insanity so adjudged by the courts." It was held that, in order to recover on a certificate of membership on the ground of insanity, it must be such degree of insanity as would authorize an adjudication of the insured's mental status by the proper courts.

In *Supreme Council Catholic Benevolent Legion v. Grove*, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913, the constitution and laws of the association provided that one-half the amount of the face of the certificate may be paid to a member who shall become permanently disabled from attending to his business or gaining a livelihood, and be "destitute of means of support," when he arrives at the age of expectancy. It was held that a member whose only income was a pension of \$29.65 a month from the relief department of a railroad, which was a mere gratuity and might at any time

be discontinued, and of which he paid at least \$15 each month in assessments to the association, and who had no property, and at the age of 71 years was disabled from labor at his trade, was destitute of means of support, though his wife owned some productive real estate, since by Burns' Ann. St. 1908, § 7852, no lands of a married woman are liable for the debts of her husband, and by section 7853 a married woman may hold property, real or personal, under her own control the same as if unmarried, and a wife is not bound either at common law or by statute to support her husband.

3289 (b). In order to constitute total disability, it is not necessary that insured should be absolutely helpless. As was said in *Brotherhood of Locomotive Firemen and Enginemen v. Aday*, 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S.) 126, "total disability" is necessarily a relative matter, and must depend chiefly on the peculiar circumstances of each case, and on the nature of the occupation or employment, and the capabilities of the person injured. It does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation, but exists if he is unable to do any substantial portion of the work connected with his occupation. So insured was totally disabled within the provisions of a health insurance policy, he being disabled to attend to his business as publisher, though he was able to go to his office a few times to give instructions to his foreman (*Great Eastern Casualty Co. v. Robins*, 111 Ark. 607, 164 S. W. 750). And a traveling salesman may be totally disabled, though he continued a journey after his accident (*International Travelers' Ass'n v. Bosworth* [Tex. Civ. App.] 156 S. W. 346). And where a brakeman was insured against loss of time, the test of liability of the insurer is whether the loss of earning power on the part of the insured was total; and the mere fact that the insured made two runs as railroad brakeman after the accident, but was unable to do any of the work himself, and was compelled to employ a substitute on those runs, or the fact that he did trivial work on his farm during the time for which he made claim, which was not shown to have added to his income, and was nothing more than he would have done while remaining in his employment as brakeman, would not defeat his right to recover on the policy (*Wall v. Continental Casualty Co.*, 86 S. W. 491, 111 Mo. App. 504).

On the other hand, in *Ætna Life Ins. Co. v. Lasseter*, 153 Ala. 630, 45 South. 166, 15 L. R. A. (N. S.) 252, the policy provided for

a weekly indemnity for loss of time if through external, violent, and accidental means insured should be wholly disabled, or if not so wholly disabled he should be prevented from performing important daily duties pertaining to any productive occupation. The policy further provided that on disability due to unnecessary exposure to obvious risk, etc., or due to hernia, the limit of the company's liability should be one-fifth of the amount otherwise payable. Insured, a law and stock agent for a railway, received an injury which produced hernia. He was not so disabled as to prevent him from engaging in any productive occupation, nor was he prevented from the performance of one or more important daily duties pertaining to any productive occupation, and lost no time from his business. It was held that insured was not entitled to recover on the policy. Under policy providing for payment if insured was wholly disabled, he could not recover for loss of one hand which did not preclude his working at any occupation (*Buckner v. Jefferson Standard Life Ins. Co.*, 172 N. C. 762, 90 S. E. 897). The loss of one eye by accident is not total disability, within an accident policy providing that total disability shall be such as renders insured unable to work or earn money, where the evidence showed that insured was not wholly unable to earn money (*Whitton v. American Nat. Ins. Co.*, 17 Ga. App. 525, 87 S. E. 827). And to the same effect is *Holcomb v. Grand Lodge, Brotherhood of Railroad Trainmen*, 188 S. W. 885, 171 Ky. 843, L. R. A. 1917B, 107. Liability of the insurer ceases when insured became able to do any work to which he was fitted, though light, and not such as he had been doing (*Life & Casualty Ins. Co. of Tennessee v. Jones*, 112 Miss. 506, 73 South. 566).

3290 (b). "Total disability," within an accident policy, does not mean absolute physical inability to transact any kind of business pertaining to insured's occupation; and it exists, though he may be able to perform a few occasional or trivial acts, if he is not able to do any substantial portion of his work.

Brotherhood of Locomotive Firemen and Enginemen v. Aday, 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S.) 126; *Davis v. Midland Casualty Co.*, 190 Ill. App. 338; *Kelly v. Supreme Court I. O. F.*, 195 Ill. App. 501; *National Life & Accident Ins. Co. v. O'Brien's Ex'x*, 159 S. W. 1134, 155 Ky. 498; *Metropolitan Casualty Ins. Co. v. Cato*, 113 Miss. 283, 74 South. 114; *James v. United States Casualty Co.*, 113 Mo. App. 622, 88 S. W. 125; *Gross v. Commercial Casualty Ins. Co. of Newark* (N. J.) 101 Atl. 169; *Continental Casualty Co. v. Wynne*, 36 Okl. 325, 129 Pac. 16; *Hefner v. Fidelity & Casualty Co.* (Tex. Civ. App.) 160 S. W. 330; *Common-*

wealth Bonding & Casualty Ins. Co. v. Bryant (Tex. Civ. App.) 185 S. W. 979.

Total disability to perform the duties of insured's occupation, for which an accident policy provided certain indemnities, is not necessarily physical inability to perform the duties. Fidelity & Casualty Co. v. Joiner (Tex. Civ. App.) 178 S. W. 806.

A section in the constitution and by-laws of a benefit society, merely providing what in certain instances will be considered a total disability of a member, does not have the effect of excluding all liability for any other kind of permanent disability than that enumerated therein. Convery v. Brotherhood of Railroad Trainmen, 190 Ill. App. 479.

3291 (b). Where a policy provided for indemnity in case insured by reason of injury should be immediately and wholly disabled and prevented from prosecuting any and every kind of business, word "prosecution" indicated that the parties intended that the insured, in order to recover benefits, should be wholly disabled from doing that business which he had the ability to prosecute, and hence the term "disabled from prosecuting any and every kind of business" did not mean that insured, who was a day laborer and able to do only manual work, could not recover because he was not so disabled as to be prevented from performing mental activities if he had the requisite education (Industrial Mut. Indemnity Co. v. Hawkins, 94 Ark. 417, 127 S. W. 457, 29 L. R. A. [N. S.] 635, 21 Ann. Cas. 1029). Though one is able to direct to some extent his business of farming and does some work himself, yet he being wholly and permanently disabled from doing all the substantial and material acts necessary to be done, he is within the provision of a benefit certificate providing for payment to him, in case of his permanent and total disability, of half what would have been due in case of his death (Foglesong v. Modern Brotherhood of America, 97 S. W. 240, 121 Mo. App. 548). In Switchmen's Union of North America v. Colehouse, 227 Ill. 561, 81 N. E. 696, the laws of a fraternal order, organized for the protection of switchmen, provided that any member who should become totally blind should be considered permanently disabled and receive the full amount of his certificate, and likewise any physical disability that might permanently disqualify a member from performing the duties of a switchman. A member sustained the loss of an eye, which disabled him from continuing in his employment as switchman. It was held that he was totally disabled, and entitled to the full amount of his certificate. On the other hand, where a person whose

occupation was described as a section foreman on track work was insured for the sum of \$5 per week for a period not exceeding 104 weeks, during which, by reason of injuries caused by accident, he should be "wholly and continuously disabled from transacting any and every kind of business pertaining to his occupation," the insured was not entitled to recover for a period of time during which, though disabled by an injury from performing some of the manual labor connected with his occupation, he was employed in the same capacity as he had been before the injury, with the same number of men under him, and at the same salary (*Raburn v. Pennsylvania Casualty Co.*, 141 N. C. 425, 54 S. E. 283).

3293-3294. (c) Confinement to house

3293 (c). If the policy provides that insurer would pay plaintiff a specified sum per week for the period of disability during which he should be necessarily confined to the house, there can be no recovery unless it appears that there was not only disability, but necessary confinement to the house for a week (*Schneps v. Fidelity & Casualty Co. of New York* [Sup.] 101 N. Y. Supp. 106).

3294 (c). There seems to be a great difference of opinion as to the construction to be given to the terms "confinement in the house" and "confinement in bed." In some cases the courts have construed the terms rather liberally in favor of the insured, probably on the theory that the right of recovery depends on the existence of disability, and that the extent of confinement is merely an evidentiary, and not an ultimate, fact. Thus in *Great Eastern Casualty Co. v. Robins*, 111 Ark. 607, 164 S. W. 750, it was held that the insured, while treated in a sanatorium for tuberculosis, was "continuously confined in the house" within the provisions of a health insurance policy, though he went out for a short time daily on the advice of his physician. So, too, the plaintiff was entitled to recover on a policy providing for sick benefits while necessarily confined to the house, though the insured on the advice of his physician sat out of doors part of the time (*Metropolitan Plate Glass & Casualty Ins. Co. v. Hawes' Ex'x*, 149 S. W. 1110, 150 Ky. 52, 42 L. R. A. [N^o S.] 700). An insurer has been held liable under a policy providing for liability so long as insured was confined to bed, though insured was up at times to get fresh air, etc. (*Home Protective Ass'n v. Williams*, 151 S. W. 361, 151 Ky. 146, Ann. Cas. 1915A, 260, reversing judgment 150 S. W. 11, 150 Ky. 134). It has also been held that insured was "entirely and continuously confined to bed," within a

health policy, where he was confined to bed the greater portion of the time every day during his sickness, though at times he sat outside the house, was once driven a few blocks, and was in and out of bed many times (*Hays v. General Assembly American Benev. Ass'n*, 104 S. W. 1141, 127 Mo. App. 195). Similarly it has been held that the clause "necessarily confined to the house," in the case of a person taking treatment for tuberculosis, meant confined to any part of the house, either inside or upon the porches attached to it on the outside (*Dulany v. Fidelity & Casualty Co.*, 106 Md. 17, 66 Atl. 614). In *Ramsey v. General Accident, Fire & Life Ins. Co.*, 160 Mo. App. 236, 142 S. W. 763, a health policy provided for payment for the number of consecutive days after the first week that insured was necessarily and continuously confined within the house and regularly visited by a physician by reason of illness contracted after the policy had been in force for 30 days. Plaintiff was taken ill in a hotel while in Florida, where he was treated by a physician, and, after getting somewhat better, was transported in a Pullman car to his home, where it was determined that it was necessary for him to undergo an operation by surgeons in a nearby city. He was operated upon, attended by them daily by being taken to them in a carriage from his hotel near by and occasionally walking to them when able, and on being returned to his home was yet under the treatment of physicians and confined to his house, except occasionally when he sat on the porch, and was once driven to his place of business without taking any part in business matters. At another time he was taken to the physicians' office, and with these exceptions he was in the house and much of the time in bed. It was held that the policy did not require that plaintiff should be literally confined within the walls of his house all the time, and that he was necessarily and continuously confined within the house within the terms of the policy.

A policy providing for indemnity during the time insured is confined to his house by illness entitles him to indemnity, though he leaves the house under his physician's orders for the purpose of improving his health. *American Life & Acc. Ins. Co. v. Nirdlinger*, 113 Miss. 74, 73 South. 875; *American Assurance Co. v. Dickson*, 34 Ohio Cir. Ct. R. 313.

Insurer was liable on a special occupation policy though insured, on his physician's advice, left his bed and attempted to take exercise. *National Life & Accident Ins. Co. v. King*, 102 Miss. 470, 59 South. 807.

Where a "sickness indemnity" policy requires insured to be necessarily confined to house, there is no break in continuity of confinement,

where there is an exigency for a removal from one house to another, and insured is carried from one to other. *Rocci v. Massachusetts Acc. Co.*, 226 Mass. 545, 116 N. E. 477. But see *Rocci v. Massachusetts Acc. Co.*, 110 N. E. 972, 222 Mass. 336.

On the other hand, some courts have construed the terms strictly. Thus in *Bruzas v. Peerless Casualty Co.*, 111 Me. 308, 89 Atl. 199, it was held that, where a sick benefit policy required that insured must be necessarily and continuously confined within the house, proof that he was "wholly and continuously disabled, suffering from walking typhoid fever" during a period for which indemnity was asked, was insufficient. And again it has been held that under a benefit certificate providing that a disability, to constitute a claim for sickness, shall require absolute, necessary, continuous confinement to the house for not less than 14 days, etc., insured was not entitled to a benefit where, though he was totally disabled from laboring, he was not confined to his house, but was able to and did walk a quarter of a mile from his house to a barber shop (*Sawyer v. Masonic Protective Ass'n*, 73 Atl. 168, 75 N. H. 276). In *Bradshaw v. American Benev. Ass'n*, 112 Mo. App. 435, 87 S. W. 46, the plaintiff had an attack of neurasthenia, but, though wholly incapacitated to attend to any business, and sometimes confined to his bed, was not bedridden, but, on the contrary, when at his worst he took trips away from home, on the advice of his physician, for his health. It was held that he was not entitled to recover sick benefit under a policy agreeing to pay an indemnity for sickness incapacitating plaintiff from transacting any and every kind of business, when, as a result thereof, he was entirely and continuously "confined in bed" and under the charge of a physician. So, too, in *Lieberman v. Columbia Nat. Life Ins. Co.*, 47 Pa. Super. Ct. 276, the court went so far as to hold that where a policy of health insurance provides for indemnity when illness "necessarily confines the insured to the house," and "prevents the insured from performing any and every kind of duty pertaining to his occupation," the insured is not entitled to recover if it appears that during the time of his illness, for which he claimed indemnity, he was out of his house daily for a part of the time by advice of his physician, although he was incapable of performing any duty pertaining to his occupation. More reasonable was the decision in *Hakspacher v. Ætna Beneficial Ass'n*, 55 Pa. Super. Ct. 410, where it was held that where a certificate provides that sick benefits shall only be paid during the period that the member "is strictly, necessarily,

and continuously confined in the house and subject to the regular personal calls of a physician in good standing, and totally disabled and prevented from transacting any and every kind of business whereby the insured can obtain a livelihood," such benefits are not payable if the member was under treatment of a physician, and was totally disabled from transacting business, but made weekly trips from his seashore abode to his home in another state for treatment by a physician, going on Thursday and returning on Saturday.

One licensed to practice osteopathy under Public Health Law, art. 8, is a regularly qualified physician within a sick benefit policy, requiring the attendance of such a physician. *Anderson v. National Casualty Co.*, 135 N. Y. Supp. 889, 151 App. Div. 439.

3295-3296. (d) Continuing or permanent disability

3295 (d). Under an accident policy providing in one class for payment of a weekly indemnity if assured's injuries "shall immediately and continuously prevent the assured" from performing any kind of business, and in another clause provided for the payment of a specified sum for partial disability, it was not necessary to liability that the injury suffered should "immediately and continuously prevent the assured" from performing any kind of business (*Windle v. Empire State Surety Co.*, 151 Ill. App. 273). So, too, an insured in an accident policy stipulating for indemnity for total disability caused at once and continuously is entitled to recover the indemnity, notwithstanding partial activity after the accident (*Continental Casualty Co. v. Mathis*, 150 S. W. 507, 150 Ky. 477). Similarly, that an interruption of eight days, during which the insured made an effort to work at his usual occupation on advice of a physician, did not destroy the continuity of his disability so as to preclude further recovery (*Clark v. Pacific Mut. Life Ins. Co. of California*, 185 Ill. App. 580).

Attempt to work is not an interruption of continuous disability. *North American Accident Ins. Co. v. Miller* (Tex. Civ. App.) 193 S. W. 750; *American Liability Co. v. Bowman* (Ind. App.) 114 N. E. 992.

In *Continental Casualty Co. v. Wade*, 101 Tex. 102, 105 S. W. 35, reversing (Tex. Civ. App.) 99 S. W. 877, the insured was injured January 31, 1903. He stopped work because of the injury for 15 minutes, and then continued to work until March 25, 1903, and died April 6th following from the injury. An accident policy provided for a specified payment if insured should receive personal injury "at once resulting in continuous" total inability to engage in any

business, etc., necessarily resulting independently of all other causes in certain results including illness, loss of members and loss of life. It was held that while the disability occurred "at once," to wit, at the time the accident happened, there was no continuous total inability to engage in business from the time of the injury to insured's death, and that the insurer was therefore not liable.

One insured in an accident policy held not disabled by an injury continuously up to the time of his death; it conclusively appearing that he discharged the duties of his profession for some months after partial recovery from the injury. *Doyle v. New Jersey Fidelity & Plate Glass Ins. Co.*, 168 Ky. 789, 182 S. W. 944, Ann. Cas. 1917D, 851.

Policy construed only to require disability to perform duties to immediately follow accident, to entitle insured to weekly indemnity, and not loss of an eye to immediately follow, to entitle him to the lump sum therefor. *Claxton v. American Casualty Co.*, 158 Pac. 544, 30 Cal. App. 457.

3296-3301. (e) Extent of liability in general

3296 (e). Under a policy providing for payment for loss of life and in addition disability benefits provided for between the accident and death, the fact that insured collected a disability benefit would not prevent a recovery for the loss of his life (*Pacific Mut. Life Ins. Co. v. McCabe*, 162 S. W. 1136, 157 Ky. 270). A provision, in a benefit certificate, stipulating for the payment of weekly indemnity for accidental injury, and for a specified sum on the death of insured by accidental means, that an injury received by a member in an attempt to rob him shall be considered an accident, and insurer shall be liable for weekly indemnity, applies only to nonfatal injuries inflicted on a member in an attempt to rob, and not where the injury inflicted proves instantly fatal (*Travelers' Protective Ass'n of America v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991). Where a policy insured against accidental death, and decedent's injury, from which he died, occurred prior to an amendment increasing the indemnity from \$3,000 to \$4,000, the fact that decedent did not die until after such increase did not entitle plaintiff to the increased amount (*Railway Mail Ass'n v. Dent*, 213 Fed. 981, 130 C. C. A. 387, L. R. A. 1915A, 314, modifying judgment [C. C.] 183 Fed. 840). In *Depue v. Travelers' Ins. Co.* (C. C.) 166 Fed. 183, the policy insured D. according to a schedule providing that the principal sum for the year was \$5,000, with 5 per cent. increase annually for 10 years (afterwards changed to 20 per cent. annually for 5 years) un-

til it amounts to \$7,500, each consecutive full year's renewal to add 5 per cent. (afterwards 10 per cent.) to the principal sum of the first year, until such additions shall amount to 50 per cent., and thenceforth, so long as the policy is in force, the insurance shall be for the original sums plus the accumulations. Attached to the policy was a rider insuring H. "as specified in the following schedule" to the amount of the original principal sum of the policy to which the supplement was attached. It was held that the limit of indemnity recoverable for the accidental death of H. was \$5,000.

For a construction of conflicting clauses as to the amount to be paid in event of death, see *Armstrong v. West Coast Life Ins. Co.*, 41 Utah, 112, 124 Pac. 518.

3297 (e). Under an accident policy binding insurer to indemnify insured or his beneficiary as therein scheduled, if insured should receive personal bodily injury effected directly and independently of all other causes through external, violent, and purely accidental means, and which should cause at once total and continuous inability to engage in any labor or occupation, and providing that, if within 90 days from the accident any one of the losses scheduled should result necessarily and solely from such injury, insurer would pay as therein designated, an accidental injury causing the death of insured within 90 days thereafter entitles the beneficiary to recover on the policy, whether total disability followed the injury "at once" or not; the words "such injury" referring back to the injury mentioned in the first clause for the purpose of identification, and not having the effect of uniting both sentences, so as to make the provision when considered as a whole mean that, before a beneficiary could recover for the death of insured, there must have been an accidental injury resulting both in immediate and total inability and loss of life (*Continental Casualty Co. v. Colvin*, 77 Kan. 561, 95 Pac. 565).

A clause in an accident insurance policy limiting indemnity in case of neuritis held not to limit indemnity during a period of total disability caused solely by the accident, though the insured was also suffering from neuritis during that period (*American Liability Co. v. Bowman* [Ind. App.] 114 N. E. 992). A clause, limiting liability "if the member shall carry other accident insurance," covers life of policy, and if, without notice to the insurer, the insured takes out another policy, the beneficiary can recover only the proportional value of the policy (*Dustin v. Interstate Business Men's Acc. Ass'n*, 37 S. D. 635, 159 N. W. 395, L. R. A. 1917B, 319). Under an in-

demnity policy covering only injuries "received within the United States (not including its parts beyond the seas), Mexico and Canada," the Canal Zone on the Isthmus of Panama is "beyond the seas" within the meaning of the policy (*Currie v. Continental Casualty Co.*, 147 Iowa, 281, 126 N. W. 164, 140 Am. St. Rep. 300).

Accident insurance being a matter of private contract, Industrial Insurance Law, providing for payment of fixed compensation to injured employes, will not affect their rights to recover on accident policies. *Ross v. Erickson Const. Co.*, 89 Wash. 634, 155 Pac. 153, L. R. A. 1916F, 319.

3298 (e). Under a policy stipulating for a monthly indemnity based on the money value of his time, the insured is entitled to recover an indemnity to the amount of his wages only (*Reddick v. Northern Acc. Co.*, 180 Mo. App. 277, 165 S. W. 354). Under a sick benefit policy, providing that weekly benefits for sickness would be paid only when insured had been confined strictly to his bed for seven consecutive days, but not expressly excepting the first week, the insured was entitled to benefits for that week (*National Life & Accident Ins. Co. v. King*, 102 Miss. 470, 59 South. 807). If the policy provides for indemnity for partial loss of time in one-fourth the amount allowed for total disability, not exceeding 16 consecutive weeks, recovery for partial disability is limited to 16 weeks (*Hastings v. Bankers' Acc. Ins. Co.*, 140 Iowa, 626, 119 N. W. 79). In *Courtney v. Fidelity Mut. Aid Ass'n*, 120 Mo. App. 110, 101 S. W. 1098, denying rehearing of 120 Mo. App. 110, 94 S. W. 768, one of the by-laws of a health insurance organization limited the payment of sick benefits to 10 weeks, and another article declared that, if the disability was prolonged beyond that period, proof must be furnished within 30 days from the expiration of the 10 weeks from the beginning of the illness, and that any medical adviser or authorized representative of the association should be entitled to examine the person of the insured and question him, and that, unless due notice should have been given, so as to permit such examination, the association should be freed from all liability. It was held that such provision did not extend the limit of liability under the policy to a period longer than 10 weeks.

Where insurer in an accident policy had a by-law stipulating that weekly benefits did not mature until 90 days after the filing of satisfactory proofs, and it admitted the waiver of proofs of injury, the period for the payment of the benefits must be computed from the date of the waiver. *McClure v. Great Western Acc. Ass'n*, 141 Iowa, 350, 118 N. W. 269.

Construction of particular contracts: *Carland v. General Accident, Fire & Life Assur. Corp.*, 183 S. W. 965, 122 Ark. 468; *National Life Ins. Co. v. Jackson*, 89 S. E. 633, 18 Ga. App. 494; *Brix v. American Fidelity Co. of Montpelier, Vt.*, 171 Mo. App. 518, 153 S. W. 789; *Taylor v. Loyal Protective Ins. Co. (Mo. App.)* 194 S. W. 1055; *American Nat. Ins. Co. v. Roberts (Tex. Civ. App.)* 146 S. W. 326; *Rieden v. Brotherhood of Railroad Trainmen (Tex. Civ. App.)* 184 S. W. 689.

3299 (e). A health policy providing for indemnity for disability from illness imposes on insurer liability for each disability from illness, though produced by the same cause (*Bolton v. Inter-Ocean Life & Casualty Co.*, 18 Mo. App. 167, 172 S. W. 1187). The fact that on March 13th insurer in a health policy settled with insured for sickness ending March 10th, and the policy provided that the insurer should not be liable for "any second claim for any sickness" until after 30 days after the payment of a previous claim, does not relieve the insurer from liability for sickness, not traceable to the former sickness and commencing March 16th (*Hays v. General Assembly American Benev. Ass'n*, 104 S. W. 1141, 127 Mo. App. 195). But no indemnity should be allowed an insured on account of an extension of the injury occasioned by his negligence to observe directions of his physician (*Maryland Casualty Co. v. Chew*, 122 S. W. 642, 92 Ark. 276).

Insured, under "sickness indemnity" policy which gave insurer "the right and opportunity to examine insured * * * when and so often as it requires," could not recover for time after he took ship for Italy. *Rocci v. Massachusetts Acc. Co.*, 226 Mass. 545, 116 N. E. 477.

3301 (e). Where a by-law of an association provides that sick benefits should be payable only when the physician of the lodge and sick committee represents a member sick and unable to work, a member of the lodge could not recover for sick benefits where the physician of the lodge refused to make the required certificate, but certified to the contrary (*Wexner v. Gruenapple*, 111 N. Y. Supp. 280, 127 App. Div. 179).

The nomenclature used in a policy of accident insurance does not affect the substance of the contract, nor change its legal effect; so that the fact that the policy calls its payments for loss of time "indemnity" does not make the policy a mere indemnity contract, precluding recovery on it where the insured has recovered from the tort-feasor. *Suttles v. Railway Mail Ass'n*, 141 N. Y. Supp. 1024, 156 App. Div. 435.

3301-3303. (f) Liability for particular injuries

3301 (f). Where the constitution of a beneficial association provides for the payment of a benefit in case the beneficiary by accident lose one hand by amputation at or above the wrist, and the certificate of which the constitution is made a part provides for benefit in case the beneficiary by accident lose a hand, the beneficiary in order to recover must bring himself within the constitutional provision (*The Chevaliers v. Shearer*, 27 Ohio Cir. Ct. R. 509). Partial indemnity being provided for in event of "the loss of a hand at or above the wrist," recovery will not be sustained where the injury consisted of only the partial loss of a hand notwithstanding the injury may be severe (*Stoner v. Yeomen of America*, 160 Ill. App. 432). So, too, it has been held that where the policy provided a payment for total disability, defined as follows: "Suffering by means of a physical separation of the loss of four fingers of one hand at or above the third joint," separation of three fingers of the hand above the third joint, and an injury to the other finger which impaired to the extent of 50 per cent. its usefulness, but did not warrant a physical separation of any part of such finger, did not entitle insured to payment as for a total disability (*Mady v. Switchmen's Union of North America*, 116 Minn. 147, 133 N. W. 472).

Where the policy provided for indemnity for total and partial disability and for indemnity for specific total losses, insured, who suffered loss of hand, was entitled to indemnity for total and partial disability, where it exceeded indemnity for loss of hand (*Lemaitre v. National Casualty Co.*, 195 Mo. App. 599, 186 S. W. 964). Where an accident policy provides an indemnity for loss of either hand, by complete severance at or above the wrist, insured cannot recover, where he lost most of his hand, but a small portion, which was of practically no use, remained below the wrist (*Continental Casualty Co. v. Bows*, 72 Fla. 17, 72 South. 278). Where the policy provided an indemnity for loss of one hand and declared that loss of the member meant a loss by severance at or above the wrist joint, the insured cannot recover the indemnity for the loss of all of his hand, except the little finger, which became paralyzed (*Wiest v. United States Health & Accident Ins. Co. of Saginaw, Mich.*, 186 Mo. App. 22, 171 S. W. 570). Similarly, it has been held that under a regulation of a fraternal benefit association that a member should recover the full amount of his certificate on the amputation or severance of an entire hand at or above wrist joint, a member was not entitled to thus recover where only a part of his hand was amputat-

ed though the hand was permanently disabled (*Brotherhood of R. Trainmen v. Walsh*, 89 Ohio St. 15, 103 N. E. 759). On the other hand, in *Moore v. Aetna Life Ins. Co.*, 75 Or. 47, 146 Pac. 151, L. R. A. 1915D, 264, Ann. Cas. 1917B, 1005, it was held that a policy stipulating for payment for loss of a hand by removal at or above the wrist, makes insurer liable where insured's hand, by reason of an accident, was amputated, except a part which was practically worthless. Severance of thumb and finger two-eighths and three-eighths of an inch, respectively, below articulation of metacarpophalangeal joints, does not entitle insured to recover for loss of such members at or above such joints (*Newman v. Standard Acc. Ins. Co.*, 192 Mo. App. 159, 177 S. W. 803).

The permanent paralysis of a hand resulting from a cut on the arm brings the plaintiff suing on the policy within the term "permanent paralysis of either extremities" as expressed in the constitution of the association. *Brotherhood of Locomotive Firemen & Enginemen v. Aday*, 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S.) 126.

In *Anderson v. Aetna Life Ins. Co.*, 75 N. H. 375, 74 Atl. 1051, the policy insured against loss of life, limbs, sight, or time in the sum of \$5,000, and paragraph 1 prescribed the conditions under which the policy was to become a claim. Paragraph 3 made the full principal sum payable in lieu of weekly indemnity if the injuries resulted in loss of sight of both eyes, loss of both hands above the wrist, of both feet above the ankles, or of one hand and one foot. Paragraph 5 provided that if the injuries resulted in the loss of the left hand at or above the wrist or of either foot above the ankle, one-fifth of the principal sum should be payable in lieu of weekly indemnity. Paragraph 7 required payment of one-eighth of the principal sum if such injuries resulted in total disability, which was defined as immediate, continuous, and entire disablement from prosecuting any kind of business pertaining to insured's occupation for 200 weeks, an indemnity of \$25 per week should be payable for 200 weeks if the total disability existed during that period, and also provided for weekly indemnity of \$10 for a partial disability of 26 weeks. Paragraph 21 provided that in no event would a claim for weekly indemnity be valid if a valid claim for any of the amounts provided for specified injuries based upon the same accident and resulting injuries. Insured's injuries caused the loss of his left arm at the middle third, the thumb and two fingers of his right hand, fracture of the nose and two ribs, injuries to the head, and scalding of the back, totally disabling him for the full period of 200 weeks.

It was held, construing the policy in view of the principle that an insurance contract is one of indemnity and of the general purposes of the policy, that plaintiff could recover the full weekly indemnity of \$25 provided for total disability, and was not limited to the sum fixed for the loss of the left hand, the total disability provided in paragraph 7 being a distinct loss from that of the left hand provided for in paragraph 5, though the loss of the hand was one of the injuries contributing to total disability, and paragraph 21 only limited recovery to the amounts provided by paragraphs 3 to 6, where the loss was covered by those paragraphs.

A holder of a benefit certificate stipulating for weekly benefits for loss of time resulting from injuries through violent means leaving external marks, or a specified sum in lieu of weekly benefits for the loss of a hand or foot, who sustained injuries through violent means leaving external marks causing a loss of time, and who also sustained the loss of a hand, is entitled to elect to take the weekly benefits instead of the specified sum for the loss of a hand. *Fricke v. United States Indemnity Soc.*, 61 Atl. 431, 78 Conn. 188.

A policy entitling the insured to one-fourth of his benefit if he should "lose a foot," does not mean that there must be a severance of the foot from the body, but means a permanent loss of use of the foot; the language "loss of a foot" in common parlance meaning the loss of the use of that member (*Modern Order of Prætorians v. Taylor*, 60 Tex. Civ. App. 217, 127 S. W. 260).

3302 (f). In *Employers' Liability Assur. Corp. v. Morrow*, 143 Fed. 750, 74 C. C. A. 640, the policy, which was for the principal sum of \$10,000, provided, by clause C, for the payment of one-half the principal sum in case of an injury resulting in the loss of an arm or leg and on surrender of the policy. Clause E provided for the payment of a fixed weekly indemnity in case of a nonfatal injury resulting in total disability, and clause F for a smaller indemnity in case of a lesser injury; the amount depending on the extent of the disability. Clause G provided that, in case of an injury received while insured was riding as a passenger in any public conveyance, the amount payable under any of the preceding clauses should be doubled. Clause M provided that no indemnity should be paid in excess of the value of the insured's time, and that if he carried concurrent insurance "making an aggregate weekly indemnity in excess of the money value of his time, then (except in case of a claim consequent on the death of the assured or loss of the sight of both eyes or the loss of two entire limbs), this corporation shall be liable for only such proportion of this insurance for weekly

indemnity, fixed indemnity or otherwise, as such money value of his time shall bear to the aggregate of the weekly indemnity of the entire insurance so held by him." Plaintiff, while traveling as a passenger upon a public conveyance, sustained an accidental injury through which he suffered the loss of an arm, being at the time the holder of a policy in another company similar in terms, except as to clause M. It was held that he was entitled to recover the sum of \$10,000 under clauses C and G without regard to the value of his time, and that clause M had no application to the case, but applied only to cases where weekly indemnity, "fixed or otherwise," becomes payable under clause E or F.

"Loss of one arm" in an insurance policy covered total disability of an arm by an injury causing paralysis. *Eminent Household of Columbian Woodmen v. Hancock* (Tex. Civ. App.) 174 S. W. 657.

A policy insuring against an accidental breaking of a "leg or arm" covers fractures of bones of the limbs whether in the hands or feet or in the upper or central divisions of the limbs, including a fracture of the heel bone, os calcis (*Rogers v. Modern Brotherhood of America*, 111 S. W. 518, 131 Mo. App. 353).

Benefit certificate, providing indemnity for broken arm, covers what was claimed to be a fracture, though defendant claimed there was no break, because the parts of the broken bone were not separated. *Southern Woodmen v. Morris*, 14 Ala. App. 464, 70 South. 952.

There can be no recovery for the loss of one eye, on policy providing for the payment of the whole amount for "total permanent disability" and one-half for the "loss of the sight of both eyes" (*Phillippy v. The Homesteaders*, 140 Iowa, 562, 118 N. W. 880). A provision that, for loss of entire sight of the eye, the insured shall receive not exceeding \$1,000, the word "entire" does not mean total blindness; but it is sufficient if the insured had practically lost the entire sight of the eye (*International Travelers' Ass'n v. Rogers* [Tex. Civ. App.] 163 S. W. 421).

Where there is no ability to see and recognize objects, the entire sight of an eye will be deemed lost, within a policy providing indemnity for such loss, though light can be distinguished from darkness (*Murray v. Ætna Life Ins. Co.* [D. C.] 243 Fed. 285). Where loss of entire sight of eye occurred, recovery could not be diminished in accordance with some pro rata share of insured's actual weekly earnings proportionate to weekly indemnity provided (*Stillman v. Ætna Life Ins. Co.* [D. C.] 240 Fed. 462). Insured's recovery is not limited to one-third of the principal sum named in the policy to

be paid in lieu of other indemnity for loss of an eye, where it appeared that he also suffered total loss of time and was rendered incapable of engaging in any other business or labor, for which he was entitled to recover under another clause in the policy (*Rabb v. North American Acc. Ins. Co.*, 154 Pac. 493, 28 Idaho, 321).

3303 (f). In *Hastings v. Bankers' Acc. Ins. Co.*, 140 Iowa, 626, 119 N. W. 79, a clause in the policy required insurer to pay for any accidental injury named in specified schedules; provided that indemnity shall not be paid for more than one such injury resulting from one accident, "and shall be in lieu of any other indemnity provided in this clause"; and provided for an indemnity for nonfatal injuries other than those described in the schedules. It was held that the quoted provision applied to the entire clause, and not merely to the specified schedules; and hence insured cannot recover under the schedules for fractured ribs and under the other provisions for a fractured sternum; and it was also held that a broken sternum was not a "complication" within an accident policy provision for indemnity for fractured "ribs with complications." In *Fidelity & Casualty Co. of New York v. Hart*, 142 Ky. 25, 133 S. W. 996, the policy provided that if the assured should contract any disease which, within a year, should result in permanent paralysis of one hand and one foot, and on account thereof assured should be permanently unable to engage in any work or occupation for wages or profit, insurer would pay \$2,500 in lieu of other indemnity on the filing of satisfactory proofs of the continuance for 52 consecutive weeks of such paralysis. Another paragraph required that written notice as early as might be reasonably possible be given insurer of the disability for which any claim was to be made, with full particulars, etc., and that affirmative preliminary proof of paralysis must also be furnished within 14 months of the beginning of total paralysis. It was held that, to entitle assured to a benefit for paralysis, it must have caused him to entirely lose the use of one hand and one foot, and have rendered him permanently unable to engage in any work or occupation for wages or profit, and such conditions must have continued for at least 52 consecutive weeks; but that there need not have been total paralysis of the limbs mentioned in the beginning so long as within a period of 52 weeks from the beginning it resulted in such total paralysis, and that condition became permanent.

"Infection," as used in an accident policy, providing that, where loss is occasioned or contributed to in any way by erysipelas, blood

poisoning, or infection, then in cases designated the amount payable shall be one-fourth of the amount which otherwise would be payable, relates to external injuries, and does not include internal inflammations, where pus is formed by the presence of pus germs (*Continental Casualty Co. v. Colvin*, 77 Kan. 561, 95 Pac. 565). Where a health policy specified an indemnity for confining illness, and a subsequent clause provided for one-fifth of the specified benefits for disability from paralysis and other specified diseases, the clauses were both effective and not repugnant; the latter being in the nature of an exception or qualification of the former (*General Acc. Ins. Co. v. Hayes*, 52 Tex. Civ. App. 272, 113 S. W. 990). A limitation of liability as to "disability, due to either accident or illness, resulting wholly or in part directly or indirectly, from * * * paralysis," applies where a disability results from paralysis, but not where an accident results in paralysis (*Foster v. North American Acc. Ins. Co.*, 176 Iowa, 399, 158 N. W. 401). A health and accident policy providing in the health portion for an indemnity for surgeon's fees for an operation for hernia must be construed to classify hernia as a disease or the result thereof, and not the result of an accident, and to estop the insurer to claim that it was the result of an accident (*Hilts v. United States Casualty Co.*, 176 Mo. App. 635, 159 S. W. 771).

Provision of accident insurance policy that only one-quarter of its face should be payable for an accident resulting in hernia is valid.
Keen v. Continental Casualty Co., 175 Iowa, 513, 154 N. W. 409.

In *Anderson v. Ætna Life Ins. Co.*, 75 N. H. 375, 74 Atl. 1051, the policy provided that if the injuries necessitated a surgical operation within a certain date, insured should be paid, in addition to the indemnity provided, the sum indicated for such operation in the schedule, provided that not more than one amount should be payable for one or more operations performed as the result of one accident, and the attached schedule contained a long list of the amounts payable for different operations, varying according to the operation. It was held that the company's liability was not limited to payment of only one of the sums named in the schedule for an operation, if several operations were necessitated by the same accident.

Where plaintiff took out a policy insuring him against illness contracted and begun after the policy had been in continuous force for 30 consecutive days, he could not recover for an attack of

chronic tubercular periostitis, or consumption of the thigh bone, with which he had been afflicted for many months (United States Health & Accident Co. v. Jolly, 101 S. W. 1179, 31 Ky. Law Rep. 232).

3303-3306. (g) Extent of liability as dependent on cause of injury or death

3303 (g). Accident policies usually contain provisions limiting the amount of the indemnity if the disability or death is caused by certain injuries. Thus the policy may provide for payment of a certain sum in case of death from external, violent and accidental means, resulting in bodily injuries causing death, and provide for recovery of one-fifth of such sum if death follows bodily injuries of which there exists no external or visible mark upon the body of contusion or wound sufficient to cause death. Such a provision does not mean that any external and visible marks of contusion or wounds upon the body shall be sufficient to show that death resulted from the injury, but the evidence must show that the wound is of itself sufficient to cause death (*Ætna Life Ins. Co. v. Bethel*, 140 Ky. 609, 131 S. W. 523). The clause, "unnecessary exposure to obvious risk or danger," as used in an accident policy limiting recovery in case of death from such cause to two-fifths of the amount of the policy, means gross or wanton negligence (*Walter v. People's Health & Accident Ins. Co.*, 173 Mich. 581, 139 N. W. 865). In *McClure v. Great Western Acc. Ass'n*, 133 Iowa, 224, 110 N. W. 466, 8 L. R. A. (N. S.) 970, 119 Am. St. Rep. 598, 12 Ann. Cas. 41, it appeared that double railroad tracks 10 feet apart were used for the running of trains in opposite directions, and when trains passed each other the space between them was 4 feet. A person walking between the tracks got out of the way of an approaching train, and was struck by an engine running on the other track. It was held that the injuries were received while he was on the roadbed of a railroad within an accident policy limiting the liability of the insurer for injuries received while the insured was on the roadbed of a railroad.

A provision in an insurance policy limiting the amount of recovery if the insured is under the influence of intoxicants or narcotics when injured is not unreasonable. *Furry's Adm'r v. General Acc. Ins. Co.*, 68 Atl. 655, 80 Vt. 526, 15 L. R. A. (N. S.) 206, 130 Am. St. Rep. 1012, 13 Ann. Cas. 515.

A provision in an accident policy, providing for payment of only one-fifth the face of the policy for death by taking poison, does not

cut down the amount of insurance, but is a mere clause for payment of a stipulated sum on happening of a certain event. *Scales v. National Life & Accident Ins. Co.* (Mo. App.) 186 S. W. 948.

Provision of accident policy, limiting extent of liability for injuries inflicted by insured or received by him while insane, construed as inapplicable to the facts. *National Life & Accident Ins. Co. v. Singleton*, 193 Ala. 84, 69 South. 80.

Policies also provide sometimes for a réduction of indemnity in case of injury resulting from disease in any form. Under such a provision the term "disease" denotes a malady, affection, sickness, illness, or disorder entirely apart from a wound or hurt producing an injury or immediate functional disturbance. So it was held in *Kenny v. Bankers' Accident Ins. Co. of Des Moines*, 136 Iowa, 140, 113 N. W. 566, that where plaintiff, while operating a mower, suffered a personal bodily injury which left an external mark visible to the eye and developed into traumatic neuritis, such affection was not a disease within policy providing a lesser liability for injuries of which there was no external mark visible to the eye or accidental injuries resulting from disease in any form. In *Holmes v. Continental Casualty Co.*, 102 Me. 287, 65 Atl. 385, the policy contained a provision for illness indemnity at the rate of \$30 per month, for the time the insured was confined in his house and visited by a legally qualified physician. The policy also contained a clause that, in case of illness from rheumatism and other diseases named, the limit of the company's liability should be one-tenth of the amount otherwise payable under the policy. Plaintiff was sick with rheumatic fever, and was entitled to recover \$40, unless that amount was reduced to one-tenth thereof by reason of the provision quoted. It was held, that the disease was one form of rheumatism, and must be considered to have been included within the meaning of the word. Where the policy provided for one-tenth of full indemnity where the injury resulted in loss of life, limb, sight, or time from hernia, insured was only entitled to such proportion of the indemnity in case he lost time wholly or in part from hernia accidentally produced at the time of the injury (*Kelsey v. Continental Casualty Co.*, 108 N. W. 221, 131 Iowa, 207, 8 L. R. A. [N. S.] 1014).

Blood poisoning, not caused by any disease or bodily infirmity of an insured at the time of an injury, but resulting solely from the accident, is not a contributory cause of his death therefrom, authorizing only one-half recovery. *New Amsterdam Casualty Co. v. Mays*, 43 App. D. C. 84.

An accident policy limiting liability for hernia after the policy has been in force for 60 days is not a limitation with reference to hernia occurring before the policy had been in force for that length of time, in which case the insurer was liable for full indemnity. *Bates v. German Commercial Acc. Co.*, 87 Vt. 128, 88 Atl. 532, Ann. Cas. 1916C, 447.

A clause in a health policy limiting the company's liability in the event of disability or illness resulting wholly or in part from chronic diseases referred to chronic diseases arising after the application was made (*Strickland v. Peerless Casualty Co.*, 90 Atl. 974, 112 Me. 100). In *Jennings v. Brotherhood Acc. Co.*, 44 Colo. 68, 96 Pac. 982, 18 L. R. A. (N. S.) 109, 130 Am. St. Rep. 109, a policy for the payment of sick benefits stipulated that no disability should constitute a claim for indemnity on account of any sickness the nature of which was incapable of direct and positive proof. Insured thought that his illness was caused by a cold, and he supposed that he took another cold. His physician stated that insured had contracted a cold which had settled on the vocal cords, and brought about a condition of chronic laryngitis, but, on account of the fact that he had lost his strength, and was unable to take even moderate exercise, he thought there was something else ailing him. Insured was ill and totally incapacitated for performing labor. It was held that insured satisfied the requirements of the stipulation, and was entitled to the sick benefits.

Liability of insurer for stipulated indemnity for 78 weeks' disability is not defeated by a provision limiting liability to 4 weeks' indemnity in case of illness caused by Bright's disease, where it did not appear that insured had Bright's disease for more than four weeks prior to his death. *National Life & Accident Ins. Co. v. O'Brien's Ex'x*, 159 S. W. 1184, 155 Ky. 498.

Where the policy provided for a reduction of the indemnity for certain losses, including death where the "accidental injury" resulted from an intentional act, the word "injury" includes fatal injuries (*Continental Casualty Co. v. Morris*, 46 Tex. Civ. App. 394, 102 S. W. 773). So a clause reducing the indemnity if injury resulted from intentional act applies, where insured was intentionally struck a slight blow without intent to kill, and fell, striking his head on the pavement and fatally fracturing his skull (*Ryan v. Continental Casualty Co.*, 94 Neb. 35, 142 N. W. 288, 48 L. R. A. [N. S.] 524, Ann. Cas. 1914C, 1234). It also applies where insured was assassinated (*General Accident, Fire & Life Assur. Corp. v. Sted-*

man [Tex. Civ. App.] 153 S. W. 692). In *Bader v. New Amsterdam Casualty Co.*, 102 Minn. 186, 112 N. W. 1065, 120 Am. St. Rep. 613, the policy, under the title "Special Indemnities," provided that it did not exclude indemnity for loss by accident produced by shooting and other enumerated causes. Some of these causes were sports involving conscious participation on the part of the assured, others excluded such participation. The policy also provided that, in case of loss covered by this title, the company should pay one-half of the ordinary indemnity. The insured was shot by a burglar and died. It was held that the beneficiary was entitled to recover one-half, and not the whole amount, of the ordinary accident indemnity.

3304 (g). A policy of accident insurance issued after the passage of Rev. St. Mo. 1879, § 5982, providing that in all suits on policies of insurance on life it shall be no defense that the insured committed suicide, unless it be shown that he contemplated suicide, when applying for the policy, cannot lawfully restrict the liability of the insurance company to one-tenth of the principal sum insured, in the event of suicide not contemplated by the insured at the time application was made for the policy (*Whitfield v. Aetna Life Ins. Co.*, 27 Sup. Ct. 578, 205 U. S. 489, 51 L. Ed. 895, reversing 144 Fed. 356, 75 C. C. A. 358).

Where a policy provides for payment of double indemnity if injuries are sustained while riding as a passenger in any railway passenger car, double indemnity is properly recovered where the insured, while a passenger, accidentally fell from a moving car, although not attempting to enter or leave the same, and in consequence met his death on the roadbed (*Barber v. Travelers' Ins. Co.*, 165 Ill. App. 239). Insured, when on platform preparatory to getting off car was passenger within provision for double indemnity for injury while riding as passenger (*Gillis v. Duluth Casualty Ass'n*, 133 Minn. 238, 158 N. W. 252). And insured, approaching a standing car with its doors open with intent to board it as a passenger, was a "passenger" (*Fay v. Aetna Life Ins. Co.*, 268 Mo. 373, 187 S. W. 861). On the other hand, in *Anable v. Fidelity & Casualty Co. of New York*, 73 N. J. Law, 320, 63 Atl. 92, affirmed in 74 N. J. Law, 686, 65 Atl. 1117, the policy provided for double indemnification if insured was killed while a passenger in a public conveyance propelled by steam. He left a train and went to a newsstand and bought a paper, and when the train started, while it was moving, ran towards it, and missed the hand rail of one car, and,

failing to retain his hold on the front platform of the last car, fell and was killed. It was held that he was not riding as a passenger in or on a public conveyance. So in *Banta v. Continental Casualty Co.*, 134 Mo. App. 222, 113 S. W. 1140, it was held that a policy providing for double indemnity where an injury is sustained while insured is on any car as a passenger, and stipulating that double liability shall not be payable for injuries sustained while getting on or off any car, does not impose double liability for injuries sustained by insured while jumping from a trolley car in imminent danger of collision with a vehicle.

In *Moore v. General Accident, Fire & Light Ins. Corp.*, 158 N. C. 305, 73 S. E. 1002, the policy in one clause provided for the payment of a certain sum monthly for twenty-four weeks for injuries received as a passenger, and in another clause limited payments for disability due to or resulting in paralysis to four weeks in any one year. The court held that, where paralysis resulted from injuries received while riding as a passenger, the company was liable for twenty-four payments.

It is sufficient to bring a case within a clause of an accident policy subjecting the company to double liability for an injury to insured while "riding as a passenger * * * in an elevator provided for passenger service," if at the time of an injury insured had so far entered an elevator as to be within it in common parlance, although some part of his body, as his foot, may have protruded (*Ætna Life Ins. Co. v. Davis*, 191 Fed. 343, 112 C. C. A. 87). In *Wilmarth v. Pacific Mut. Life Ins. Co. of California*, 168 Cal. 536, 143 Pac. 780, Ann. Cas. 1915B, 1120, the policy contained a clause providing double indemnity for injuries received while riding as a passenger in a passenger elevator. It was held that the term "passenger elevator" included an elevator used for passengers though also for freight, and though not of any particular form; also that the insurer was liable for the double indemnity, where insured sustained injuries from which he died while alighting from a moving elevator; and where the policy provided double indemnity for injuries while in passenger elevator if moving cause of death originated in elevator, the double indemnity was recoverable though death was caused by a subsequent fall down the elevator shaft.

As the platform of a subway station is not a public conveyance, it was error to permit recovery of double indemnity upon theory that injury was sustained by insured "while in or on a public conveyance, including the platform, steps, or running board thereof,

provided by a public carrier for passenger service" (*Weil v. Globe Indemnity Co.*, 179 App. Div. 166, 166 N.Y. Supp. 225). Insured, injured while alighting from taxicab, which he had engaged for certain trip, could not recover double indemnity, under policy providing therefor in case of injury on public conveyance provided by common carrier for passenger service (*Anderson v. Fidelity & Casualty Co. of New York*, 100 Misc. Rep. 411, 166 N. Y. Supp. 640). But an automobile of a liveryman who serves all members of the public is the vehicle of a common carrier, within an accident policy providing for a double indemnity to one injured in or on a public conveyance of a common carrier (*Fidelity & Casualty Co. v. Joiner* [Tex. Civ. App.] 178 S. W. 806).

3306 (g). Policies may provide for double indemnity for injuries caused by the "burning of a building." Under such a provision recovery may be had for death resulting from injuries received in the burning of the contents of the loft of a barn (*Wilkinson v. Aetna Life Ins. Co.*, 88 N. E. 550, 240 Ill. 205, 25 L. R. A. [N. S.] 1256, 130 Am. St. Rep. 269, affirming 144 Ill. App. 38). On the other hand it has been held in New York that a policy insuring against accident "caused by the burning of a building" while insured is therein requires the burning of a building either in whole or in part as a condition precedent to liability, and a death caused by the burning of the contents of a room of a building, merely scorching the door of the room, is not caused by the burning of a building (*Houlihan v. Preferred Acc. Ins. Co. of New York*, 89 N. E. 927, 196 N. Y. 337, 25 L. R. A. [N. S.] 1261, reversing 127 App. Div. 630, 111 N. Y. Supp. 1048, rehearing denied 197 N. Y. 532, 90 N. E. 1160). In *Maryland Casualty Co. v. Edgar*, 203 Fed. 656, 122 C. C. A. 52, it was held one injured by an explosion, which preceded a fire in a building, was not injured in consequence of the burning of the building while he was therein, within the terms of a double liability clause.

3306-3310. (h) Extent of liability as dependent on classification of risk

3306 (h). A provision in an accident policy for a smaller indemnity if insured is injured while engaged in an occupation more hazardous than that specified in his application is reasonable and will be enforced (*Beane v. Continental Casualty Co.*, 106 Miss. 813, 64 South. 732). But an insurer cannot, after the issuance of a policy, change its classification of occupations so as to decrease the amount

payable under the policy (*Morse v. Fraternal Acc. Ass'n*, 77 N. E. 491, 190 Mass. 417, 112 Am. St. Rep. 337).

Where a policy provided for a smaller indemnity if insured was injured while engaged in a more hazardous occupation, an insured, who had changed to a more hazardous occupation, and who was killed while off duty, was entitled only to such decreased indemnity (*Beane v. Continental Casualty Co.*, 106 Miss. 813, 64 South. 732). Where the classification of risks provided that each \$1,000 of insurance carried with it \$5 weekly indemnity, unless otherwise specified, and recited, after the classification, "Occupation, aëronaut (not insurable)," that the limit of risks was \$500 insured could only recover \$2.50 a week for injuries sustained while operating a flying machine (*Ridgely v. Ætna Life Ins. Co.*, 145 N. Y. Supp. 1075, 160 App. Div. 719). But the fact that insurer had classified in its manual laborers engaged about an oil cloth and linoleum factory, and also laborers about oil wells, under an extra hazard did not amount to such classification of labor in handling gasoline, there being no specification as to the handling of gasoline (*Roseberry v. American Benev. Ass'n*, 142 Mo. App. 552, 121 S. W. 785).

3307 (h). In *Everson v. General Accident, Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 202 Mass. 169, 88 N. E. 658, the occupation of the plaintiff was described in the schedule of warranties as "proprietor," his business as "Mfgr. of infusorial earth," and his duties as "office duties and traveling only," and the policy provided that, if the insured was injured in any occupation classified as more hazardous than that stated in the schedule of warranties, the liability should be only for such portion of the principal sum, as the premiums paid by him will purchase at the rate fixed by the corporation for such hazardous occupation. It was held that defendant could not complain of an instruction that if, during the period in question, he was actually working about machinery, experimenting, using acids, and thus engaged in more hazardous occupation, he was entitled only to such portion of the principal sum insured as the amount paid would buy according to the schedule of the company. Under an application for accident insurance made a part of the policy, stating that applicant was a logging contractor, and providing that for injury in a more dangerous occupation insurer's liability should be only for such part of the principal as the premium paid would purchase at the rate fixed for the greater hazard, insurer is liable only for the indemnity provided for a logger

where insured died of injuries received while working as such (*Bothell v. National Casualty Co.*, 59 Wash. 209, 109 Pac. 590).

3308 (h). Generally, it may be said that to engage in an occasional act connected with some other occupation is not a change within the condition. So, in *Pacific Mut. Life Ins. Co. v. Van Fleet*, 47 Colo. 401, 107 Pac. 1087, where one insured as a railroad brakeman met death while engaged in a balloon ascension, the court said that a change of occupation must be a permanent change, or a temporary change in all substantial respects a change of occupation, and was not changed by the performance of some individual acts of a more hazardous nature, and recovery might be had. The fact that an insured, a contractor, whose duties were described in the schedule of warranties as "traveling and supervising only," was personally attempting to adjust a tank of a heating plant when killed by an explosion did not reduce him to the status of a laborer, a more hazardous occupation, so as to reduce the company's liability (*Miller v. Missouri State Life Ins. Co.*, 153 S. W. 1080, 168 Mo. App. 330). The use of the term "office duties only," in describing the occupation of one insured, does not necessarily limit the risk to accidents occurring in the office where his duties are generally performed. So a change in the occupation of assured from a receiving clerk to foreman, classed as more hazardous, is not shown by proof that assured, who performed the duties of his occupation, was accidentally killed while temporarily directing other men as to their duties (*Redmond v. United States Health & Accident Ins. Co.*, 148 N. W. 913, 96 Neb. 744). Similarly a stipulation in an accident policy that, if insured is injured while at work in any occupation classed as more hazardous than that stated in the schedule, the liability of insurer shall be only for such proportion of the indemnity as the premium will purchase at the rate fixed by the company for the hazard, does not contemplate the inhibition of acts performance of which is necessarily implied from the vocation named in the policy, but applies to a regular occupation engaged in by insured in a class other than that named in the policy; and where insured's occupation is stated as member of firm or employed as manager of a beef company, and where his duties are described as "office duties and traveling only," the insurer is liable for injuries received by insured while in the refrigerator of his employer's plant directing the transfer of carcasses from one truck to another, and illustrating to the workmen how to do the work (*Thorne v. Casualty Co. of America*, 106 Me. 274, 76 Atl. 1106).

3309 (h). Generally acts of the insured merely incidental to daily life or for the purpose of recreation, cannot be regarded as acts in the way of occupation. But it was held in *Lane v. General Accident Ins. Co.* (Tex. Civ. App.) 113 S. W. 324, that where one insured as a sheep farmer by a policy classifying as more hazardous the occupation of a hunter, and stipulating that, where an injury occurred while doing any act pertaining to any occupation classified as more hazardous, the liability of insurer should be for such part of the principal as the premium paid would purchase at the rates fixed for such more hazardous occupation, was killed while hunting for recreation, insurer was liable only to the indemnity provided for the occupation of a hunter. And to the same effect is *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509. On the other hand, in *Price v. National Accident Soc.*, 37 Pa. Super. Ct. 299, it was held that where the insured, a shifting passenger conductor on a railroad, is killed after his day's work is done, and while riding as a passenger on a train, the indemnity payable is to be determined not according to his occupation, but according to the fact that he was a railroad passenger, a less dangerous position under the classification of risks set forth in the policy.

Where injury under accident policy was sustained in occupation known to insurer's agent when he made the classification, although the occupation at time of accident was more hazardous than that under such classification, insurer could not reduce indemnity to that which premiums would have purchased in more hazardous class. *Parker v. North American Accident Ins. Co.*, 79 W. Va. 576, 92 S. E. 88, L. R. A. 1917D, 1174.

3310-3312. (i) Questions of practice

3310 (i). Allegations of the complaint that insured's injury was total and permanent, and that he was totally and permanently disabled from performing manual labor or business upon which he depended for a livelihood, and was totally and permanently disabled from following his usual occupation, sufficiently alleged total and permanent disability (*Indiana Life Endowment Co. v. Patterson*, 55 Ind. App. 291, 103 N. E. 817). If the constitution and laws of a mutual benefit association provide that, should a death occur or a permanent disability be approved by the Supreme Council when one assessment on each member would not amount to \$5,000, then the sum paid the beneficiary shall be a proportionate amount of one assessment on each member, it is not incumbent on a member suing for a permanent disability benefit to show the

number of members, but the association must show that as matter of defense, especially where the association did not defend on the ground of the insufficiency of the number of members, but because it determined that the member was not destitute of the means of support (*Supreme Council Catholic Benev. Legion v. Grove*, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. [N. S.] 913). Where the policy stipulates for a reduction of the indemnity for injuries received while on the roadbed of any railroad, except while crossing at a public highway, a petition which alleges that insured while on his way to a depot was overtaken by a train and struck by the pilot of the engine, is not inconsistent with a finding that he was crossing at a public highway and entitled to the full indemnity (*McClure v. Great Western Acc. Ass'n*, 141 Iowa, 350, 118 N. W. 269).

3311 (i). In an action on a health policy specifying an indemnity for confining illness, excepting disabilities resulting from paralysis, etc., in which case one-fifth of the amount is payable, insurer cannot show that it was paralysis which confined insured without pleading that fact (*General Acc. Ins. Co. v. Hayes*, 52 Tex. Civ. App. 272, 113 S. W. 990). Where a clause in an insurance policy provided that, if insured is injured "in an occupation" classified by the company in its latest manual as more hazardous than that, stated in the schedule of warranties, the liability of the company is thereby reduced, it is a proper matter of defense where insured has changed occupations, and may be pleaded either in the language of the policy or in its legal effect; and if the company pleads a reduction of liability on account of insured changing to a more hazardous occupation, it is unnecessary to aver that insured was not engaged in the former occupation, where it is averred that he was engaged in the more hazardous one (*McCarthy v. Pacific Mut. Life Ins. Co. of California*, 178 Ill. App. 502).

In *Thompson v. Loyal Protective Ass'n*, 167 Mich. 31, 132 N. W. 554, it appeared that under the classification adopted by defendant association, the occupation in which it claimed that insured was engaged when injured, as claimed by him, he would receive \$100 in case of death by accident, and \$20 in case of death by sickness, and there was no classified employment under which the insured would receive \$100 for death from sickness. After proof of death had been furnished, showing decedent's work at the time of the claimed injury, and after a further investigation expressly to determine the nature of his work and the cause of injury, defendant tendered to the beneficiary, with its plea in the action on the certificate,

and paid into court, the sum of \$100, and costs. It was held that the tender waived any claim that death resulted from sickness while engaged as a common laborer, or from any other cause than accident while engaged in the occupation classified to correspond to the \$100 tendered.

In an action on a health policy specifying an indemnity for confining illness, but providing in a subsequent clause for one-fifth of the amount for a disability from specified diseases, the burden was on insurer to show that insured's illness was one embraced by the latter clause (*General Acc. Ins. Co. v. Hayes*, 52 Tex. Civ. App. 272, 113 S. W. 990). So, too, where a certain occupation was classed in the manual of defendant association as hazardous, rendering a higher rate of premium necessary, or affording a lesser amount of indemnity with the same premium than that pertaining to the ordinary occupation of insured, it was a matter within the knowledge of insurer, and the burden rested on it in an action on the policy to establish the same (*Roseberry v. American Benev. Ass'n*, 142 Mo. App. 552, 121 S. W. 785). Where the policy provides that a certain sum would be paid on death of insured from injuries which shall "immediately and wholly and continuously disable and prevent the insured from performing any * * * duty pertinent to his occupation," the burden was on plaintiff to prove that the results of the injuries were according to the policy stipulation (*McKinney v. General Accident Fire & Life Assur. Co.*, 211 Fed. 951, 128 C. C. A. 449).

Admissibility of evidence as to extent of disability and liability of the insurer is considered in the following cases: *Bond v. Grand Lodge Brotherhood of Railroad Trainmen*, 165 Ill. App. 490; *Supreme Council Catholic Benev. Legion v. Grove*, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913; *Cochburn v. Hawkeye Commercial Men's Ass'n*, 163 Iowa, 28, 143 N. W. 1006; *Foglesong v. Modern Brotherhood of America*, 97 S. W. 240, 121 Mo. App. 548; *Continental Casualty Co. v. Wynne*, 36 Okl. 325, 129 Pac. 16; *General Acc. Ins. Co. v. Hayes*, 52 Tex. Civ. App. 272, 113 S. W. 990.

3312 (i). The plaintiff was not bound to prove by eyewitnesses that the injuries, which caused insured's death, were accidental; that fact being properly established by circumstantial evidence (*Wilkinson v. Aetna Life Ins. Co.*, 88 N. E. 550, 240 Ill. 205, 25 L. R. A. [N. S.] 1256, 130 Am. St. Rep. 269, affirming 144 Ill. App. 38).

The sufficiency of the evidence to show the extent of disability and the liability of the insurer is considered in the following cases: Or-

der of United Commercial Travelers v. Barnes, 80 Pac. 1020, 72 Kan. 293, 7 Ann. Cas. 809, affirmed 82 Pac. 1099, 72 Kan. 293, 7 Ann. Cas. 809; Continental Casualty Co. v. Fleming (Ky.) 124 S. W. 331; National Life & Accident Ins. Co. v. O'Brien's Ex'x, 159 S. W. 1134, 155 Ky. 498; Russell v. Fraternities Health & Accident Ass'n, 113 Me. 559, 92 Atl. 820; Williams v. Western Travelers' Acc. Ass'n, 97 Neb. 352, 149 N. W. 822; Ætna Life Ins. Co. of Hartford, Conn., v. Griffin, 58 Tex. Civ. App. 198, 123 S. W. 432; Hefner v. Fidelity & Casualty Co. of New York (Tex. Civ. App.) 160 S. W. 330.

The sufficiency of the evidence to show confinement to the house within the terms of the policy is considered in Cooper v. Phoenix Accident & Sick Ben. Ass'n, 104 N. W. 734, 141 Mich. 478; Rief v. Continental Casualty Co., 111 N. W. 502, 131 Wis. 368.

The sufficiency of evidence to show that insured was in a burning building when it took fire, and that the burning of the building caused the injuries resulting in death, is considered in Wilkinson v. Ætna Life Ins. Co., 240 Ill. 205, 88 N. E. 550, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269, affirming 144 Ill. App. 38.

The general question of the extent of disability and liability of the insurer is for the jury.

Indiana Life Endowment Co. v. Reed, 54 Ind. App. 450, 103 N. E. 77; Strickland v. Peerless Casualty Co., 90 Atl. 974, 112 Me. 100; Province v. Travelers' Ins. Co., 111 S. W. 1193, 132 Mo. App. 394; Beber v. Brotherhood of Railroad Trainmen, 106 N. W. 168, 75 Neb. 183, 121 Am. St. Rep. 782; Turner v. Columbia Nat. Life Ins. Co., 100 S. C. 121, 84 S. E. 413.

The sufficiency of the evidence to warrant a submission to the jury is considered in Continental Casualty Co. v. Ogburn, 186 Ala. 398, 64 South. 619; Brotherhood of Locomotive Firemen & Enginemen v. Aday, 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S.) 126; Wall v. Continental Casualty Co., 86 S. W. 491, 111 Mo. App. 504; James v. United States Casualty Co., 88 S. W. 125, 113 Mo. App. 622; Province v. Travelers' Ins. Co., 111 S. W. 1193, 132 Mo. App. 394; Hefner v. Fidelity & Casualty Co. of New York (Tex. Civ. App.) 160 S. W. 330.

The sufficiency of the evidence to warrant a submission to the jury of the question whether insured came to his death from injuries received while in a burning building is considered in Kleis v. Travelers' Ins. Co. of Hartford, 136 N. W. 1101, 118 Minn. 422; Pierre v. Kansas City Casualty Co., 141 Pac. 690, 80 Wash. 347.

The propriety of certain instructions is considered in Pacific Mut. Life Ins. Co. v. Despain, 77 Kan. 654, 95 Pac. 580; General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland, v. Homely, 109 Md. 93, 71 Atl. 524; Province v. Travelers' Ins. Co., 111 S. W. 1193, 132 Mo. App. 394; Modern Order of Prætorians v. Taylor, 60 Tex. Civ. App. 217, 127 S. W. 260.

XXIV. CAUSE OF LOSS AND EXTENT OF LIABILITY— GUARANTY AND INDEMNITY INSURANCE

1. RISK AND CAUSE OF LOSS

3313-3319. (a) Employers' liability insurance

3313 (a). There are special forms of these policies, which cover liabilities for injuries to persons not employés. As to these the injury must be caused by some one in the employ of the insured, or by some structure or apparatus connected with the insured's business.

Creem v. Fidelity & Casualty Co. of New York, 126 N. Y. Supp. 555, 141 App. Div. 493; *Graustein & Co. v. Employers' Liability Assur. Corp., Limited, of London*, 101 N. E. 1073, 214 Mass. 421; *Scarritt Estate Co. v. Casualty Co. of America*, 149 S. W. 1049, 166 Mo. App. 567; *Camden & Atlantic Tel. Co. v. United States Casualty Co.*, 75 Atl. 1077, 227 Pa. 242.

A policy binding insurer to indemnify insured against loss for damages for injuries to persons while on his premises is a contract of indemnity against loss and not against liability merely, and no right of action accrues thereon until insured has actually paid a judgment rendered against him (*Puget Sound Imp. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 100 Pac. 190, 52 Wash. 124).

3314 (a). A policy insuring a company as to injuries suffered by its employés does not insure the company against damages recovered by an employé for the malpractice of a company surgeon (*May Creek Logging Co. v. Pacific Coast Casualty Co.*, 82 Wash. 301, 144 Pac. 67, L. R. A. 1915C, 155); and a liability insurance policy, limiting liability to accidents occurring in the contracting and building business of the employer, does not cover accidents in work not connected with such business (*Bayer v. Bayer*, 191 Mich. 423, 158 N. W. 109). So a policy insuring physician against liability for mistake of assistant "while acting under assured's instructions" does not cover case treated by assistant without instructions other than previous general instructions (*Seay v. Georgia Life Ins. Co.*, 179 S. W. 312, 132 Tenn. 673, Ann. Cas. 1916E, 1157).

(1371)

A policy insuring an employer against loss from liability for damages for "bodily injuries or death accidentally suffered * * * by any employ   while on duty," covers the liability of the employer to an employ   engaged as hostler for injuries caused by being infected with glanders on account of the negligence of the employer (*H. P. Hood & Sons v. Maryland Casualty Co.*, 92 N. E. 329, 206 Mass. 223, 30 L. R. A. [N. S.] 1192, 138 Am. St. Rep. 379). So it covers liability to an employ   who was painting the roof of the gin to preserve the iron from rust, under clause "engaged in occupations connected with the business of cotton ginning" (*Maryland Casualty Co. v. W. C. Robertson & Co.* [Tex. Civ. App.] 194 S. W. 1140); and it has been held to cover damages caused by employ  s' contracting typhoid fever from drinking water (*  tna Life Ins. Co. v. Portland Gas & Coke Co.*, 229 Fed. 552, 144 C. C. A. 12, L. R. A. 1916D, 1027).

Under insurance policy issued under Workmen's Compensation Act to manufacturer and retailer of shoes, which made no reference to retail business, but obligated insurer to pay any compensation which became due, it has been held that the obligation of insurer was as broad as the act, and covered injuries to employ  s received in business of retailing shoes (*In re Cox*, 114 N. E. 281, 225 Mass. 220).

3315 (a). Where a large metal tube filled with various metals and materials of an explosive and dangerous nature was exposed to the heat of a furnace on plaintiff's premises and actually exploded and injured an employ  , such tube and its contents constituted an "explosive," within a warranty in an employer's liability policy insuring plaintiff that no explosives should be used on the premises (*B. Roth Tool Co. v. New Amsterdam Casualty Co.*, 161 Fed. 709, 88 C. C. A. 569).

3316 (a). In the following cases the exception excluding liability for injuries caused by additions or alterations, etc., was held not to apply, the work being dealt with as "repairs":

Cary Brick Co. v. Fidelity & Casualty Co., 147 N. Y. Supp. 414, 162 App. Div. 873 (dredging a canal, which was located entirely within the brickyard); *Springfield Light, Heat & Power Co. v. Philadelphia Casualty Co.*, 184 Ill. App. 175 (coal bunkers then being installed); *Harbor & Suburban Bldg. & Sav. Ass'n v. Employers' Liability Assur. Corp., Limited*, of London, England, 140 N. Y. Supp. 717, 79 Misc. Rep. 150 (replacing the roof); *Kresge v. Maryland Casualty Co.*, 143 N. W. 668, 154 Wis. 627 (vestibules in the nature of

storm doors); *Ætna Life Ins. Co. v. El Paso Electric R. Co.* (Tex. Civ. App.) 184 S. W. 628.

Liability cannot be defeated on ground that accident was result of repairs being made by independent contractor (*Triangle Waist Co. v. General Acc., Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 177 App. Div. 904, 163 N. Y. Supp. 687).

In the following cases an exception was held to apply:

Evansville Ice & Storage Co. v. Fidelity & Casualty Co. of New York, 61 Ind. App. 194, 111 N. E. 812; *Maryland Casualty Co. v. Little Rock R. & Electric Co.*, 122 S. W. 994, 92 Ark. 306 (employés in the engine and boiler rooms of an electric power house from which insured electric company purchased electric current); *South Knoxville Brick Co. v. Empire State Surety Co.*, 126 Tenn. 402, 150 S. W. 92, Ann. Cas. 1913E, 107 (tramway in brickyard); *Rust Lumber Co. v. General Accident, Fire & Life Assur. Corp.*, 64 South. 122, 134 La. 309 (mill hands in boring an artesian well, though the water was to be used in the sawmill business); *Charles Wolff Packing Co. v. Travelers' Ins. Co.*, 94 Kan. 630, 146 Pac. 1175 ("immediately" adjoining does not cover employé in a park across a street from the premises); *Home Mixture Guano Co. v. Ocean Accident & Guarantee Corp., Limited*, of London, England (C. C.) 176 Fed. 600 (relining an acid chamber in the course of extraordinary repairs); *Syracuse Malleable Iron Works v. Travelers' Ins. Co.*, 157 N. Y. Supp. 572, 94 Misc. Rep. 411.

Within a liability insurance policy excluding injuries in connection with structural alterations of the plant, a "structural alteration" was one changing the physical structure of the building or plant (*Kinston Cotton Mills v. Liability Assur. Corp.*, 77 S. E. 682, 161 N. C. 562).

In *Kinston Cotton Mills v. Liability Assur. Corp.*, 77 S. E. 682, 161 N. C. 562, it was held that whether injuries to employé while digging sand for the construction of a chimney were covered by a liability insurance policy excluding injuries in connection with additions or alterations, but including the making of repairs, was a question for the jury.

3318 (a). In *Steven v. Fidelity & Casualty Co. of New York*, 178 Ill. App. 54, it was held that the fact that the compensation paid a certain employé is omitted from the schedule upon which the premium is estimated, and a premium on that compensation is never paid, does not relieve the insurance company from liability, though the negligence of such employé causes the accident, where it appears from the terms of the policy that the insured agrees to pay an additional premium in case the total compensation earned

by all employ  s proves to be more than the amount stated in the schedule.

In *East Carolina R. Co. v. Maryland Casualty Co.*, 58 S. E. 906, 145 N. C. 114, however, it was held that under a contract to indemnify an employer against liability for accidents to employ  s provided "this policy does not cover loss for liability for injuries as aforesaid to, or caused by, any person unless his wages are included in the estimated wages named in the schedule," the wages of the employ   causing the injury, as well as those of the employ   injured, must be so included, to make the indemnity company liable; and in *Employers' Indemnity Co. of Philadelphia v. Kelly Coal Co.*, 149 S. W. 992, 149 Ky. 712, 41 L. R. A. (N. S.) 963, that insured in an indemnity policy paid wages to a person injured for a contractor was held not to make the person injured an employ   within the indemnity policy.

3319 (a). Insurer has burden of pleading and proving that the loss was one excepted by the policy (*Bridal Veil Lumbering Co. v. Pacific Coast Casualty Co.*, 75 Or. 57, 145 Pac. 671); but where the policy provided that it did not insure against injuries caused by a subcontractor or his workmen, it was necessary for insured to prove, in an action on the policy, that the liability on which the action was based did not arise from any act of a subcontractor or a subcontractor's servant (*Tolmie v. Fidelity & Casualty Co. of New York*, 76 N. E. 1110, 183 N. Y. 581, affirming 88 N. Y. Supp. 717, 95 App. Div. 352).

The special provision that the policy should not cover loss from liability for injuries caused by assured's failure to observe any statute affecting the safety of persons was not repugnant to a preceding general statement that the indemnity should be "against loss from common-law or statutory liability" for injury to employ  s, etc. (*Royle Min. Co. v. Fidelity & Casualty Co. of New York*, 103 S. W. 1098, 126 Mo. App. 104).

There was no liability under an employer's indemnity policy providing that the indemnity company should not be liable for injuries to persons employed in violation of law where the injured employ   was below the age limit fixed by statute.

American Candy Co. v.   tna Life Ins. Co., 159 N. W. 917, 164 Wis. 266; *  tna Life Ins. Co. v. Tyler Box & Lumber Mfg. Co.* (Tex. Civ. App.) 149 S. W. 283; *Frank Unnewehr Co. v. Standard Life & Accident Ins. Co.*, 176 Fed. 16, 99 C. C. A. 490; *United Waste Mfg. Co. v. Maryland Casualty Co.*, 148 N. Y. Supp. 852, 85 Misc.

Rep. 539; *Louis F. Kleeman Co. v. New Amsterdam Casualty Co.*, 164 S. W. 167, 177 Mo. App. 397; *Buffalo Steel Co. v. Ætna Life Ins. Co.*, 141 N. Y. Supp. 1027, 156 App. Div. 453, affirming judgment (Sup.) 136 N. Y. Supp. 977.

Under such a policy it is immaterial whether the accident to one so employed was due to or caused by violation of the law.

Buffalo Steel Co. v. Ætna Life Ins. Co. (Sup.) 136 N. Y. Supp. 977, affirmed in 141 N. Y. Supp. 1027, 156 App. Div. 453; *Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 196 Fed. 340, 116 C. C. A. 160.

In *Bridal Veil Lumbering Co. v. Pacific Coast Casualty Co.*, 75 Or. 57, 145 Pac. 671, however, violation by employer of law relative to safeguarding machinery at places for work was held not to relieve insurer against liability unless injury to employé was due to such violation.

Where an indemnity policy excepted liability from violation of a statute affecting the safety of persons, such provision included only statutes aiming to secure safety of persons engaged in or around dangerous work or machinery, and did not include Laws 1905, c. 215 (Rev. Laws Supp. 1909, § 1199—1), prohibiting the obstruction of a highway (*Butler Bros. v. American Fidelity Co.*, 120 Minn. 157, 139 N. W. 355, 44 L. R. A. [N. S.] 609).

In *London Guarantee & Accident Co. v. Morris*, 156 Ill. App. 533, it was held that the word "child," as used in a casualty policy excepting from the operation of the policy injuries to any child employed by assured contrary to law, means one under the age of puberty, and a boy between 15 and 16 years of age is not within the exception.

In *Travelers' Ins. Co. v. Henderson Cotton Mills*, 85 S. W. 1090, 120 Ky. 218, 27 Ky. Law Rep. 653, 117 Am. St. Rep. 585, 9 Ann. Cas. 162, it was held that, though a policy of employers' indemnity insurance provided that the employés should be over 12 years of age the petition in an action on the policy need not allege that the injured employé was over that age.

In *Mason-Henry Press v. Ætna Life Ins. Co.*, 105 N. E. 826, 211 N. Y. 489, affirming 139 N. Y. Supp. 1133, 155 App. Div. 876, insurer against liability whose policy did not cover liability for matters arising out of a violation of law was held not to have waived or estopped itself to rely on such limitation of liability by its acts in connection with the conduct of the defense of an action.

In *Currie v. Continental Casualty Co.*, 147 Iowa, 281, 126 N. W. 164, 140 Am. St. Rep. 300, whether the policy was absolutely canceled, and whether a provision therein limiting liability for injuries to places within the United States was waived, was held, under the evidence, for the jury.

In *Re Gould*, 102 N. E. 693, 215 Mass. 480, Ann. Cas. 1914D, 372, whether a policy issued by a mutual liability insurance company under the Workmen's Compensation Act (St. 1911, c. 751) pt. 3, § 11, as amended by St. 1912, c. 571, § 14, covered an injury happening to an employé while outside the state was held to depend upon whether the act enjoined such payment by the company.

An insurer, under Workmen's Compensation Law, by treating claimant as employé and including his salary as a basis for the premium, cannot deny claimant is an employé (*Kennedy v. Kennedy Mfg. & Engineering Co.*, 177 App. Div. 56, 163 N. Y. Supp. 944).

A policy insuring the owner of a building in process of erection against loss from common-law or statutory liability arising from the "contingent liability" of the assured, as owner, for damages on account of injuries accidentally suffered by any person in connection with and during the construction of the building, for an act or negligence of himself, any contractor or subcontractor, imposes no liability on the insurer.

American Cereal Co. v. London Guarantee & Accident Co., 211 Fed. 96, 128 C. C. A. 24; *Sroka v. Frankfort American Ins. Co.*, 94 N. Y. Supp. 501, 47 Misc. Rep. 607.

Though judgment recovered by injured servant against trustee in bankruptcy was actually paid by purchaser from trustee in bankruptcy of the bankrupt's property, the trustee suffered a loss diminishing the amount of the purchase price, and so insurer was liable (*Georgia Casualty Co. v. Bowron*, 233 Fed. 89, 147 C. C. A. 159, L. R. A. 1916F, 876, affirming [D. C.] 223 Fed. 673).

An employer's indemnity policy containing "no action" clause, but providing that insurer will defend suits for damages against insured, is not inconsistent or ambiguous (*Most v. Massachusetts Bonding & Insurance Co.* [Mo. App.] 196 S. W. 1064).

Indemnity insurance company, which elects to exercise its right under policy to defend action brought against insured, is not agent of insured in defense or settlement of suit, but is rather in position of independent contractor (*Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 240 Fed. 573, 153 C. C. A. 377).

3319-3323. (b) Fidelity insurance

3320 (b). Under a bond binding the obligor to reimburse an employer for pecuniary loss sustained by reason of fraud or dishonesty of an employé amounting to embezzlement or larceny, mere fraud or dishonesty not amounting to embezzlement or larceny did not render the obligor liable.

Farmers' State Bank of South Greenfield v. Title Guaranty & Trust Co. of Scranton, Pa., 113 S. W. 1147, 133 Mo. App. 705; *John Lee Clarke v. Fidelity & Deposit Co. of Maryland*, 131 Pac. 468, 73 Wash. 62, 46 L. R. A. (N. S.) 931; *Dixie Fire Ins. Co. v. Nelson*, 157 S. W. 416, 128 Tenn. 70; *Dominion Trust Co. v. National Surety Co.*, 221 Fed. 618, 137 C. C. A. 342, Ann. Cas. 1917C, 447.

Such an indemnity bond, however, may be enforced by proof that the incumbent took money with felonious intent to convert it to his own use. It is not essential that there shall be any malice, malignity, villainy, or depraved heart (*Tonsor v. Fidelity & Deposit Co. of Maryland*, 158 Ill. App. 515).

Where a bank cashier by false certificate extends to a depositor credit to which he is not entitled, pursuant to an arrangement that the cashier shall derive benefit, and loss to the bank results, a liability arises on the bond to indemnify the bank for loss from fraud or dishonesty amounting to embezzlement or larceny (*Rankin v. United States Fidelity & Guaranty Co.*, 99 N. E. 314, 86 Ohio St 267).

Such a bond, however, does not cover a loss due to carelessness of the employé (*United States Fidelity & Guaranty Co. v. Bank of Batesville*, 112 S. W. 957, 87 Ark. 348).

In an action on such a bond a declaration is insufficient which contains no averment that the incumbent committed an act of larceny or embezzlement.

Tonsor v. Fidelity & Deposit Co. of Maryland, 158 Ill. App. 515; *Canton Nat. Bank v. American Bonding & Trust Co.*, 73 Atl. 684, 111 Md. 41, 18 Ann. Cas. 820.

The burden to establish the embezzlement or larceny is upon the obligees in the bond (*Tonsor v. Fidelity & Deposit Co. of Maryland*, 158 Ill. App. 515).

Where a contract indemnified plaintiff against fraud or dishonesty of an employé amounting to embezzlement or larceny, and the employé collected and misappropriated funds in another state, the question of larceny vel non would depend on the laws of the state where the contract was made (*J. W. Matthews & Co. v. Em-*

ployer's Liability Assur. Corp., 89 N. E. 1102, 195 N. Y. 593, affirming 111 N. Y. Supp. 76, 127 App. Div. 195).

Similarly, since a postmaster would be liable under the federal laws for misconduct in his official capacity, an insurance contract to indemnify the sureties of a postmaster for loss caused by his embezzlement of money order funds, etc., should be construed with reference to the federal laws imposing a liability upon postmasters in such cases, in determining what constitutes an embezzlement within the contract, and not under the state statutes defining the offense (*Griffin v. Zuber*, 113 S. W. 961, 52 Tex. Civ. App. 288).

Surety company, whose undertaking related to claims by "others," is not liable to plaintiff, a marshal, on its indemnity bond because of the recovery by the defendant in execution against the marshal in an action for the wrongful levy and execution upon exempt property (*McNamee v. National Surety Co.* [Sup.] 156 N. Y. Supp. 758).

Liability on a fidelity bond insuring an employer against loss through the "fraud or dishonesty" of an employé is not limited to such losses as result from his criminal acts, such as embezzlement or larceny, but such words have a broader meaning, and include any acts which show a want of integrity or a breach of trust (*United States Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co.*, 148 Fed. 353, 78 C. C. A. 345).

In the same case it is stated that the testimony characterizing such acts necessarily takes a wide range, and evidence of his general course of conduct in plaintiff's affairs, though not directly relating to the transactions in issue, is properly admissible to show the spirit and intent which moved him.

Yet the mere failure of factors to turn over to the principal on demand property belonging to the principal, or the proceeds thereof, was not a breach of the bond, rendering the surety company liable (*T. M. Sinclair & Co. v. National Surety Co.*, 107 N. W. 184, 132 Iowa, 549).

Nor does such a bond extend to loss by simple mistake of agent, without fraud, in paying for merchandise (*Kansas Flour Mills Co. v. American Surety Co. of New York*, 158 Pac. 1118, 98 Kan. 618); and where an insurance agent authorized to retain 20 per cent. of all premiums remits 30 per cent. without direction as to application thereof, the fact that the company applies part to the agent's debt for money advanced will not fix liability on a bonding company which has indemnified the insurance company against loss

occasioned by embezzlement by the agent (Kansas State Mut. Hail Ass'n v. Title Guaranty & Surety Co., 155 Pac. 13, 97 Kan. 271, rehearing denied 156 Pac. 715, 97 Kan. 651).

The acts constituting fraud or dishonesty must have been committed in the performance of the duties in connection with which the risk was assumed.

Buchner v. Title Guaranty & Surety Co., 144 App. Div. 326, 128 N. Y. Supp. 1007; *Livingston & Taft v. Fidelity & Deposit Co. of Maryland*, 81 N. E. 330, 76 Ohio St. 253; *Coyle v. United States Fidelity & Guaranty Co.*, 104 N. E. 559, 217 Mass. 268, Ann. Cas. 1917C, 450; *Alabama Fidelity & Casualty Co. v. Alabama Penny Sav. Bank* (Ala.) 76 South. 103.

However, where the position is named and certain of the duties described, the risk is not limited to the specific duties, but covers any duties naturally belonging to the office.

Farmers' & Merchants' State Bank of Verdon v. United States Fidelity & Guaranty Co., 28 S. D. 315, 133 N. W. 247, 36 L. R. A. (N. S.) 1152; *Granger v. Empire State Surety Co.*, 116 N. Y. Supp. 973, 132 App. Div. 437.

3321 (b). A bond to indemnify a bank against dishonesty of its cashier for one year or during any renewal and discovered within six months of the term or renewal, on being renewed for another year, will be construed as though originally executed for two years; there being no terms in either instrument indicating that an act of dishonesty in the first year must be discovered within six months from the expiration of that year.

Rankin v. United States Fidelity & Guaranty Co., 99 N. E. 314, 86 Ohio St. 267; *United States Fidelity & Guaranty Co. v. Newton*, 115 Pac. 897, 50 Colo. 379.

Such a bond, which limits the guarantor's liability to losses occurring and discovered within a certain specified time, is not violative of Ky. St. §§ 2515, 2519, limiting the time within which actions for relief for fraud may be brought, nor opposed to public policy (*Ballard County Bank's Assignee v. United States Fidelity & Guaranty Co.*, 150 S. W. 1, 150 Ky. 236, Ann. Cas. 1914C, 1208).

In *United States Fidelity & Guaranty Co. v. First Nat. Bank of Dundee*, 84 N. E. 670, 233 Ill. 475, affirming 137 Ill. App. 382, it was held that the renewal certificates precluded the bank from recovering more than the face value of the original bond, together with interest thereon.

A bank cashier's fidelity bond did not cover an alleged larceny of silver coin claimed to have been deposited on a certain date before the issue of the bond, but not found in the bank's vaults when the cashier absconded; there being no evidence as to when the same was taken (*Fidelity & Casualty Co. v. Bank of Timmons ville*, 139 Fed. 101, 71 C. C. A. 299).

3323 (b). Employer is entitled to recover without first exhausting his remedies against those primarily liable for the loss (*First Nat. Bank of Crandon v. United States Fidelity & Guaranty Co. of Baltimore*, 137 N. W. 742, 150 Wis. 601).

In the same case it was said that negligence is not a defense to an action on an indemnity bond, unless it is such that it amounts to fraud or bad faith. Yet in *Atlantic City Aerie No. 64, Fraternal Order of Eagles, v. International Fidelity Ins. Co.*, 85 Atl. 325, 83 N. J. Law, 583, insurer against dishonesty of plaintiff's treasurer was held not liable where plaintiff's auditing committee, in examining the treasurer's books, failed to verify the cash on hand by inquiry at the bank, where he deposited the money received.

The negligence of an employé within the provisions of a policy insuring against loss sustained through the culpable negligence of any employé, which would render the insurer liable would be a failure to use that degree of care which men of ordinary prudence usually exercise in regard to their own affairs of like gravity.

Great Northern Express Co. v. National Surety Co., 129 N. W. 127, 113 Minn. 162, 31 L. R. A. (N. S.) 775; *United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank*, 145 Fed. 273, 74 C. C. A. 553.

So the conduct of a clerk in railroad freight office in delivering goods consigned to shipper's order, with draft against consignee attached, to the consignee, without his presentation of the original bill of lading, is culpable negligence, within the meaning of the clerk's fidelity bond (*Louisville & N. R. Co. v. United States Fidelity & Guaranty Co.*, 148 S. W. 671, 125 Tenn. 658).

In an action on an indemnity insurance policy, evidence on the part of plaintiff that he understood the claim for damages was one that came within the terms of the policy is admissible on the issue whether defendant's acts and representations to plaintiff estopped them from claiming that the risk was not covered by the policy (*Tozer v. Ocean Accident & Guarantee Corp.*, 109 N. W. 410, 99 Minn. 290).

In an action on a policy indemnifying against embezzlement or larceny by an employé, a preponderance of evidence as to the embezzlement or larceny is sufficient (*Fidelity & Deposit Co. of Maryland v. Colorado Ice & Storage Co.*, 103 Pac. 383, 45 Colo. 443).

The sufficiency of evidence was considered in *United States Fidelity & Guaranty Co. v. Bank of Batesville*, 112 S. W. 957, 87 Ark. 348; *First Nat. Bank of Crandon v. United States Fidelity & Guaranty Co. of Baltimore*, 137 N. W. 742, 150 Wis. 601; *Goldman v. Fidelity & Deposit Co. of Maryland*, 104 N. W. 80, 125 Wis. 390; *Williams v. United States Fidelity & Guaranty Co.*, 66 Atl. 495, 105 Md. 490; *Title Guaranty & Surety Co. v. Bank of Fulton*, 117 S. W. 537, 89 Ark. 471, 33 L. R. A. (N. S.) 676.

The correctness of instructions was considered in *Marcus v. Fidelity & Deposit Co. of Maryland* (Sup.) 145 N. Y. Supp. 49; *Fidelity & Deposit Co. of Maryland v. Colorado Ice & Storage Co.*, 103 Pac. 383, 45 Colo. 443; *United States Fidelity & Guaranty Co. v. Overstreet*, 84 S. W. 764, 27 Ky. Law Rep. 248; *Goldman v. Fidelity & Deposit Co. of Maryland*, 104 N. W. 80, 125 Wis. 390.

3323-3326. (c) Credit insurance

3323 (c). Where a policy made the "experience" of the insured in dealing with its customers the basis of credit, the term "experience" meant a business transaction which was closed, since until the goods for which the credit was extended were paid for, and the transaction closed, the creditor would not be justified in extending further credit (*Philadelphia Casualty Co. v. Cannon & Byers Millinery Co.*, 118 S. W. 1004, 133 Ky. 745).

Where the extension of credit was to be based upon experience, another section of the policy, making solvency a requisite of the extension of credit to old and new customers, was inconsistent, and could not be given effect; ambiguities being resolved against the insurer (*Lexington Grocery Co. v. Philadelphia Casualty Co.*, 72 S. E. 870, 157 N. C. 116).

So under policy of credit insurance protecting insured against classes of customers described in a schedule of capital and credit ratings, it was held that loss from a sale to an old customer whose rating was designated by a symbol in which the capital column was blank was covered (*Paskusz v. Philadelphia Casualty Co.*, 106 N. E. 749, 213 N. Y. 22, Ann. Cas. 1915A, 652, on this point reversing 131 N. Y. Supp. 421, 146 App. Div. 763).

Where a credit insurance policy excepted an initial loss of \$750, the insured was not entitled to recover thereunder for a loss of

\$195.30 (*Paskusz v. Philadelphia Casualty Co.*, 131 N. Y. Supp. 421, 146 App. Div. 763).

3325 (c). In *National Aniline & Chemical Co. v. American Credit Indemnity Co.*, 77 Atl. 920, 228 Pa. 588, a bond of a credit indemnity company provided that, if it issued a new bond before the expiration of the first one, the losses during the term of the new bond on merchandise shipped within 12 months immediately before the expiration of the old bond should be covered under the new bond, subject to the limitations of the same. It was held there could be no recovery for loss during the second bond on goods sold during the pendency of the second to a class of purchasers included in the first bond, but excluded by the provisions of the new bond.

3326 (c). Where a petition exhibited a list of debtors of the assured, and alleged that such debtors had become insolvent, had instituted bankruptcy proceedings, or had made deeds of assignment, and the answer merely denied lack of knowledge or lack of information that the losses, or any thereof, had been sustained by plaintiff in fact through the insolvency of the debtors as defined in the policy, such denial not being sufficient to raise an issue, proof of loss was not required (*American Credit Indemnity Co. of New York v. Hecht & Co.*, 129 S. W. 340, 137 Ky. 261, denying rehearing 125 S. W. 697, 137 Ky. 261).

Where a policy provided that the insured should be indemnified against loss on account of sales of goods of the kind usually dealt in by the insured, and the accounts taken from the books of the insured showed the character of goods to be such as the insured dealt in, the items themselves furnished the best evidence as to the character of the goods sold, and hence no additional proof as to their character was required (*Philadelphia Casualty Co. v. Cannon & Byers Millinery Co.*, 133 Ky. 745, 118 S. W. 1004). So it was held in the same case that, where insured showed that it had sold and delivered to its customers, whose accounts were involved in the action, the bills of goods set forth in the items of account filed with his deposition, and that these goods were not paid for, and accompanied his statements with such evidence of debt or insolvency in each case as insured had received after investigation, it established a *prima facie* case entitling it to judgment.

3326-3329. (d) Title insurance

3326 (d). Where a policy of title insurance excepted claims of tenure by present occupants, together with instruments, liens, in-
(1382)

cumbrances, judicial proceedings, and pending suits not shown by any public record, etc., the policy covered the record title only, and did not insure against a claim sustainable only by proof of adverse possession, or against a recorded deed of trust by a stranger to the record title (*Bothin v. California Title Ins. & Trust Co.*, 96 Pac. 500, 153 Cal. 718, Ann. Cas. 1914D, 634).

3327 (d). A policy insuring a purchaser of real estate against any defect of title affecting the premises, or the interest of the purchaser therein, or by reason of the unmarketability of the title or by reason of liens or incumbrances at the date of the policy, but exempting "variations between the location of the fences, stoops and the record lines," is breached by encroachments on the premises arising from the fact that the stoop, the door cap, and pilaster newel post of the adjoining property encroached several inches on the premises (*Glyn v. Title Guarantee & Trust Co.*, 117 N. Y. Supp. 424, 132 App. Div. 859). It was said in the same case that insured was entitled to recover the difference between the value of the property when purchased as it was with encroachments and its value as it would have been if there had been no such encroachments.

In *Broadway Realty Co. v. Lawyers' Title Ins. & Trust Co.*, 157 N. Y. Supp. 1088, 171 App. Div. 792, reversing judgment 154 N. Y. Supp. 1024, 91 Misc. Rep. 137, title insurer was held not liable under the policy for loss to the assured by its being compelled to cut off a foot of the building, begun by its vendor and completed by it, which extended so much over the line of the land.

A title insurance policy is a contract of indemnity, and insured is therefore limited to recovery for actual damages sustained.

Empire Development Co. v. Title Guarantee & Trust Co., 157 N. Y. Supp. 68, 171 App. Div. 116; *Wheeler v. Equitable Trust Co.*, 70 Atl. 750, 221 Pa. 276 (no loss where mortgagee bought in the mortgage at his own sale at a price equal to the loan); *Banes v. New Jersey Title Guarantee & Trust Co.*, 142 Fed. 957, 74 C. C. A. 127 (no loss to assignee of part interest in a mortgage by fact that receiver had collected the mortgage debt and discharged the mortgage, it not appearing that the proceeds were not still in the receiver's hands); *Palliser v. Title Ins. Co. of New York*, 115 N. Y. Supp. 545, 61 Misc. Rep. 490 (no loss until he has paid off the assessments or the premises have been sold in enforcement thereof).

In *Foehrenbach v. German-American Title & Trust Co.*, 66 Atl. 561, 217 Pa. 331, 12 L. R. A. (N. S.) 465, 118 Am. St. Rep. 916, however, it was held that where one in possession of land and claiming a

title in fee simple applies, in good faith, to a title insurance company, which issues to him a policy, and thereafter it is decided in partition proceedings that he has only a half interest in the land, and the insured because thereof voluntarily surrenders the premises to a purchaser at judicial sale, he may recover the value from the company, and it cannot claim that, as he never had title to the half interest, he suffered no loss.

3328 (d). A condition in a policy of title insurance that no claim shall arise under the policy, unless the party insured has been evicted under an adverse title insured against, is not fulfilled so as to give a right of action by the insured by an adjudication on appeal that a decree of an orphans' court, confirming an administrator's sale of the lands in question, and authorizing a deed therefor to the plaintiffs should be reversed and for nothing holden (*Ocean View Land Co. v. West Jersey Title Guaranty Co.*, 61 Atl. 83, 71 N. J. Law, 600).

Where title insurance company found that lands, not sought to be insured, were, as to land sought to be insured, dominant estates, which could enforce restrictive covenants against property to be insured, and releases were obtained from owners of dominant estates, but not from mortgagees of such estates, rights of such mortgagees were properly excepted from insurance (*Title Guarantee & Trust Co. v. Maloney* [Sup.] 165 N. Y. Supp. 280).

3329. (e) Other forms of guaranty insurance

3329 (e). Under an automobile accident policy, providing that insurer would defend any suits against insured on account of automobile accidents, the insurer was not required to defend a criminal proceeding (*Patterson v. Standard Accident Ins. Co.*, 144 N. W. 491, 178 Mich. 288, 51 L. R. A. [N. S.] 583, Ann. Cas. 1915A, 632).

The word "accident," as used in an automobile indemnity policy, is construed to mean "undesigned and unforeseen occurrence of an unfortunate character resulting in bodily injury to a person other than the insured" (*Chapin v. Ocean Accident & Guarantee Corporation*, 147 N. W. 465, 96 Neb. 213, 52 L. R. A. [N. S.] 227).

An automobile policy exempting loss incurred in operating it in violation of law would have excepted a death caused while the car was driven by the insured's 16 year old son, contrary to ordinance, had the ordinance been valid (*Royal Indemnity Co. v. Schwartz* [Tex. Civ. App.] 172 S. W. 581).

In *Rock Springs Distilling Co. v. Employers' Indemnity Co. of Philadelphia*, 169 S. W. 730, 160 Ky. 317, an insurance company (1384)

was held not liable on a policy insuring a corporation against injuries caused by its automobile, for injuries caused by the automobile while conveying a stockholder to his home, where the person injured recovered judgment against the stockholder, and not against the corporation, although the corporation voluntarily defended the action and paid the judgment.

Contracts of a corporation to defend physicians against suits for damages for malpractice at its own expense, not exceeding a certain amount, are not to render personal services, but to indemnify against loss and damage resulting from the defense of such actions (*Physicians' Defense Co. v. O'Brien*, 111 N. W. 396, 100 Minn. 490).

Under policy indemnifying dentist from liability for alleged malpractice of himself or assistant while acting under his instructions, insurer is not liable for a judgment obtained by a patient who was operated on and injured by an unregistered and unlicensed assistant, in view of 2 Comp. St. New Jersey 1910, pp. 1911, 1913, 1915, §§ 1, 8 and 12 (*Betts v. Massachusetts Bonding & Ins. Co.* [N. J.] 101 Atl. 257).

Under the provisions of a marine policy on a towing tug, insuring against loss or damage for which the tug should become legally liable caused by collision or stranding, underwriter only responsible for injuries received by a tow while such tow was alongside or attached to a hawser, it was held that there could be no recovery on the policy for the loss of tows while they were at anchor where they had been placed by the tug, and for which she had been adjudged liable on the ground that she had left them in an unsafe place and insufficiently anchored (*Barber v. Home Ins. Co. of City of New York* [D. C.] 154 Fed. 87).

A casualty insurance company, which defended an action against insured for a loss covered by the policy, cannot defeat recovery on the policy on the ground that the loss was not caused by the act for which recovery was allowed against the insured (*Taxicab Motor Co. v. Pacific Coast Casualty Co. of San Francisco, Cal.*, 132 Pac. 393, 73 Wash. 631).

So a judgment against a city employing a sewer contractor in favor of a pedestrian injured by the negligent failure to guard open sewer trenches is binding on the contractor and his insurer against loss, though they were not parties, but defended the action (*Kibler v. Maryland Casualty Co.*, 132 Pac. 878, 74 Wash. 159); but no action lies on an insurance contract of indemnity against.

loss or damages from liability, as distinguished from a contract of indemnity against liability merely, when no loss has in fact accrued to the insured (*United States Fidelity & Guaranty Co. v. Maryland Casualty Co.*, 182 Ill. App. 438).

Where every part of habitable portion of building was let to and occupied by tenants when cornice fell and injured pedestrians, policy, stipulating indemnity for owner, providing it was issued with understanding that assured was the owner, but not in occupation or control of the property, covered the case (*De Mun Estate Corp. v. Frankfort General Ins. Co.*, 187 S. W. 1124, 196 Mo. App. 1).

Indemnity bond given by contractor and bonding company to railroads does not cover employé's action against contractor for personal injury (*Gadsden v. Crafts*, 88 S. E. 423, 171 N. C. 288).

Under a liability policy insuring against sums paid by insured toward satisfying judgments against him insured's giving a note for such a judgment constitutes a payment rendering insurer liable (*Rodgers v. Pacific Coast Casualty Co.* [Cal.] 164 Pac. 1115).

In an action on a building contractor's indemnity bond, conditioned to save the owner harmless from any loss for breach of contract, a breach of condition being clearly shown by proof of the satisfaction of a judgment recovered against plaintiff's property, the burden was on defendant to show payment or performance the same as in any other case (*Helmer v. Title Guaranty & Surety Co. of Scranton, Pa.*, 104 Pac. 783, 55 Wash. 558).

2. EXTENT OF LIABILITY

3330-3332. (a) Employers' liability insurance

3330 (a). The liability of an insurance company on an employer's liability policy is fixed by the terms of the policy.

London Guarantee & Accident Co. v. Mississippi Cent. R. Co., 52 South. 787, 97 Miss. 165; *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981; *Rogers v. Western Indemnity Co. of Dallas, Tex.*, 173 S. W. 1087, 189 Mo. App. 82; *London Guarantee & Accident Co. v. Ogelsby*, 80 Atl. 57, 231 Pa. 186; *Buffalo Steel Co. v. Aetna Life Ins. Co.* (Sup.) 136 N. Y. Supp. 977; *United States Cast Iron Pipe & Foundry Co. v. Bragg*, 47 South. 66, 156 Ala. 522; *Kibler v. Maryland Casualty Co.*, 132 Pac. 878, 74 Wash. 159; *Maryland Casualty Co. v. Peppard* (Okl.) 157 Pac. 106.

So the provision as to defense by defendant was to prescribe the terms on which the defense was given to the company, and

(1386)

did not give the assured any discretion in the conduct of the case, even though its interests might be prejudiced in the legal proceedings taken (*Davison v. Maryland Casualty Co.*, 83 N. E. 407, 197 Mass. 167). In such case there is, however, an implied obligation that insurer exercise good faith (*Brunswick Realty Co. v. Frankfort Ins. Co.*, 99 Misc. Rep. 639, 166 N. Y. Supp. 36).

So although a policy provides that the insurer shall defend actions against the insured because of accidents, and the insurer refuses to defend such an action, it is not therefore bound absolutely by settlement of an action by the insured; but to recover the insured must show a liability within the policy and its amount, and cannot recover more than the actual loss sustained (*Mayor, Lane & Co. v. Commercial Casualty Ins. Co.*, 155 N. Y. Supp. 75, 169 App. Div. 772, modifying 150 N. Y. Supp. 624).

Where there is or may be different grounds of liability asserted, for some of which an insurer in an employer's liability insurance policy is liable, and for some of which the employer must stand the loss, neither party can exclude the other from participating in the defense (*Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 190 S. W. 382, 195 Mo. App. 313).

That an indemnity insurance company refused to agree to a settlement which insured could have procured, and a judgment for a greater amount was obtained against insured, does not render the insurer liable for that part of such judgment above the amount of the insurer's liability as fixed by the policy and in excess of the settlement which it refused to accept.

Wynnewood Lumber Co. v. Travelers' Ins. Co., 91 S. E. 946, 173 N. C. 269; *Wisconsin Zinc Co. v. Fidelity & Deposit Co. of Maryland*, 155 N. W. 1081, 162 Wis. 39; *New Orleans & C. R. Co. v. Maryland Casualty Co.*, 38 South. 89, 114 La. 153, 6 L. R. A. (N. S.) 562; *C. Schmidt & Sons Brewing Co. v. Travelers' Ins. Co.*, 90 Atl. 653, 244 Pa. 286, 52 L. R. A. (N. S.) 126.

Contra: *Fidelity & Casualty Co. of New York v. Southern Ry. News Co.*, 101 S. W. 900, 31 Ky. Law Rep. 55, rehearing denied 103 S. W. 297, 31 Ky. Law Rep. 725; *Brown & McCabe, Stevedores, v. London Guarantee & Accident Co.* (D. C.) 232 Fed. 298.

3331 (a). Where indemnity insurer, which had refused to defend suit, notified insured that settlement could be made for a small amount, but insured allowed judgment by default for the full claim, rule as to minimizing damages should apply (*Carthage Stone Co. v. Travelers' Ins. Co.*, 172 S. W. 458, 186 Mo. App. 318).

So where the insurer, having notice of an accident to the insured's employé, disclaims any liability and refuses to make any defense, it cannot when sued by insured, complain of a just settlement with the injured party (*United States Fidelity & Guaranty Co. v. Pressler* [Tex. Civ. App.] 185 S. W. 326).

If the insurer fails to defend the action against the insured under the stipulation of the policy, and the insured is obliged to defend it, the insurer is liable for the cost or expenses incurred by the insured in that behalf.

Lowe v. Fidelity & Casualty Co. of New York, 87 S. E. 250, 170 N. C. 445; *Sachs v. Maryland Casualty Co.*, 156 N. Y. Supp. 419, 170 App. Div. 494; *John B. Stevens & Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 207 Fed. 757, 125 C. C. A. 295, 47 L. R. A. (N. S.) 1214; *Harbor & Suburban Bldg. & Savings Ass'n v. Employers' Liability Assur. Corporation, Limited, of London, Eng.*, 140 N. Y. Supp. 717, 79 Misc. Rep. 150; *South Knoxville Brick Co. v. Empire State Surety Co.*, 150 S. W. 92, 126 Tenn. 402, Ann. Cas. 1913E, 107; *Ætna Life Ins. Co. v. Bowling Green Gaslight Co.*, 150 S. W. 994, 150 Ky. 732, 43 L. R. A. (N. S.) 1128; *Conqueror Zinc & Lead Co. v. Ætna Life Ins. Co.*, 133 S. W. 156, 152 Mo. App. 332; *Travelers' Ins. Co. v. Henderson Cotton Mills*, 85 S. W. 1090, 120 Ky. 218, 27 Ky. Law Rep. 653, 117 Am. St. Rep. 585, 9 Ann. Cas. 162; *Hudson River Telephone Co. v. Ætna Life Ins. Co.*, 121 N. Y. Supp. 565, 66 Misc. Rep. 329, affirmed 123 N. Y. Supp. 1121, 138 App. Div. 931; *Anderson & Ireland Co. v. Maryland Casualty Co.*, 90 Atl. 780, 123 Md. 67; *Maryland Casualty Co. of Baltimore, Md., v. Omaha Electric Light & Power Co.*, 157 Fed. 514, 85 C. C. A. 106; *Brewster v. Empire State Surety Co. of New York*, 130 N. Y. Supp. 439, 145 App. Div. 678; *Coast Lumber Co. v. Ætna Life Ins. Co.*, 125 Pac. 185, 22 Idaho, 264; *Southwestern Surety Ins. Co. v. Thompson* (Tex. Civ. App.) 180 S. W. 947; *Bowron v. Georgia Casualty Co. (D. C.)* 223 Fed. 673; *Maryland Casualty Co. v. Peppard* (Okla.) 157 Pac. 106, L. R. A. 1916E, 597.

So the fact that liability insurer had offered employer free use of its legal departments after repudiating liability under the policy does not prevent employer's recovery of attorney's fee incurred in defending suit for injury (*Compton Heights Laundry Co. v. General Accident, Fire & Life Assur. Corp., Limited, of Perth, Scotland*, 190 S. W. 382, 195 Mo. App. 313).

If the insurer unsuccessfully defends the action, it cannot deduct the expenses of the suit from the amount for which it becomes liable under the policy.

New Amsterdam Casualty Co. v. Cumberland Telephone & Telegraph Co., 152 Fed. 961, 82 C. C. A. 315, 12 L. R. A. (N. S.) 478; *Cannon*

Mfg. Co. v. Employers' Indemnity Co., 76 S. E. 536, 161 N. C. 19, Ann. Cas. 1914D, 1095; *Coast Lumber Co. v. Aetna Life Ins. Co.*, 125 Pac. 185, 22 Idaho, 264; *Myton v. Fidelity & Casualty Co. of New York*, 92 S. W. 1149, 117 Mo. App. 442; *Puget Sound Imp. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 100 Pac. 190, 52 Wash. 124.

Interest accruing on the judgment recovered in such action pending an appeal therefrom, is not a part of such expense.

Brewster v. Empire State Surety Co. of New York, 130 N. Y. Supp. 439, 145 App. Div. 678; *Little Cahaba Coal Co. v. Aetna Life Ins. Co.*, 192 Ala. 42, 68 South. 317, Ann. Cas. 1917D, 863; *Maryland Casualty Co. of Baltimore, Md., v. Omaha Electric Light & Power Co.*, 157 Fed. 514, 85 C. C. A. 106; *Davison v. Maryland Casualty Co.*, 83 N. E. 407, 197 Mass. 167.

Contra, under terms of local statute are *Century Realty Co. v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 179 Mo. App. 123, 161 S. W. 624; *Id.*, 179 Mo. App. 145, 161 S. W. 631; *Same v. Traveler's Ins. Co.*, 179 Mo. App. 144, 161 S. W. 630.

Under the terms of some policies it has been held that the insurer's liability was limited, despite the expenses of suit, to the amount named in the policy.

Munro v. Maryland Casualty Co., 96 N. Y. Supp. 705, 48 Misc. Rep. 183; *National & Providence Worsted Mills v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 66 Atl. 58, 28 R. I. 126.

The policy does not cover groundless or fictitious claims made against insured.

Henderson Lighting & Power Co. v. Maryland Casualty Co., 69 S. E. 234, 153 N. C. 275, 30 L. R. A. (N. S.) 1105.

Contra, under the terms of the policy: *South Knoxville Brick Co. v. Empire State Surety Co.*, 150 S. W. 92, 126 Tenn. 402, Ann. Cas. 1913E, 107.

Where insured in a liability policy indemnifying him against damages recovered for injuries owing to his negligence successfully defended an injury action, he could not recover expenses of litigation from insurer.

Creem v. Fidelity & Casualty Co. of New York, 116 N. Y. Supp. 1042, 132 App. Div. 241; *Dixie Fire Ins. Co. v. American Bonding Co.*, 78 S. E. 430, 162 N. C. 384; *Lawrence v. General Accident Assur. Corp. of Perth, Scotland*, 85 N. E. 1112, 192 N. Y. 568, affirming 108 N. Y. Supp. 939, 124 App. Div. 545; *Nesson v. United States Casualty Co.*, 87 N. E. 191, 201 Mass. 71, 131 Am. St. Rep. 390.

But insurer, having defended suits against insured under an agreement to defend at its own cost at its election, it is liable for

the costs of the defense whether the plaintiff was successful or not (*Hudson River Telephone Co. v. Aetna Life Ins. Co.*, 121 N. Y. Supp. 565, 66 Misc. Rep. 329, affirmed 123 N. Y. Supp. 1121, 138 App. Div. 931); and under provisions of employer's liability insurance policy, insurer, declining to defend suit after notice as required by policy, may be liable to insured for his expenses in his successful defense of suit (*Southern States Fire Ins. Co. v. Hand-Jordan Co.*, 73 South. 578, 112 Miss. 565).

So, insurer having defended a suit against the employer and lost, and declined to appeal if the employer appeals and obtains a reversal the insurer is liable for the expenses incurred by the insurer (*Brassil v. Maryland Casualty Co.*, 133 N. Y. Supp. 187, 147 App. Div. 815).

3332 (a). Where an injured servant sued his master, and the insurer, under its policy, defended the action, the judgment in favor of the employé established conclusively between the insurer and the insured the liability of the insured to the employé, so as to fix the amount of the charge against the insurer, if any liability existed.

Buffalo Steel Co. v. Aetna Life Ins. Co. (Sup.) 136 N. Y. Supp. 977; *Creem v. Fidelity & Casualty Co. of New York*, 126 N. Y. Supp. 555, 141 App. Div. 493; *B. Roth Tool Co. v. New Amsterdam Casualty Co.*, 161 Fed. 709, 88 C. C. A. 569; *Humes Const. Co. v. Philadelphia Casualty Co.*, 79 Atl. 1, 32 R. I. 246, Ann. Cas. 1912D, 906; *Mason-Henry Press v. Aetna Life Ins. Co.*, 146 App. Div. 181, 130 N. Y. Supp. 961; *Murch Bros. Const. Co. v. Fidelity & Casualty Co. of New York*, 176 S. W. 399, 190 Mo. App. 490.

Insurer against liability, unless arising out of violation of law, is entitled, when a claim was made on various grounds, including a violation of law, to refuse to defend or to defend the action under an understanding with or notice to the employer that if the only allegation sustained was the one of violation of law, its rights should be preserved, and it should not be liable.

Mason-Henry Press v. Aetna Life Ins. Co., 105 N. E. 826, 211 N. Y. 489, affirming 139 N. Y. Supp. 1133, 155 App. Div. 876; *Royle Mining Co. v. Fidelity & Casualty Co. of New York*, 161 Mo. App. 185, 142 S. W. 438; *Steven v. Fidelity & Casualty Co. of New York*, 178 Ill. App. 54.

But indemnity insurance company is liable to insured for its negligence in defense of action against insured, which it had undertaken under right given by policy, though it was not required to do so (*Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 240 Fed. 573, 153 C. C. A. 377).

So where holder of indemnity policy suffered verdict for death of person through accident covered by policy, and insurer agreed to appeal and assured policy holder appeal had been taken, but, without latter's knowledge, permitted time to expire without taking it, policy holder had a cause of action against insurer (*McAleenan v. Massachusetts Bonding & Insurance Co.*, 219 N. Y. 563, 114 N. E. 114, affirming 159 N. Y. Supp. 401, 173 App. Div. 100).

A delay of three months without action by an indemnity company, after notice of claim against insured, has been held to estop the company to rely on a stipulation forbidding settlement without its consent (*Interstate Casualty Co. v. Wallins Creek Coal Co.*, 176 S. W. 217, 164 Ky. 778, L. R. A. 1915F, 958).

Under a policy for \$5,000, stipulating that insured should not settle without insurer's consent, insurer was not entitled to benefit proportionally with insured by a settlement, made after judgment and affirmance, not reducing the amount below \$5,000 (*Mears Mining Co. v. Maryland Casualty Co.*, 144 S. W. 883, 162 Mo. App. 178).

In *Tighe v. Maryland Casualty Co.*, 106 N. E. 135, 218 Mass. 463, insurer was held not entitled to successfully resist an action on the policy because a judgment against plaintiff was rendered by default instead of after the trial of an issue, as provided in the conditions of the policy.

The question of reasonableness of notice given by employer's indemnity company to the insured, that it would withdraw from a case of which it had undertaken the defense, and that insured should come in and defend is a question of law for the court (*United Waste Mfg. Co. v. Maryland Casualty Co.*, 148 N. Y. Supp. 852, 85 Misc. Rep. 539).

The sufficiency of evidence was considered in *Hudson River Telephone Co. v. Aetna Life Ins. Co.*, 121 N. Y. S. 565, 66 Misc. Rep. 329, affirmed 123 N. Y. Supp. 1121, 138 App. Div. 931; *Ocean Accident & Guarantee Corporation v. Joslin Dry Goods Co.*, 146 Pac. 790, 27 Colo. App. 52; *Globe Nav. Co. v. Maryland Casualty Co.*, 81 Pac. 826, 39 Wash. 299; *Pacific Coast Casualty Co. v. Home Telephone & Telegraph Co.*, 106 Pac. 262, 11 Cal. App. 712.

3332-3334. (b) Same—When liability accrues

3334 (b). The amount paid by an employer in the prudent settlement of suits against it, founded on the negligence of an employé, may be recovered from the insurer against loss because of such negligence, who had denied all liability, and refused to defend the

(1391)

suits, as provided in the policy, although such policy contains a condition against compromising any claim without the written consent of the insurer and provides that no action shall lie against the insurer as respects any loss under the policy unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue (*St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co.*, 26 Sup. Ct. 400, 201 U. S. 173, 50 L. Ed. 712).

So, where the attorneys and agents representing the insurer made a settlement of such a case for more than the amount of the policy, with the assent of the assured, which paid the money, further provisions of the policy prohibiting settlements by the assured without consent in writing of the insurer, that it should be liable only after final judgment against the assured, etc., have no application, and constitute no defense to an action to recover on the policy on account of the claim so settled; nor can it deny, as against the assured, the authority of the agents and attorneys employed by it and acting in its behalf to make the settlement (*New Amsterdam Casualty Co. v. East Tennessee Telephone Co.*, 139 Fed. 602, 71 C. C. A. 586).

In *Dunham v. Philadelphia Casualty Co.*, 162 S. W. 728, 179 Mo. App. 558, it was held that under an employers' liability policy it was a condition precedent to a recovery of expenses incurred by the insured that the payment be not made until after the trial of the issues or with the written consent of the company.

Under an employers' liability policy, which provides that the insurer shall not be liable to reimburse the insured except for "losses actually sustained and paid by him in satisfaction of a judgment after trial of the issues," it is a condition precedent to the recovery of indemnity that the insured shall have actually paid the loss.

Ford v. Aetna Life Ins. Co. v. Hartford, Conn., 70 Wash. 29, 126 Pac. 69; *Texas Short Line Ry. Co. v. Waymire* (Tex. Civ. App.) 89 S. W. 452; *West Riverside Coal Co. v. Maryland Casualty Co.*, 135 N. W. 414, 155 Iowa, 161, 48 L. R. A. (N. S.) 195; *Campbell v. Maryland Casualty Co.*, 97 N. E. 1026, 52 Ind. App. 228; *Lowe v. Fidelity & Casualty Co. of New York*, 87 S. E. 250, 170 N. C. 445; *Wisconsin Zinc Co. v. Fidelity & Deposit Co. of Maryland*, 155 N. W. 1081, 162 Wis. 39; *Philadelphia Pickling Co. v. Maryland Casualty Co.*, 98 Atl. 433, 89 N. J. Law, 330; *Curtis & Gartside Co. v. Aetna Life Ins. Co.* (Okla.) 160 Pac. 465; *Eberlein v. Fidelity & Deposit Co. of Maryland*, 159 N. W. 553, 164 Wis. 242; *Kingan & Co. v. Maryland Casualty Co.* (Ind. App.) 115 N. E. 348; *Clark v. Bonsal & Co.*, 72 S. E. 954, 157 N. C. 270, 48 L. R. A. (N. S.) 191;

Carter v. Ætna Life Ins. Co., 91 Pac. 178, 76 Kan. 275, 11 L. R. A. (N. S.) 1155; *Brassil v. Maryland Casualty Co.*, 133 N. Y. Supp. 187, 147 App. Div. 815; *Saratoga Trap Rock Co. v. Standard Accident Ins. Co.*, 143 App. Div. 852, 128 N. Y. Supp. 822; *Atlas Hardwood Lumber Co. v. Georgia Life Ins. Co.*, 167 S. W. 109, 129 Tenn. 477; *Brassil v. Maryland Casualty Co.*, 104 N. E. 622, 210 N. Y. 235, L. R. A. 1915A, 629, affirming 133 N. Y. Supp. 187, 147 App. Div. 815; *Davison v. Maryland Casualty Co.*, 83 N. E. 407, 197 Mass. 167; *Edgefield Mfg. Co. v. Maryland Casualty Co.*, 58 S. E. 969, 78 S. C. 73; *Appel v. People's Surety Co.*,[†] of New York, 132 N. Y. Supp. 200, 148 App. Div. 70; *O'Connell v. New York, N. H. & H. R. R.*, 72 N. E. 979, 187 Mass. 272.

It has been held, however, that a policy against "loss from liability" for damages on account of accidental injuries indemnifies assured against liability and not merely against payment of liability (*Maryland Casualty Co. v. Peppard* [Okl.] 157 Pac. 106, L. R. A. 1916E, 597).

Payment and satisfaction of the judgment may be made by notes executed in good faith and accepted by the judgment creditor, so that a cause of action would accrue in favor of the assured and against the company.

Kennedy v. Fidelity & Casualty Co. of New York, 110 N. W. 97, 100 Minn. 1, 9 L. R. A. (N. S.) 478, 117 Am. St. Rep. 658, 10 Ann. Cas. 673; *Taxicab Motor Co. v. Pacific Coast Casualty Co. of San Francisco, Cal.*, 132 Pac. 393, 73 Wash. 631; *Herbo-Phosa Co. v. Philadelphia Casualty Co.*, 84 Atl. 1093, 34 R. I. 567; *Seattle & S. F. Ry. & Nav. Co. v. Maryland Casualty Co.*, 96 Pac. 509, 50 Wash. 44, 18 L. R. A. (N. S.) 121; *Riner v. Southwestern Surety Ins. Co.*, 85 Or. 293, 165 Pac. 684.

In *Stenbom v. Brown-Corliss Engine Co.*, 119 N. W. 308, 137 Wis. 564, 20 L. R. A. (N. S.) 956, however, it was held that there is no bona fide payment of the judgment against an employer for injury to an employé where, judgment being obtained against the employer too late to be filed as a claim in the bankruptcy proceedings against it, a receiver of it as judgment debtor was appointed in supplemental proceedings, and the receiver gave his note in settlement of the judgment.

Where land conveyed as part of award was of value equal to amount for which it was taken, there was a substantial compliance, with requirement that loss be paid in money, and insured can recover full amount of award (*Komula v. General Accident Fire & Life Assur. Corp., Limited, of Perth, Scotland*, 162 N. W. 919, 165 Wis. 520).

In *McBride v. Ætna Life Ins. Co.*, 191 S. W. 5, 126 Ark. 528, however, where the evidence showed that on execution of employé's judgment against employer, his property was sold to employé who credited \$5,000 on judgment, and who sold property under a prior agreement to another for \$1,000 a finding was warranted that true value of property was \$1,000, for which insurer was liable. Under employer's indemnity policy indemnifying against loss or expenses actually sustained and paid, there must be actual loss from enforced payment of judgment liability by assured before obligation of insurer matures. Under insurance policy indemnifying employer against losses and expenses paid for injuries to employé's, where property of the insured was sold on execution, the real value of such property was the amount for which insurer was liable, and the fact that maximum amount of liability under insurance policy was credited on judgment by employé did not determine liability of insurer. Under employer's liability indemnity policy, the fact that damages were paid by appropriation of employer's property on execution did not prevent recovery from insurer notwithstanding provision of policy that no action should lie except for loss "actually sustained and paid in money." In an action on insurance policy indemnifying employer against damages paid for injuries to employé's, interest should be allowed only from the date of payment by insured, and not from date of original payment.

So in *J. Frank & Co. v. New Amsterdam Casualty Co.* (Cal.) 165 Pac. 927, it was held that the insurer may inquire whether the judgment has been paid, but not where the funds with which to pay it were obtained; while in *Davies v. Maryland Casualty Co.*, 154 Pac. 1116, 89 Wash. 571, L. R. A. 1916D, 395, rehearing denied 155 Pac. 1035, 89 Wash. 571, L. R. A. 1916D, 398, it was held that where an insolvent coal company, assured by an indemnity policy for \$5,000, gave the widow of its deceased employé notes for \$17,000 to satisfy her judgment for \$15,000, she expecting to return them immediately, satisfy the judgment, and receive an assignment of the indemnity policy, which was done, the transaction did not constitute payment of the judgment by the insolvent company.

The provision does not prevent the maintenance of an action on the policy by an assignee of the claim for indemnity, who for value received from the assured has assumed and paid the judgment liability, which within the true meaning of such provision is equivalent to payment by the assured (*Maryland Casualty Co. of Baltimore, Md., v. Omaha Electric Light & Power Co.*, 157 Fed. 514,

85 C. C. A. 106) ; also where defendant did not introduce the policy alleged to limit the liability to money actually paid in satisfaction of a judgment after trial, and plaintiff established the recovery of the judgment, he could recover, whether he had paid the judgment or not, since it was a liability imposed by law, and limitation as to payment was not available (*Lewinthan v. Travelers' Ins. Co. of Hartford, Conn.*, 113 N. Y. Supp. 1031, 61 Misc. Rep. 621).

In *Rochester Mining Co. v. Maryland Casualty Co.*, 128 S. W. 204, 143 Mo. App. 555, under the terms of the policy, it was held that it was the duty of defendant in an action against plaintiff for injury to an employé to furnish an appeal bond, and having failed to do so, or to notify a plaintiff to do so in time to stay the judgment, and so having forced plaintiff to pay it, defendant waived the right to have plaintiff, before suing on the bond, wait till determination of the appeal.

In *Creem v. Fidelity & Casualty Co. of New York*, 126 N. Y. Supp. 555, 141 App. Div. 493, an insurer agreed to indemnify a subcontractor against loss for injuries to employés and the public. A pedestrian was injured by falling over an obstruction in the street caused by the subcontractor in the performance of his work. A judgment for the damages was recovered against the contractor, who subsequently recovered judgment over against the subcontractor. It was held that the subcontractor's cause of action on the policy arose on the rendition of judgment against him, whether he had notice to defend the action against the contractor or not.

Indemnity insurers, who had agreed, if they assumed defense of suit, they would either pay insured indemnity to which they were entitled or secure their release from the claim, but who failed to do either, were liable to insured in assumpsit without its first paying the injured party's claim, and in action by injured party against insured they were chargeable as trustees with amount of indemnity (*Lombard v. Maguire-Penniman Co.*, 97 Atl. 892, 78 N. H. 110).

3335. (c) Same—Liability to person injured

3335 (c). Under the contract of an insurance company to indemnify the insured against loss for damages on account of bodily injuries caused by negligence of the insured, the insurer is not liable to one injured, who has recovered judgment therefor against the insured, the judgment not being paid, so as to render the insurer liable to the insured, though the insured is insolvent; there being

(1395)

no privity between the insured and the one injured, through the contract.

Beyer v. International Aluminum Co., 101 N. Y. Supp. 83, 115 App. Div. 853; *Northam v. Casualty Co. of America (C. C.)* 177 Fed. 981; *Fidelity & Casualty Co. of New York v. Martin*, 173 S. W. 307, 163 Ky. 12, L. R. A. 1917F, 924; *Morris v. Travelers' Ins. Co. (C. C.)* 189 Fed. 211; *Clark v. Bonsal & Co.*, 72 S. E. 954, 157 N. C. 270, 48 L. R. A. (N. S.) 191; *Burke v. London Guarantee & Accident Co.*, 110 N. Y. Supp. 1124, 126 App. Div. 933, affirming 93 N. Y. Supp. 652, 47 Misc. Rep. 171.

Hence no valid claim existed against insurer until the judgment should be paid by the assured, and it could not therefore be held liable to the plaintiff in the judgment as garnishee (*Allen v. Ætna Life Ins. Co.*, 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958, affirming [C. C.] 137 Fed. 136).

However, in *Moore v. Maryland Casualty Co.*, 63 Atl. 490, 73 N. H. 518, 111 Am. St. Rep. 647, on the insolvency of the employer railway company plaintiff brought suit in equity to compel the casualty company to pay plaintiff the amount of its indebtedness on the policy to the railway company. It was held that the railway company's receiver was an indispensable party and that the suit could not be maintained until the court had acquired jurisdiction of him.

Further, an indemnity policy may undertake to insure the employer for the benefit of certain employes (*United Zinc Cos. v. General Acc. Assur. Corp.*, 102 S. W. 605, 125 Mo. App. 41).

In *McBride v. Ætna Life Ins. Co.*, 191 S. W. 5, 126 Ark. 528, it was held that, under employer's indemnity policy, employé, to whom policy was assigned was entitled to recover only such costs as were adjudged against employer, and not to costs incurred in efforts to collect judgment.

3336-3338. (d) Fidelity insurance

3336 (d). The rule that checks drawn on a bank by a depositor should be charged against the deposits in the order in which they were made was properly applied in an action by a corporation on a bond indemnifying it against loss through the negligence of its treasurer, based on his alleged negligence in making deposits in the bank after knowledge of its insolvency (*National Surety Co. v. Western Pac. Ry. Co.*, 200 Fed. 675, 119 C. C. A. 91).

Insured having absconded, insurer's liability to all insured's cred-
(1396)

itors was limited to the amount of the bond (*Illinois Surety Co. v. Mattone*, 122 N. Y. Supp. 928, 138 App. Div. 173).

A fidelity bond of an insurance agent, obligating him to pay over all moneys which he owed or might thereafter owe the general agent, either for advances or otherwise. Such latter provision only secured advances made in the line of the agency, and did not include other personal advances (*Kaufman v. Marshall*, 115 S. W. 680, 89 Ark. 1).

3337 (d). Where a bond issued by a surety company indemnifying an employer against default of an employé for a certain amount provided that it should not lapse at the end of the term if renewed, but that the liability of the surety should not be cumulative, the total liability for the whole period represented by the original term and renewal periods was limited to the amount specified in the bond.

Fidelity Deposit Co. of Maryland v. Champion Ice Mfg. & Cold Storage Co., 133 Ky. 74, 117 S. W. 393; *American Bonding Co. of Baltimore v. Morrow*, 96 S. W. 613, 80 Ark. 49, 117 Am. St. Rep. 72.

In *Alex. Campbell Milk Co. v. United States Fidelity & Guaranty Co.*, 146 N. Y. Supp. 92, 161 App. Div. 738, however, it was held that where a guaranty company issued a bond to secure an employer against defalcations by his employé, and renewed the bond for several years, the bond and each renewal constituted different liabilities, rendering the insurer liable up to the limit fixed by the bond for the employé's defalcation each year.

A bond given by a surety company against embezzlement by a bank cashier during a stated term, and covering losses "discovered during said term or within six months thereafter, and within six months after the determination of this obligation," does not impose any liability for embezzlement by the cashier which was not discovered until more than three years after the termination of the bond (*Lyons v. National Surety Co.*, 147 S. W. 778, 243 Mo. 607); and under a bond subsequently executed by defendant insurer, which is not a renewal of original bond, no recovery for defalcation occurring during term of original bond or as extended could be had, not being discovered within time fixed (*Miners' & Merchants' Bank v. United States Fidelity & Guaranty Co.*, 233 Fed. 654, 147 C. C. A. 462).

Where the term of service for which a fidelity bond was given ceased on testator's death, his executors could only recover for dam-

ages caused by the dishonesty of the employé up to that time (Roth v. Massachusetts Bonding & Ins. Co., 149 N. W. 143, 158 Wis. 469).

In *John Church Co. v. Ætna Indemnity Co.*, 80 S. E. 1093, 13 Ga. App. 826, a contract of fidelity insurance was held confined to the faithfulness of the principal in the bond in his discharge of a certain defined duty, without regard to the period of time necessary for its performance.

3338 (d). In an action on a fidelity bond indemnifying an employer against loss by reason of the dishonesty of an employé, the testimony of the employé as to the amount of his collections under his employment was admissible (Supreme Ruling of the Fraternal Mystic Circle v. National Surety Co., 99 N. Y. Supp. 1033, 114 App. Div. 689).

A statement of alleged embezzlements or larcenies of an agency director delivered to an indemnity company, to the extent that it reflects information contained in the books and records of the employer kept in the regular and ordinary course of its business, is based on "the accounts of the employer" within a provision of the indemnity bond making such a statement prima facie evidence of the loss (*Security Mut. Life Ins. Co. v. Ætna Indemnity Co.*, 108 N. Y. Supp. 171, 124 App. Div. 50).

3338-3341. (e) Credit insurance

3338 (e). In *Knerll v. Ocean Accident & Guarantee Corp.* (Sup.) 119 N. Y. Supp. 744, a contract of credit insurance on certain accounts for sales of merchandise provided that the insured should bear a proportionate share of the loss, and covered actual loss "in excess of an initial or own loss to be borne" by insured, "being one and one-half per cent., but in no event to be less than \$750 on the gross aggregate amount of all * * * sales" within a certain time and in a specified territory. It was held that it was necessary for plaintiff to show the gross aggregate amount of all sales made in the territory and within the time specified in the contract.

A similar position was taken in *Pringle Bros. v. Philadelphia Casualty Co.*, 112 N. E. 465, 218 N. Y. 1, reversing 138 N. Y. Supp. 330, 153 App. Div. 180, where a clause of policy insuring against bad debts, requiring with the notice of loss a statement of prior experience with the debtor, and limiting liability to the amount of goods sold him within the 12 months next preceding the first shipment for which liability is claimed, was held to limit it, not simply to indebtedness paid, but according to all transactions in the stated period.

In *Steinwender v. Philadelphia Casualty Co.*, 126 N. Y. Supp. 271, 141 App. Div. 432, it was held that the provision limiting the insurer's liability to the highest previous indebtedness, etc., meant the highest indebtedness of a customer which had been paid previous to the execution of the bond.

In *American Credit Indemnity Co. v. Jung*, 195 Fed. 177, 115 C. C. A. 129, reversing (C. C.) 180 Fed. 510, a credit indemnity policy and rider attached was held to create one contract, limiting the liability of insurer on rated and unrated accounts in excess of the initial loss, which must be borne by the indemnified.

In *Philadelphia Casualty Co. v. Cannon & Byers Millinery Co.*, 118 S. W. 1004, 133 Ky. 745, however, under the terms of the policy there in question, it was held that the effect of the rider was simply to antedate the policy six months, and hence accounts made during such time must be treated as a part of the gross business done by insured during the life of the policy, for the purpose of determining the initial loss. It was held in the same case that "first bill" meant the particular articles contracted for at one time, without regard to the time within which the bill therefor should be paid, and did not include all goods, which were sold and delivered between the first sale and the maturity of the bill therefor. Where a policy of credit insurance makes no provision as to the application of salvage, the insured may apply it to the discharge of those debts for which he holds no security and for the loss of which he is not indemnified.

The phrase "highest previous indebtedness" in a credit insurance bond means the highest previous paid indebtedness, and not that merely contracted (*Pringle Bros. v. Philadelphia Casualty Co.*, 138 N. Y. Supp. 330, 153 App. Div. 180). In the same case it was held that an insurer issuing a policy covering credits was not liable for interest on the amount of a loss prior to the time that the defaulting debtor was chargeable with interest.

In *Peden Iron & Steel Co. v. Ocean Accident & Guarantee Corp.*, 151 Fed. 992, 81 C. C. A. 178, a credit insurance policy provided that the gross aggregate of insolvent accounts coming within the provisions of the agreement to be taken into the calculation of losses under the contract was limited to \$5,000, but that no account against any one debtor should be covered for more than \$3,000, and only 75 per cent. of the amount so covered on such accounts should be included in the calculation of losses under the contract. It was held that such clause was ambiguous, and, being construed

in favor of the insured, meant that the liability of the guarantor was \$5,000, and that the 75 per cent. provision applied only to the accounts of individual debtors which were limited to \$3,000.

Where first credit indemnity bond was surrendered before expiration and second bond was obtained as substitute, no recovery could be had for loss which did not fall within second bond, by reason of provisions as to subsequent bonds (*Henry A. Hitner's Sons Co. v. American Credit Indemnity Co.*, 239 Fed. 689, 152 C. C. A. 523).

A rider attached to a credit insurance policy covering goods sold between certain dates, "if otherwise coming within conditions of policy," did not impose initial loss provided upon all gross sales, but only upon those made to debtors who were in sound financial condition at time of paying premium (*Knobel v. London Guarantee & Accident Co.* [Sup.] 163 N. Y. Supp. 977).

Construction of the terms of a credit insurance policy was also dealt with in *Philadelphia Casualty Co. v. Fechheimer*, 220 Fed. 401, 136 C. C. A. 25, Ann. Cas. 1917D, 64.

3341 (e). Where a policy of credit insurance makes no provision as to the application of salvage, the insured may apply it to the discharge of those debts for which he holds no security and for the loss of which he is not indemnified (*Philadelphia Casualty Co. v. Cannon & Byers Millinery Co.*, 118 S. W. 1004, 133 Ky. 745).

An insurance policy which covers loss of rents includes loss of income where the premises in question were not demised for a specific term (*Gray v. Merchants' Ins. Co. of Newark*, 125 Ill. App. 370).

3341-3342. (f) Title insurance

3342 (f). A complaint in an action on a policy insuring title to real estate, which alleges that by reason of the premises insured has suffered damage in a specified sum, is sufficient to permit proof of such damage as is the naturally and legally presumable consequence of the injury done (*Glyn v. Title Guarantee & Trust Co.*, 117 N. Y. Supp. 424, 132 App. Div. 859).

3342-3343. (g) Other forms of guaranty insurance

3343 (g). An automobile accident indemnity company, having refused to defend is estopped to claim that it was not liable for attorney fees incurred by insured because the insurer's written consent to incur the fee was not first had (*Royal Indemnity Co. v. Schwartz* [Tex. Civ. App.] 172 S. W. 581).

So where insurer issued a policy against liability for damages for injuries to persons using an elevator in insured's building, and agreed to defend, at its own cost, actions against insured, and, pending an action, notified insured that it might withdraw from the defense, and insured thereupon employed an attorney, who assisted in defending the action, insurer was liable for the attorney's fees incurred (*Anderson & Ireland Co. v. Maryland Casualty Co.*, 90 Atl. 780, 123 Md. 67).

A provision in a policy against loss from the operation of an automobile, that no action shall lie against the insurer, unless brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue, applies only when the company denies liability and refuses to defend (*Patterson v. Adan*, 138 N. W. 281, 119 Minn. 308, 48 L. R. A. [N. S.] 184).

Where insurer, issuing an indemnity policy against loss from operation of machinery, received notice of actions against insured on claims, but failed to defend, and insured was obliged to pay judgments, insurer was liable therefor (*E. M. Upton Cold Storage Co. v. Pacific Coast Casualty Co.*, 147 N. Y. Supp. 765, 162 App. Div. 842).

A policy indemnifying an owner of an automobile for injuries to others, provided the automobile is not operated by a person under the age fixed by law, or under the age of 16 years, when construed in connection with Pub. Acts 1911, c. 85, § 5, makes insurer liable where insured paid damages for the death of a person struck by his automobile while operated by his son, between the age of 16 and 17 years, not accompanied by a licensed operator (*Brock v. Travelers' Ins. Co.*, 91 Atl. 279, 88 Conn. 308).

Automobile owner, insured against loss on account of accidents, insurer not agreeing by policy to consent to settlement of any claim for less than limit of policy, is without cause of action against insurer to recover \$750, paid by him as contribution to a sum paid a claimant in settlement of suit (*Levin v. New England Casualty Co.*, 160 N. Y. Supp. 1041, 97 Misc. Rep. 7).

Where a bond was conditioned as an indemnity against loss because of work or materials furnished in the construction of a building and also as a guaranty to complete the building, on the failure of the contractor so to do such failure is a breach of the condition of the bond for which an action will lie (*Equitable Trust Co. v. National Surety Co.*, 63 Atl. 699, 214 Pa. 159, 6 Ann. Cas. 465).

Holder of automobile accident insurance policy, who failed to

pay \$3,750, which decedent's administratrix offered to accept in settlement of any damage recovered in excess of \$5,000, could not recover against insurance company damages occasioned by excess judgment recovered on account of company's failure to accede to compromise (*McAleenan v. Massachusetts Bonding & Ins. Co.*, 159 N. Y. Supp. 401, 173 App. Div. 100, order affirmed 219 N. Y. 563, 114 N. E. 114).

Where subcontractor, as collateral to indemnity bond, agreed to assign real estate to surety company "in event of claim under bond, and only for amount equal to legal liability," word "claim" meant one reduced to certainty by judgment (*Maryland Casualty Co. v. Hanlon* [N. J. Ch.] 100 Atl. 352).

By statement of insurer against casualty loss that it will assume a defense under a reservation of policy rights and without liability for any judgment that may be recovered, it assumes any liability that it must assume under the policy (*Hartigan v. Casualty Co. of America*, 161 N. Y. Supp. 145, 97 Misc. Rep. 464).

Insurer of owner of premises against loss by damages for personal injuries is not liable to owner for balance of judgment above the face of the policy in infant's damage suit, on account of blunder of insurer in settling claim with infant's mother in a prior action; the settlement proving to be invalid because the mother was not appointed guardian ad litem (*Silverstein v. Standard Acc. Ins. Co. of Detroit, Mich.*, 162 N. Y. Supp. 601, 175 App. Div. 639).

An ordinary title insurance policy, issued to mortgagee, with provisions covering loss or damages sustained by reason of non-completion of buildings on premises, being a contract of indemnity, insured is bound to show actual loss sustained before there can be a recovery (*Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Central Trust & Savings Co.*, 255 Pa. 322, 99 Atl. 910).

The sufficiency of evidence was considered in *Miller v. Massachusetts Bonding & Ins. Co.*, 93 Atl. 320, 247 Pa. 182, L. R. A. 1915D, 615; *Kitsap County Transp. Co. v. Pacific Coast Casualty Co.*, 121 Pac. 457, 67 Wash. 297.

XXV. NOTICE AND PROOFS OF LOSS

1. NECESSITY OF NOTICE AND PROOF OF LOSS

3347-3350. (a) Notice and proof of loss as condition precedent to recovery—General rule

3347 (a). Furnishing of preliminary proofs of loss as required by a policy is a condition precedent to any right of action thereon, and, unless waived, an action does not accrue until they have been furnished.

Morris v. Dutchess Ins. Co., 68 S. E. 22, 67 W. Va. 368; *Thomas Orr Trucking & Forwarding Co. v. Metropolitan Surety Co.*, 73 Atl. 541, 77 N. J. Law, 749; *Palatine Ins. Co. v. Lynn*, 141 Pac. 1167, 42 Okl. 486; *Western Travelers' Acc. Ass'n v. Tomson*, 105 N. W. 293, 72 Neb. 661; *Perry v. Caledonian Ins. Co.*, 93 N. Y. Supp. 50, 103 App. Div. 113; *Slocum v. Saratoga & Washington Fire Ins. Co. of Saratoga and Washington Counties*, 134 N. Y. Supp. 72, 149 App. Div. 867; *Bennett v. Aetna Ins. Co.*, 88 N. E. 335, 201 Mass. 554, 131 Am. St. Rep. 414; *Nance v. Oklahoma Fire Ins. Co.*, 120 Pac. 948, 31 Okl. 208, 38 L. R. A. (N. S.) 426; *Davis v. Pioneer Mut. Ins. Ass'n*, 87 Pac. 829, 44 Wash. 532; *Castell v. Woodcock (Sup.)* 121 N. Y. Supp. 585; *Davis v. Northwestern Mut. Fire Ass'n*, 92 Pac. 881, 48 Wash. 50, 15 Ann. Cas. 333; *Harp v. Fireman's Fund Ins. Co.*, 61 S. E. 704, 130 Ga. 726, 14 Ann. Cas. 299; *Commercial Union Assur. Co., Limited, of London, England, v. Shults*, 130 Pac. 572, 37 Okl. 95; *Niagara Fire Ins. Co. v. Layne*, 172 S. W. 1090, 162 Ky. 665; *Citizens' Mut. Fire Ins. Co. of Cecil County v. Conowingo Bridge Co.*, 77 Atl. 378, 113 Md. 430; *Stoebe v. Hanover Fire Ins. Co. of New York*, 112 N. Y. Supp. 553, 128 App. Div. 887; *Smith v. Scottish Union & National Ins. Co.*, 85 N. E. 841, 200 Mass. 50; *Home Fire Ins. Co. v. Driver*, 112 S. W. 200, 87 Ark. 171; *American Cereal Co. v. Western Assur. Co. (C. C.)* 148 Fed. 77; *Chapin v. Ocean Accident & Guarantee Corporation*, 147 N. W. 465, 96 Neb. 213, 52 L. R. A. (N. S.) 227; *Masino v. Farmers' & Mechanics' Mut. Ins. Ass'n of Bucks County*, 84 Atl. 406, 235 Pa. 419; *Piercy v. Frankfort Marine Accident & Plate Glass Ins. Co., etc.*, 127 N. Y. Supp. 354, 142 App. Div. 839; *Hatch v. United States Casualty Co.*, 83 N. E. 398, 197 Mass. 101, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290; *Lee v. Casualty Co. of America*, 96 Atl. 952, 90 Conn. 202; *Union Mut. Ins. Co. v. Huntsberry (Okl.)* 156 Pac. 327; *National Live Stock Ins. Co. v. Bartlow*, 110 N. E. 224, 60 Ind. App. 233; *Talbot v. Atlantic Horse Ins. Co.*, 193 Ill. App. 587; *Fidelity Phenix Fire Ins. Co. v. Sadau (Tex. Civ. App.)* 178 S. W. 559; *Kazarian Bros. v. Providence-Washington Ins. Co. (R. I.)* 101

Atl. 221; *Bailey v. First Nat. Fire Ins. Co. of Washington, D. C.*, 89 S. E. 80, 18 Ga. App. 213; *Shawnee Fire Ins. Co. v. Beaty* (Okla.) 166 Pac. 84.

3349 (a). It is stated in some cases that the failure to furnish proofs of loss, as required by a contract of insurance, forfeits the policy and is a complete defense to any suit thereon.

American Nat. Ins. Co. v. Gallimore (Tex. Civ. App.) 166 S. W. 17; *American Nat. Life Ins. Co. v. Rowell* (Tex. Civ. App.) 175 S. W. 170; *Queen of Arkansas Ins. Co. v. Laster*, 156 S. W. 848, 108 Ark. 261.

3350 (a). An insured can only be required to make proof of loss by the express terms of the policy (*Burbank v. Pioneer Mut. Ins. Ass'n*, 110 Pac. 1005, 60 Wash. 253, Ann. Cas. 1912B, 762).

Where failure to furnish proofs of loss is not made a ground of forfeiture in a fire insurance policy, it will not be given that effect.

Gragg v. Home Ins. Co. of New York, 90 S. W. 1045, 28 Ky. Law Rep. 988; *Windle v. Empire State Surety Co.*, 151 Ill. App. 273; *Wilson v. German-American Ins. Co.*, 133 Pac. 715, 90 Kan. 355; *Central Trust & Safe Deposit Co. v. Dubuque Fire & Marine Ins. Co.*, 1 Ohio App. 447, 34 Ohio Cir. Ct. R. 218.

In Pennsylvania it has been held that formal proofs of loss are not necessary in the case of a total loss of a building insured, where the insurance company has been promptly notified of the loss and has inspected the premises.

Gartsee v. Citizens' Ins. Co., 30 Pa. Super. Ct. 602; *McGinnis v. St. Paul Fire & Marine Ins. Co.*, 38 Pa. Super. Ct. 390; *Livingstone v. Boston Ins. Co.*, 99 Atl. 212, 255 Pa. 1.

This rule, however, has no application to the total loss of a stock of merchandise (*Lapcevic v. Lebanon Mut. Ins. Co.*, 40 Pa. Super. Ct. 294; *Same v. Ohio Ins. Co.*, Id., 301; *Same v. Concordia Ins. Co.*, Id.).

In *Western Travelers' Acc. Ass'n v. Tomson*, 103 N. W. 695, 72 Neb. 661, on rehearing reversing 101 N. W. 341, 72 Neb. 661, it was held that, if an insurance company has actual knowledge of a loss within the time stipulated in the policy for the giving of formal notice thereof, such notice is dispensed with.

A directly contrary result was reached in *Continental Ins. Co. v. Parkes*, 39 South. 204, 142 Ala. 650.

3350-3352. (b) Special circumstances affecting application of rule

3352 (b). Where an insurance company became insolvent and a receiver was appointed after a loss, but before the time for filing

proofs had expired, and the court fixed a time within which creditors were required to file petitions establishing their claims, that order superseded the requirement of filing proofs of loss (*Gleason v. Prudential Fire Ins. Co.*, 151 S. W. 1030, 127 Tenn. 8).

An injury to a stallion caused by a kick received from a horse resulting in a slight scratch, which was considered so trivial that no attention was paid to it, is not an illness or accident requiring notice by registered mail so as to bar recovery on a policy for the loss of the animal by fire (*Scarlett v. National Live Stock Ins. Co.*, 193 Ill. App. 488).

3352-3353. (c) Policy covering mortgagee's interest

3353 (c). Unless the mortgagee clause attached to a policy makes it obligatory on the mortgagee to furnish proofs of loss and an appraisalment, it is not a condition precedent to his right of action that he furnish the same.

Salomon v. North British & Mercantile Ins. Co., of New York, 135 N. Y. Supp. 806, 150 App. Div. 728; *Reed v. Firemen's Ins. Co. of Newark*, 81 N. J. Law, 523, 80 Atl. 462, 35 L. R. A. (N. S.) 343; *Union Institution for Savings in City of Boston v. Phoenix Ins. Co.*, 196 Mass. 230, 81 N. E. 994, 14 L. R. A. (N. S.) 459, 13 Ann. Cas. 433.

In *Heilbrunn v. German Alliance Ins. Co. of New York*, 125 N. Y. Supp. 374, 140 App. Div. 557, question certified to Court of Appeals *Heilbrunn v. Same*, 140 App. Div. 936, 126 N. Y. Supp. 1131, it is stated that the mortgage clause in the standard fire policy, providing that the insurance as to the interest of the mortgagee shall be subject to the conditions "hereinbefore contained," etc., inserted after stipulations referring to acts done by insured prior to the issuance of the policy and to contingencies under which insurer will be relieved from liability and before provisions referring wholly to conditions to be complied with by insured after a loss by requiring insured to give notice and proofs of loss does not require a mortgagee to furnish proof of loss or to give any other notice than that involved in the commencement of his action on the policy for a loss.

In *American Cereal Co. v. Western Assur. Co.* (C. C.) 148 Fed. 77, it was held that where a policy insured a manufacturing company, loss, if any, payable to plaintiff, a mere allegation in the petition that the insured had neglected and refused to furnish proofs of loss was insufficient to justify plaintiff in furnishing the same.

In *Union Institution for Savings in City of Boston v. Phoenix Ins. Co.*, 196 Mass. 230, 81 N. E. 994, 14 L. R. A. (N. S.) 459, 13 Ann. Cas. 433, however, it was held that where a policy, payable to a mortgagee as its interest might appear, required the mortgagor to furnish immediate proof of loss, but also provided that no default of the mortgagor should affect the mortgagee's rights, the insurer was not liable to any one on the policy until notice and reasonable information of loss and an opportunity to rebuild and repair the property, if it elected to do so, as authorized by the policy, or until the amount of the loss was determined by arbitration, unless the agreement to arbitrate was waived, so that, where the insured failed to furnish the proofs of loss, the mortgagee was bound to furnish such proofs as it was able within a reasonable time as a condition to its right to recover on the policy.

It has also been held that the clause relative to proof of loss did not make the policy void for failure to furnish proof of loss, but was merely a time limitation upon the right of action; the provision in terms making it void for certain causes, except as to the mortgagee, relating to acts rendering it void before the destruction of the property (*Loewenstein v. Queen Ins. Co.*, 127 S. W. 72, 227 Mo. 100).

3353-3355. (d) Demand for proofs

3355 (d). The requirement in a fire policy that insured shall submit to an examination under oath, touching the matters relating to the risk and the destruction of the property, is valid, and a refusal to comply therewith will preclude a recovery on the policy where it provides that no suit can be sustained until compliance with that condition.

Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 South. 922; *Connecticut Fire Ins. Co. of Hartford, Conn., v. George*, 153 Pac. 116.

The refusal of insured to submit to an examination merely suspends the right of recovery until compliance; and hence the refusal is a matter of abatement only (*Aachen & Munich Fire Ins. Co. v. Arabian Toilet Goods Co.*, 10 Ala. App. 395, 64 South. 635).

Where one on examination before a court commissioner as to the subject-matter of the insurance, answered as far as she had knowledge, but in many instances answered that she had no knowledge, and referred the insurer to her manager and the books of the concern, there was no violation of a provision in the policy, and an action on the policy before further answers to the questions was

not premature (*Meyer v. Home Ins. Co.*, 106 N. W. 1087, 127 Wis. 293).

Until compliance by the insured with a demand for books of accounts, bills, etc., made under the provisions of the policy, or until a showing that compliance was impossible, he could not maintain an action on the policy.

Mutual Fire Ins. Co. of Montgomery County v. Pickett, 83 Atl. 1097, 117 Md. 638; *Riley v. Etna Ins. Co.* (W. Va.) 92 S. E. 417, L. R. A. 1917E. 983; *Fidelity Phenix Fire Ins. Co. v. Sadau* (Tex. Civ. App.) 178 S. W. 559.

Where a fire policy provides that insured may be required to furnish a certificate of a notary or magistrate as to the honesty of the loss, if required, and such certificate is required, the furnishing of it becomes a condition precedent to a right to sue on the policy (*Egan v. Merchants' Fire Ass'n*, 82 Pac. 898, 40 Wash. 513).

Under Code 1906, § 2592, declaring that insurance companies shall not assert that the property insured was worth less than the value stated in the policy, and that the measure of the amount recoverable is the amount of the insurance, failure of insured to furnish plans and specifications of the building, after demand made in accordance with a stipulation therefor in the policy, was no defense to an action to recover for loss (*Mississippi Home Ins. Co. v. Barron*, 45 South. 875, 91 Miss. 722).

2. TIME AND MANNER OF SERVICE OF NOTICE AND PROOFS OF LOSS

3356-3358. (a) Time of giving notice of loss

3356 (a). A requirement of the policy for "immediate" notice, or notice "forthwith," or "at once," will not receive a literal interpretation. Due diligence by the insured, resulting in notice within a reasonable time, under all the circumstances, is all that can be required.

Will & Baumer Co. v. Rochester German Ins. Co., 125 N. Y. Supp. 606, 140 App. Div. 691; *Reynolds v. Maryland Casualty Co.*, 30 Pa. Super. Ct. 456; *Travelers' Ins. Co. of Hartford, Conn. v. Nax*, 142 Fed. 653, 73 C. C. A. 649, reversing (C. C.) 130 Fed. 985; *Downs v. German Alliance Ins. Co.*, 6 Pennewill (Del.) 166, 67 Atl. 146; *Myers v. Maryland Casualty Co.*, 101 S. W. 124, 123 Mo. App. 682; *Cady v. Fidelity & Casualty Co. of New York*, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260; *Everson v. General Fire & Life Assur. Corp., Limited, of Perth, Scotland*, 88

N. E. 658, 202 Mass. 169; *Bennett v. Aetna Ins. Co.*, 88 N. E. 335, 201 Mass. 554, 131 Am. St. Rep. 414; *Hughes v. Central Accident Ins. Co.*, 71 Atl. 923, 222 Pa. 462; *Homestead Fire Ins. Co. v. Ison*, 110 Va. 18, 65 S. E. 463; *National Live Stock Ins. Co. v. Elliott*, 60 Ind. App. 112, 108 N. E. 784; *Pacific Mut. Life Ins. Co. v. Adams*, 112 Pac. 1026, 27 Okl. 496; *Aetna Life Ins. Co. v. Fitzgerald*, 75 N. E. 262, 165 Ind. 317, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232, 6 Ann. Cas. 551; *National Live Stock Ins. Co. v. Henderson* (Tex. Civ. App.) 164 S. W. 852; *Reynolds v. Maryland Casualty Co.*, 30 Pa. Super. Ct. 456; *Maryland Casualty Co. v. Burns*, 149 S. W. 867, 149 Ky. 550; *Jennings v. Brotherhood Acc. Co.*, 44 Colo. 68, 96 Pac. 982, 18 L. R. A. (N. S.) 109, 130 Am. St. Rep. 109; *National Live Stock Ins. Co. v. Bartlow*, 60 Ind. App. 233, 110 N. E. 224; *Curran v. National Life Ins. Co. of United States*, 96 Atl. 1041, 251 Pa. 420; *Jackson v. Life & Annuity Ass'n*, 195 S. W. 535; *Orlando v. Great Eastern Casualty Co.*, 155 N. Y. Supp. 20, 91 Misc. Rep. 539.

Under different circumstances, the holdings as to what was a reasonable time have varied.

National Live Stock Ins. Co. v. Simmons, 62 Ind. App. 15, 111 N. E. 18 (one day reasonable); *Eaton v. Globe & Rutgers Fire Ins. Co.*, 227 Mass. 354, 116 N. E. 536 (twelve days reasonable); *Woodall v. Fidelity & Casualty Co.*, 62 S. E. 808, 131 Ga. 517 (twenty-six weeks unreasonable); *Northern Assur. Co. v. Standard Leather Co.*, 165 Fed. 602, 91 C. C. A. 440, reversing (C. C.) 156 Fed. 689 (thirty days unreasonable); *Jefferson Realty Co. v. Employers' Liability Assur. Corporation*, 149 S. W. 1011, 149 Ky. 741 (several months unreasonable); *Bennett v. Aetna Ins. Co.*, 88 N. E. 335, 201 Mass. 554, 131 Am. St. Rep. 414 (fifty-one days unreasonable); *Hefner v. Fidelity & Casualty Co. of New York* (Tex. Civ. App.) 160 S. W. 330 (ten months unreasonable).

3358-3361. (b) Time of furnishing proofs of loss

3359 (b). Generally, provisions requiring an "immediate" delivery of proofs, or that proofs shall be furnished "forthwith," mean only that proofs must be furnished within a reasonable time.

Pacific Mut. Life Ins. Co. v. Adams, 112 Pac. 1026, 27 Okl. 496; *Smith v. Scottish Union & National Ins. Co.*, 85 N. E. 841, 200 Mass. 50.

A clause in a policy requiring proof of loss within a certain time, to entitle the insured to maintain an action, will be liberally construed in favor of the insured.

Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co., 116 Pac. 154, 50 Colo. 424, Ann. Cas. 1912C, 597; *Harp v. Fireman's Fund Ins. Co.*, 61 S. E. 704, 130 Ga. 726, 14 Ann. Cas. 299; *Glazer v. Home Ins. Co.*, 82 N. E. 727, 190 N. Y. 6, reversing 98 N. Y.

Supp. 979, 113 App. Div. 235, which affirms 96 N. Y. Supp. 136, 48 Misc. Rep. 515; *Dakin v. Queen City Fire Ins. Co. of Sioux Falls*, S. D., 59 Or. 269, 117 Pac. 419; *Niagara Fire Ins. Co. v. Layne*, 162 Ky. 665, 172 S. W. 1090.

3361 (b). Proof of loss served upon the local agent of a fire insurance company more than 20 days after the date of the fire is not sufficient, and in the absence of waiver or estoppel the insurance company is not bound by such service of proof (*Dunn v. Farmers' Fire Ins. Co.*, 34 Pa. Super. Ct. 245).

So an unexplained and unexcused delay of three months in furnishing a sworn statement of loss would prevent recovery (*Swaine v. Teutonia Fire Ins. Co.*, 109 N. E. 825, 222 Mass. 108).

Similarly, where insured gives immediate notice of a fire, but leaves the state without furnishing the statement required within sixty days, and absents himself for months, he cannot recover on the policy, although there was a total loss (*Forester v. Teutonia Fire Ins. Co.*, 60 Pa. Super. Ct. 151).

3361-3362. (c) Reasonableness of time of furnishing notice and proofs a question for the jury

3361 (c). In *Will & Baumer Co. v. Rochester German Ins. Co.*, 125 N. Y. Supp. 606, 140 App. Div. 691, it was held that in view of the confusion of business through San Francisco and the delay of means of communication with any one there caused by the earthquake of 1906, which actually destroyed more than two-thirds of the city, the jury were warranted in finding that the delay in furnishing the proofs of loss was excusable.

3362-3364. (d) Special provisions as to time of furnishing notice and proofs

3362 (d). Where the provisions of the policy fix a definite time, such provisions are binding on the insured, and must be complied with, unless waived.

Downs v. German Alliance Ins. Co., 6 Pennewill (Del.) 166, 67 Atl. 146; *Miller v. Milwaukee Mechanics' Ins. Co.*, 181 Ill. App. 133; *Hatcher v. Sovereign Fire Assur. Co. of Canada*, 71 Wash. 79, 127 Pac. 588; *Commercial Fire Ins. Co. v. Waldron*, 88 Ark. 120, 114 S. W. 210; *Davis v. Pioneer Mut. Ins. Ass'n*, 44 Wash. 532, 87 Pac. 829; *Burgess v. Mercantile Town Mut. Ins. Co.*, 89 S. W. 568, 114 Mo. App. 169; *Emory v. Glens Falls Ins. Co.*, 7 Pennewill (Del.) 101, 76 Atl. 230; *Williams v. United States Casualty Co.*, 64 S. E. 510, 150 N. C. 597; *Hatch v. United States Casualty Co.*, 197 Mass. 101, 83 N. E. 398, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep.

332, 14 Ann. Cas. 290; *Craig v. United States Health & Accident Ins. Co.*, 61 S. E. 423, 80 S. C. 151, 18 L. R. A. (N. S.) 106, 128 Am. St. Rep. 877, 15 Ann. Cas. 216.

3363 (d). Policy, requiring insured "within sixty days after a fire" to render statement, requires submission of statement within 60 days after fire has terminated or abated to such extent that inspection of property may be made (*Slocum v. Saratoga & Washington Fire Ins. Co. of Saratoga and Washington Counties*, 134 N. Y. Supp. 72, 149 App. Div. 867).

3364. (e) Same—Statutory provisions *

3364 (e). Acts La. 1898, p. 151, No. 105, § 22, prescribing the use of policies conforming to the requirements of the New York standard form, is not in conflict with Acts La. 1900, p. 209, No. 135, relating to valued policies in so far as the form of policy prescribed required the insured to make preliminary proofs of loss and to furnish the insurer with information concerning the character, situation, and actual value of the property destroyed (*Melancon v. Phoenix Ins. Co.*, 40 South. 718, 116 La. 324).

Under Pub. Laws Me. 1905, c. 158, requiring proof of a fire loss to be made within a reasonable time, in determining whether a delay from November 24th to December 28th was reasonable, the conditions surrounding insured could be considered, including the facts that she had been led to believe by insurer's agent that the insurance had been validly canceled (*Bard v. Fireman's Ins. Co.*, 108 Me. 506, 81 Atl. 870).

In *Greenough v. Phoenix Ins. Co. of Hartford*, 92 N. E. 447, 206 Mass. 247, it was held that under the standard fire policy provision in Massachusetts (Rev. Laws, c. 118, § 60), requiring one sustaining a loss to forthwith render a statement to the insurer, insured may properly take a few days to acquire the knowledge necessary to intelligently prepare a statement to give insurer reliable data, and to protect his own rights.

Where the petition on a town mutual fire policy does not indicate when notice of loss should be transmitted to insurer, the court could not declare as a matter of law that proof of a loss sustained April 28th was furnished too late when furnished May 20th, especially in view of the public policy indicated by Rev. St. Mo. 1899, § 7979 (Ann. St. Mo. 1906, p. 3793), providing that notice of loss may be given within 90 days after a loss, though such provision by virtue of section 8084 (page 3840) is inapplicable to town mutual

companies (*Wiccarver v. Mercantile Town Mut. Ins. Co.*, 137 Mo. App. 247, 117 S. W. 698).

Chapter 170, Pub. St. N. H. 1901, is in conflict with the requirements of a sworn statement of loss or appraisal by referees, and compliance with either of these requirements is not a condition precedent to the maintenance of a suit on the policy.

Gleason v. Canterbury Mut. Fire Ins. Co., 64 Atl. 187, 73 N. H. 583;
Levi v. Palatine Ins. Co., 78 Atl. 617, 75 N. H. 551.

Const. Okl. art. 23, § 9, prevents the abridging of the time within which rights under the law may be enforced and the requiring of any notice as condition precedent to maintaining of an action for breach of the duty imposed by law, but does not relate to acts that must be performed by the parties to an insurance policy as a part of the contract (*Gray v. Reliable Ins. Co.*, 110 Pac. 728, 26 Okl. 592).

In Pennsylvania it has been held that the requirement of a contract of insurance, that, "within sixty days after the fire," the insured must furnish proofs of loss to the company, is as important since the act of 1883 as before it, and the insured is not obliged to comply with the requirements of his policy in the way provided by the act of 1883, but he must still comply with them unless such compliance has been waived by the company (*Hottner v. Aachen & Munich Fire Ins. Co.*, 31 Pa. Super. Ct. 461).

Under *Vernon's Sayles' Ann. Civ. St. Tex.* 1914, art. 4874, where property insured is totally destroyed by fire, the liability of the insurance company accrues immediately after the occurrence of the fire, regardless of stipulations as to notice and proof of loss (*Fire Ass'n of Philadelphia v. Richards* [Tex. Civ. App.] 179 S. W. 926).

3366-3371. (h) Effect of delay

3366 (h). Where an insurance policy provides for notice of loss within a fixed time and proofs of loss within a fixed time, and provides that the failure to comply with other provisions of policy shall forfeit it, the policy is not forfeited by failure to give notice or make proof within the time limited, in the absence of fraud.

Dixon v. State Mut. Ins. Co., 34 Okl. 624, 126 Pac. 794, L. R. A. 1915F, 1210; *North British & Mercantile Ins. Co. v. Edmundson*, 52 S. E. 350, 104 Va. 486; *Higson v. North River Ins. Co.*, 67 S. E. 509, 152 N. C. 206; *Preferred Acc. Ins. Co. v. Fielding*, 83 Pac. 1013, 35 Colo. 19, 9 Ann. Cas. 916; *Dakin v. Queen City Fire Ins. Co. of Sioux Falls, S. D.*, 59 Or. 269, 117 Pac. 419;

S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co., 69 W. Va. 129, 71 S. E. 194; *Harp v. Fireman's Fund Ins. Co.*, 61 S. E. 704, 130 Ga. 726, 14 Ann. Cas. 299.

3367 (h). Delay of insured in furnishing proof of loss under a Minnesota standard fire insurance policy does not affect the insured's right of action on the policy (*Cash v. Concordia Fire Ins. Co. of Milwaukee*, Wis., 111 Minn. 162, 126 N. W. 524; *Same v. Des Moines Fire Ins. Co.*, 111 Minn. 538, 126 N. W. 526).

In *Arkansas Mutual Fire Ins. Co. v. Clark*, 105 S. W. 257, 84 Ark. 224, it was held that where a policy of fire insurance stipulates that the insured shall within 60 days after a fire render a sworn statement to the insurer showing the amount of loss, etc., and subsequently provides that no suit shall be brought on the policy until after full compliance by the insured with all the foregoing requirements, a failure to furnish the proof of loss within the stipulated time operates as a forfeiture of the policy.

In *American Fire Ins. Co. v. Haynie*, 91 Ark. 43, 120 S. W. 825, however, it was held that failure to present proof of loss within the time prescribed by the policy works a forfeiture of the policy.

3371 (h). Under a provision of an indemnity policy, which limited the company's liability to a disability of not more than 26 weeks, requiring notice in writing of any disability, "for which claim is to be made" to be sent to the company "within 10 days after the beginning of such disability in order to entitle claimant to indemnity," an insured, who did not give notice of his illness within 10 days after it began, or until some months thereafter, could recover for the 26 weeks of illness following the time when notice was given (*Miner v. National Casualty Co.*, 166 Mich. 669, 132 N. W. 446).

3. PERSONS BY WHOM AND TO WHOM NOTICE MAY BE GIVEN AND PROOFS FURNISHED

3372-3373. (a) Persons by whom notice of loss may be given

3373 (a). Where a written notice is delivered to an agent of an insurance company, and the company receives same within the time limit, there is a sufficient compliance with a provision of the policy requiring the notice to "be mailed to the secretary of the company."

Blunt v. National Fidelity & Casualty Co., 93 Neb. 685, 141 N. W. 1033; *National Live Stock Ins. Co. v. Henderson* (Tex. Civ. App.) 164 S. W. 852.

Code Supp. Iowa 1902, § 1742a, providing that, in furnishing proofs of loss under any contract of insurance, it shall only be necessary for the "assured" to give notice in writing of the loss to the company issuing the contract, etc., supersedes the provisions of the policy so far as it relates to proofs of loss (*American Cereal Co. v. Western Assur. Co.* [C. C.] 148 Fed. 77).

A mortgagee, to whom a loss under a fire policy is made payable under a stipulation, indorsed on the policy, to the effect that the policy shall not be invalidated by any act or neglect of the owner, is not required to give notice and proof of loss; that duty being imposed on the owner (*Adams v. Farmers' Mut. Fire Ins. Co.*, 90 S. W. 747, 115 Mo. App. 21).

3373-3374. (b) Person to whom notice of loss must be given

3373 (b). Where the policy required notice of loss to be given to the company, notice to its agent was not sufficient.

Caldwell v. Virginia Fire & Marine Ins. Co., 124 Tenn. 593, 139 S. W. 698; *Downs v. German Alliance Ins. Co.*, 6 Pennewill (Del.) 166, 67 Atl. 146.

3374-3377. (c) Person by whom proofs may be furnished

3375 (c). Under a fire policy issued to the owner of the property, providing "loss, if any, first payable to M., mortgagee, as his interest may appear," requiring proof of loss by "the insured," such proof by the mortgagee, the owner refusing to make it.

McDowell v. St. Paul Fire & Marine Ins. Co., 101 N. E. 457, 207 N. Y. 482, affirming 130 N. Y. Supp. 294, 145 App. Div. 724; *Amory v. Reliance Ins. Co.*, 94 N. E. 677, 208 Mass. 378.

It has also been held that a mortgagee may recover upon a fire insurance policy containing the union mortgage clause of the standard policy of New York, New Jersey, and Connecticut for a loss of the property by fire when neither he nor the mortgagor present proof of loss within 60 days after loss, as required of "the insured" by a condition in the policy (*Ohio German Fire Ins. Co. v. Krumm*, 31 Ohio Cir. Ct. R. 409).

3376 (c). Where a policy was issued to the holder of a bond for deed and the holder of the legal title, who subsequent to the fire conveyed his interest to the insurer's agent, the failure of the legal owner to sign proofs of loss does not defeat the rights of the holder of the bond, though the policy required the proofs to be signed by the insured (*Alezunas v. Granite State Fire Ins. Co.*, 111 Me. 171, 88 Atl. 413).

So, if a wife is left in charge of insured property and a loss occurs, and the husband is absent and his whereabouts are unknown, the wife may make proofs of loss by implied appointment (*Evans v. Crawford County Farmers' Mut. Fire Ins. Co.*, 109 N. W. 952, 130 Wis. 189, 9 L. R. A. [N. S.] 485, 118 Am. St. Rep. 1009).

3378-3380. (e) Person on whom proofs may be served

3378 (e). Where a policy provides that proofs of loss must be made to the company, a delivery of such proofs to one who is only a soliciting agent is not a delivery to the company (*Arkansas Mutual Fire Ins. Co. v. Clark*, 105 S. W. 257, 84 Ark. 224); and where policies required that notice of loss should be sent to the insurer's home office, submission of proofs of loss to the insurer's local office was not a compliance therewith (*Fisher v. Travelers' Ins. Co.*, 124 Tenn. 450, 138 S. W. 316, Ann. Cas. 1912D, 1246).

3379 (e). Where, however, an agent's written authority to receive proposals of insurance against loss or damage by fire, "with power only to issue, countersign, renew, and cancel policies of insurance and to make indorsements thereon" and to receive premiums subject to the rules adopted by the company and a policy issued by him required insured to give immediate notice of loss "to this company," it was held that the agent was authorized to receive notice and proof of loss in absence of express provision to the contrary in the policy (*De Michele v. London & Lancashire Fire Ins. Co.*, 40 Utah, 312, 120 Pac. 846, Ann. Cas. 1914D, 1076).

So, where an agent of a fire insurance company had authority "to conduct the business of fire insurance" in the state, it included the right to receive proofs of loss (*Green v. Star Fire Ins. Co.*, 77 N. E. 649, 190 Mass. 586); and where a policy specified no particular place where or person to whom proof of loss should be delivered, but merely stipulated that proof should be rendered to insurer, proof of loss, left with an agent possessing power to adjust losses, was received by insurer (*Johnson v. Lumber Ins. Co. of New York*, 137 Mo. App. 380, 118 S. W. 112).

Where a fire policy required the insured to give immediate written notice of loss, pursuant to which insured delivered proofs of loss to agents who had apparent authority to receive proofs of loss, and thereafter immediately borrowed the papers for the purpose of making a copy of them, a finding that there had been a good delivery of the proofs of loss was justified (*Walker v. Lancashire Ins. Co.*, 75 N. E. 66, 188 Mass. 560).

4. FORM AND SUFFICIENCY OF NOTICE AND PROOFS OF LOSS**3380-3381. (a) Form and sufficiency of notice of loss**

3380 (a). Service of proofs of loss is a sufficient compliance with a requirement in a policy that a written notice of loss be given, provided such notice be made in time.

Will & Baumer Co. v. Rochester German Ins. Co., 125 N. Y. Supp. 606, 140 App. Div. 691; *Da Rin v. Casualty Co. of America*, 41 Mont. 175, 108 Pac. 649, 27 L. R. A. (N. S.) 1164, 137 Am. St. Rep. 709.

3381 (a). The requirement of notice being that the fact of loss be stated and, as far as known at the time, the cause thereof, so that the insurer may inquire into the accident and the circumstances thereof, the requirement that "full particulars" be given does not mean that all the details of the accident must be stated.

Correll v. National Acc. Soc., 139 Iowa, 36, 116 N. W. 1046, 130 Am. St. Rep. 294; *Root v. London Guarantee & Accident Co.*, 72 N. E. 1150, 180 N. Y. 527, affirming 86 N. Y. Supp. 1055, 92 App. Div. 578, 15 N. Y. Ann. Cas. 100.

A letter sent by an insured to an insurance company stating merely that there was a fire, but giving no information as to what was consumed, or whether the property destroyed, if destroyed at all, was covered by the policy, is an insufficient notice of loss, although the loss may have been total, and will not take the place of the proof required by the policy (*McCrea v. Patrons' Mut. Fire Ins. Co. of Southern Pennsylvania*, 46 Pa. Super. Ct. 618).

Under Pub. St. N. H. 1901, c. 170, § 6, however, providing that, in case of loss of or damage to property insured, the insured shall give notice thereof in writing to the secretary, a director, or an agent of the company within 30 days, a notice is sufficient if it is in writing and informs the insurer of a loss or damage by fire under the policy, without more particularly specifying the property lost or damaged (*Gleason v. Canterbury Mut. Fire Ins. Co.*, 64 Atl. 187, 73 N. H. 583).

3381-3383. (b) Form and sufficiency of proofs of loss in general

3381 (b). Where a burglary insurance policy required that the proof of loss should be in writing, duly subscribed and certified to by the assured, etc., the failure of the assured to comply with this condition of the policy would defeat his recovery (*Reich v. Maryland Casualty Co.*, 104 N. Y. Supp. 984, 54 Misc. Rep. 585).

3382 (b). All that is required of the insured is a reasonable and substantial compliance with the requirements of the policy as to proof of loss.

Insurance Co. of North America v. Cochran (Okla.) 159 Pac. 247; *St. Paul Fire & Marine Ins. Co. v. Mittendorf*, 24 Okla. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651; *National Union Fire Ins. Co. v. Burkholder*, 116 Va. 942, 83 S. E. 404.

That part of an insurance policy relating to proofs of loss should be construed with great liberality.

Farrell v. Farmers' & Merchants' Ins. Co., 120 N. W. 929, 84 Neb. 72; *Reed v. Continental Ins. Co.*, 6 Pennewill (Del.) 204, 65 Atl. 569.

No particular form of proof of loss under a policy is required, so long as the proof is ample to enable the insurer to consider its rights and liabilities (*O'Brien v. North River Ins. Co. of City of New York*, 212 Fed. 102, 128 C. C. A. 618, L. R. A. 1917C, 722); but an insured in a fire policy, sustaining a loss, must, in furnishing proofs of loss, give, if possible, all the information called for by the policy (*Downs v. German Alliance Ins. Co.*, 6 Pennewill [Del.] 166, 67 Atl. 146).

3383 (b). Technical "proof of loss" is a requirement arising out of a policy for the benefit of the insurer, and distinguished from the proof of loss in court before the jury pursuant to the rules of evidence, to make a liability on the policy (*Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244); and the fact that the proof showed facts of which the association might avail itself as a defense to an action on the certificate did not derogate from the sufficiency of the proofs or bar the bringing of an action (*Lyons v. United Moderns*, 83 Pac. 804, 148 Cal. 470, 4 L. R. A. [N. S.] 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672).

In *Billmyer v. Hamburg-Bremen Fire Ins. Co.*, 49 S. E. 901, 57 W. Va. 42, it was held that, the preliminary proof of loss having been made, another was unnecessary after an award on the amount of loss.

In *Stitt v. Locomotive Engineers' Mut. Protective Ass'n*, 177 Mich. 207, 142 N. W. 1110, it was held that the claim of a discharged employé, seeking indemnity under a certificate insuring him against loss of time, was insufficient to establish a prima facie case of liability of the insurer under the certificate.

Under a policy providing that the insured should render a sworn statement of the time and origin of the fire, the interest of insured, and cash value of each item of loss, a statement not sworn to is

not sufficient (*Glazer v. Home Ins. Co.*, 96 N. Y. Supp. 136, 48 Misc. Rep. 515, affirmed by *Glazer v. Home Ins. Co.*, 98 N. Y. Supp. 979, 113 App. Div. 235, reversed 82 N. E. 727, 190 N. Y. 6).

The requirement of a fire policy of proof of loss under oath means the oath of insured, and is not met by proof of loss under the oaths of others (*St. Paul Fire & Marine Ins. Co. v. Mittendorf*, 24 Okl. 651, 104 Pac. 354, 28 L. R. A. [N. S.] 651).

Yet it was held in *Brunswick-Balke-Collender Co. v. Northern Assur. Co.*, 105 N. W. 76, 142 Mich. 29, where the insured in a fire policy is a nonresident of the state, the proof of loss need not be sworn to by him, as required by the policy, but proof of loss, verified by his agent, is sufficient.

Where insured in a policy covering a stock of merchandise furnished all the proof of loss that he could because of the loss of the original bills rendered and who furnished copies of statements by merchants from whom he had made purchases and an unverified invoice of the goods he substantially complied with the policy requiring a verified statement containing the cash value of each item and the amount of loss (*Ohio Farmers' Ins. Co. v. Glaze*, 55 Ind. App. 147, 101 N. E. 734).

Omission of a statement of venue in proofs of loss under a fire policy is amendable in furtherance of justice (*Slocum v. Saratoga & Washington Fire Ins. Co. of Saratoga and Washington Counties*, 134 N. Y. Supp. 72, 149 App. Div. 867).

3383-3384. (c) Statutory provisions

3383 (c). In *Continental Ins. Co. v. Bair* (Ind. App.) 114 N. E. 763, it was held that under Burns' Ann. St. Ind. 1914, § 4622g, insured's failure to submit affidavit showing proofs of loss could not be made more specific was the omission of a mere technical detail, where the proofs furnished when fairly construed were not subject to objection.

Where a policy upon live stock merely provided for notice of loss to the secretary or nearest director within seven days, the provisions of Code Iowa, § 1744, as to notice of loss were waived; the purpose of the Code being to prevent insurers from adopting complicated systems of proof of loss and not to prevent insurer from adopting simpler methods (*Kinney v. Farmers' Mutual Fire & Ins. Society of Kiron, Iowa*, 159 Iowa, 490, 141 N. W. 706, Ann. Cas. 1915A, 609).

The modifying clause "so far as known to him," in the standard form policy provision (Rev. Laws Mass. c. 118, § 60), requiring a

statement of loss to set forth the value of the property insured, insured's interest, all other insurance, etc., applies to all the statements insured is required to make (*Greenough v. Phoenix Ins. Co. of Hartford*, 92 N. E. 447, 206 Mass. 247, 138 Am. St. Rep. 383).

3384. (d) Statement as to cause of loss

3384 (d). A provision in a fire policy requiring proof of loss and a signed and sworn statement by insured showing the property lost or damaged and his knowledge and belief as to the time and origin of the fire was reasonable and valid.

Fidelity-Phenix Fire Ins. Co. v. Sadau (Tex. Civ. App.) 167 S. W. 334;
Glazer v. Home Ins. Co., 82 N. E. 727, 190 N. Y. 6, reversing 98 N. Y. Supp. 979, 113 App. Div. 235, and affirming 96 N. Y. Supp. 136, 48 Misc. Rep. 515.

Under a policy providing for notice and proof of loss, a sworn subscribed statement by insured claiming a total loss, stating that the origin of the fire was unknown, and that all terms of the policy had been complied with, was a reasonably full and exact compliance with the provision (*Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244).

So a statement in proof of loss that cause of fire was unknown, without stating facts, in the absence of fraud or of any showing that insurer was deceived or deprived of knowledge supposed to be afforded by proofs of loss, has been held not to avoid policy (*Marx v. Williamsburgh City Fire Ins. Co.*, 192 Mich. 497, 158 N. W. 1052).

3384-3386. (e) Statement of interest and occupancy—Incumbrances on property

3385 (e). Where the insured in his application for insurance upon a building informed the agent that his interest in the land was that of a homestead entry, his statement in the proof of loss that the building was on his land, should be regarded as having been made in the light of that disclosure and, if not in fact true, is not ground for forfeiture (*Queen of Arkansas Ins. Co. v. Taylor*, 100 Ark. 9, 138 S. W. 990).

Under a policy providing that, within 60 days after loss, the insured should render a sworn statement of the time and origin of the fire, the interest of insured, and cash value of each item of loss, a statement merely giving the name of insured, the number of the policy, a list of articles claimed to be damaged, but not stating the time and origin of the fire or the interest of insured, is not suffi-

cient (*Glazer v. Home Ins. Co.*, 82 N. E. 727, 190 N. Y. 6, reversing 98 N. Y. Supp. 979, 113 App. Div. 235, and affirming 96 N. Y. Supp. 136, 48 Misc. Rep. 515).

In *Continental Ins. Co. v. Bair* (Ind. App.) 114 N. E. 763, it was held that proofs of loss of house by fire stating incumbrance thereon, etc., substantially comply with terms of the policy and with Burns' Ann. St. 1914, § 4622g.

3386-3387. (f) Statement of value and amount of loss

3386 (f). Where a stock of merchandise insured was totally destroyed, proof of loss, though failing to give the cash value of each item insured and the amount of the loss thereon, as required by the policy, was sufficient (*Prudential Fire Ins. Co. v. Alley*, 51 S. E. 812, 104 Va. 356).

3387 (f). The statement of value made in the proofs of loss was not required to be within plaintiff's personal knowledge (*German-American Ins. Co. v. Brown*, 87 S. W. 135, 75 Ark. 251).

Where the policy required insured to render a sworn statement stating the cash value of the property affected and the amount of the loss, a statement of the estimated cost value of the material and labor was not sufficient to show the value of the property "at the time of the loss" (*Davis v. Pioneer Mut. Ins. Ass'n*, 44 Wash. 532, 87 Pac. 829).

3389-3390. (h) Same—Detailed statement and plans and specifications

3390 (h). Where a policy required that insured should set out in the statement of loss the cash value of each item of property and the amount of the loss thereon reference in the proof of loss to a schedule a copy of which, itemized and valued, had been delivered to the adjuster of defendant within 30 days after the fire and was in his possession at the time of the trial was a substantial compliance with the policy (*Pearce Mfg. Co. v. Lebanon Mut. Ins. Co.*, 65 Atl. 663, 216 Pa. 265).

Where after loss the carriers submitted an itemized statement of the destroyed articles in the form of two schedules, one containing articles which the carriers claimed were included in the policy, and the other articles which might be included this was a sufficient proof of loss to entitle the owner of property included in the latter list to recover under the terms of the policy (*Kellner v. Fire Ass'n of Philadelphia*, 106 N. W. 1060, 128 Wis. 233, 116 Am. St. Rep. 45).

A statement of loss, showing "the cash value of the property in-

sured by you, and for which claim for loss is hereby made, * * * as is shown in 'statement of loss' hereto attached," which also show the items destroyed and the price of each item, the word "price," instead of "cash value" being at the head of the column in which the value of each item was given, together with a letter stating that the proofs of loss were filed on the basis of the actual cash market value at the time of the fire, is a sufficient statement of loss under a policy providing that the cash value of each item and the amount of loss thereon should be shown (*Frick v. United Firemen's Ins. Co.*, 67 Atl. 743, 218 Pa. 409; *Same v. Svea Fire & Life Ins. Co.*, 67 Atl. 747, 218 Pa. 420).

Where an insurance policy provided that in case of fire the insured should give immediate notice in writing and make a complete inventory of the property, stating the quantity and cost of each article and the amount claimed thereon, and render a statement to the company within 60 days, sworn to by the insured, stating the cash value of each article and the amount of loss thereon, it has been held that if insured furnished a proper statement of loss, duly signed and sworn to, it was a compliance with the policy, though no inventory was furnished (*Frick v. United Firemen's Ins. Co.*, 67 Atl. 743, 218 Pa. 409; *Same v. Svea Fire & Life Ins. Co.*, 67 Atl. 747, 218 Pa. 420).

Where the loss is total, insured need not furnish verified plans and specifications of the building, with a statement of the cost of replacing the same.

Weisberger v. Western Reserve Ins. Co. of Cleveland, Ohio, 95 Atl. 402, 250 Pa. 155; *Pearce Mfg. Co. v. Lebanon Mut. Ins. Co.*, 65 Atl. 663, 216 Pa. 265.

Where an insurer waived the preliminary notice and proof of loss required by the policy, the insured, having left with the insurer's agent a list of the articles destroyed or damaged, is not deprived of the right of recovery because of failure to leave with the insurer's agent a list of the undamaged articles (*Spring Garden Ins. Co. v. Whayland*, 64 Atl. 925, 103 Md. 699).

Where the insured shows that he could not, by the use of such reasonable means as were within his power, secure bills or duplicates, it is a sufficient excuse for his failure to comply with a demand for them, made under a provision in the policy (*Mutual Fire Ins. Co. of Montgomery County v. Pickett*, 83 Atl. 1097, 117 Md. 638).

In *Bingell v. Royal Ins. Co.*, 87 Atl. 955, 240 Pa. 412, it was held that an insurer, who furnished such proofs of loss as were requested in so far as he was able, was entitled to recover, though the inventory furnished was not a complete statement of all the goods in his store prior to the fire, especially where defendant company retained same 45 days before objecting.

A clause requiring the insured to include in his proof of loss a complete inventory of quantity, cost, cash value, and amount claimed on each article is inapplicable to damage to a building, and errors or omissions in attempting such statement constitute no bar to recovery (*Weiman v. National Ben Franklin Fire Ins. Co. of Pittsburgh, Pa.* [Sup.] 159 N. Y. Supp. 698).

3390-3393. (i) Production of books and inventory

3391 (i). Where a policy provides that insured, as often as required, shall produce all books of account, invoices, and other vouchers or certified copies thereof, at such reasonable place as may be designated by the company, and another clause provides that no action on the policy shall be sustained until full compliance with the foregoing requirements, the clause required insured to produce for examination his books of account as a condition precedent to his right of recovery on the policy (*Tucker v. Colonial Fire Ins. Co.*, 51 S. E. 86; 58 W. Va. 30).

A provision that, in case of loss, insured should make a complete inventory and report within 60 days, was not merely directory, and, if disregarded on demand without excuse, insured could not recover (*Seattle Merchants' Ass'n v. Germania Fire Ins. Co. of New York*, 64 Wash. 115, 116 Pac. 585).

Where a small country merchant inventoried his stock in January and in September, and took out a policy in October, his production of his last inventory of a loss in November is within the warranty providing for production of "last preceding inventory" (*J. B. Clark & Sons v. Franklin Ins. Co.*, 58 South. 345, 130 La. 584).

3392 (i). Failure of plaintiff to produce books and vouchers, may not be complained of, there having been no proper demand for their production.

Seibel v. Firemen's Ins. Co., 62 Atl. 101, 212 Pa. 604, affirming 24 Pa. Super. Ct. 154; *Narinsky v. Fidelity Surety Co.* (Sup.) 92 N. Y. Supp. 771.

The clause requiring insured to produce for examination his books of account at such reasonable place as may be designated by the company means a reasonable place in the locality where the insured property was situated; and a demand that insured produce them for examination at a city located 140 miles from the place where the insured goods were situated is unreasonable as to place (*Tucker v. Colonial Fire Ins. Co.*, 51 S. E. 86, 58 W. Va. 30).

In *German Alliance Ins. Co. v. Newbern*, 25 Okl. 489, 106 Pac. 826, 28 L. R. A. (N. S.) 337, it was held that failure of insured to produce the books and inventory means the failure to produce if they are in existence, or if they have been lost or destroyed by the negligence or the design of the insured, and that where an inventory was stolen from an unlocked safe while the building mentioned in the policy was open for business, and where under the policy the insured had a right to keep it, its loss and consequent failure of insured to produce does not invalidate the policy, where insured acted as prudent men in good faith would act.

So where insured's books of account, bills, invoices, etc., were destroyed in the fire which burned the insured property, his right to recover was not barred by his failure to produce for examination, as required, all books of account, etc., or certified copies thereof.

Central Nat. Fire. Ins. Co. of Chicago, Ill., v. Black, 220 Fed. 8, 135 C. A. 584; *Glenn v. Colonial Assur. Co.*, 44 Pa. Super. Ct. 208; *Same v. Jefferson Fire Ins. Co.*, Id. 212.

3393 (i). The standard fire policy does not require bills and vouchers for the purchase of property in the premises at the time of the fire to be all in English (*Hirschman v. Fireman's Fund Ins. Co. of San Francisco, Cal.* [City Ct. N. Y.] 123 N. Y. Supp. 781).

3395-3397. (k) Examination of insured—Examination of property

3396 (k). In *Liverpool & London & Globe Ins. Co. v. Cargill*, 44 Okl. 735, 145 Pac. 1134, it was held that where insurer's representative excuses the insured from attendance, and no further notice is given, the right to the examination is abandoned. It was stated in the same case that, at an examination of insured under a provision of a fire insurance policy, the insured has a right to be represented by an attorney.

All verbal demands for an examination of the insured, under oath, in respect to the cause of the fire, are merged in a subsequent written demand therefor; and a written demand which omits to

name the time and place for such examination or the person before whom it is to take place, is insufficient (*Citizens' Ins. Co. v. Herpolsheimer*, 76 Neb. 232, 109 N. W. 160).

Nor does insured breach a requirement to attend for examination concerning a loss, where no person is designated by the insurer to make such examination (*Central Nat. Fire Ins. Co. of Chicago, Ill., v. Black*, 220 Fed. 8, 135 C. C. A. 584).

Where a fire policy is an Illinois contract, Rev. St. 1899, § 7976 (Ann. St. 1906, p. 3792), requiring the examination of insured for the adjustment of a loss to be conducted where the loss occurred, will not be applied (*Johnson v. Lumber Ins. Co. of New York*, 137 Mo. App. 380, 118 S. W. 112).

A condition of a fire policy avoiding liability if the assured refuses to submit to examination on oath is enforceable as against one who refuses without cause to submit to examination (*Gordon v. St. Paul Fire & Marine Ins. Co.*, 163 N. W. 956). It was stated in the same case, however, that where insured refused to submit to examination as required by policy only so long as her attorney was not present, she did not break a condition of the policy so as to preclude recovery.

So refusal of insured to submit himself to further examination as required by fire policy has been held not a complete and final refusal (*North British & Mercantile Ins. Co. v. Rose*, 228 Fed. 290, 142 C. C. A. 582).

3397-3401. (l) Certificate of magistrate, notary, or other person

3401 (l). Where a fire insurance policy requires the insured to furnish to the insurance company a certificate of the nearest magistrate as to the loss, and the insured furnishes a certificate of the nearest magistrate, but this is returned to him by the company on the ground that it is insufficient, but without the particular insufficiency being stated, and the magistrate on request refuses to furnish any other certificate, a ruling by the trial judge that the proofs of loss were sufficient in law, and a resultant verdict and judgment for the insured, will not be reversed on appeal (*Degenhardt v. Aachen & Munich Fire Ins. Co.*, 44 Pa. Super. Ct. 644; *Same v. Atlas Assur. Co.*, Id. 653).

3401-3402. (m) Same—Excuses for failure to furnish certificate

3401 (m). Under Act April 2, 1913 (Acts 33d Leg. Tex. c. 105) § 1 (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 4874a), and section 3, insurer of personalty destroyed by fire is unable to escape liability

for failure of insured to comply with provision of policy that he would furnish a certificate of the magistrate nearest the fire as to the circumstances and the loss; there being no question as to the good faith of insured (*Springfield Fire & Marine Ins. Co. v. Nelms* [Tex. Civ. App.] 184 S. W. 1094).

5. PLEADING AND PRACTICE RELATING TO NECESSITY AND SUFFICIENCY OF NOTICE AND PROOFS OF LOSS

3402-3405. (a) Declaration or complaint

3403 (a). Under a policy of insurance providing that no suit shall be maintainable until after full compliance by the insured with all the requirements of the policy, a compliance with the requirements is condition precedent to the maintenance of the action (*Williams v. Fire Ass'n of Philadelphia*, 104 N. Y. Supp. 100, 119 App. Div. 573).

So a petition, in an action on a fire policy, must allege the giving of notice of the loss; that being a condition precedent to a right to recover.

Katzenstein v. Fidelity & Casualty Co. of New York, 96 N. Y. Supp. 183, 48 Misc. Rep. 496; *Gray v. Reliable Ins. Co.*, 110 Pac. 728, 26 Okl. 592; *Hilburn v. Phenix Ins. Co.*, 108 S. W. 576, 129 Mo. App. 670.

The petition must allege the furnishing of proofs of loss or a waiver thereof by the insurer, or the petition is demurrable.

San Francisco Sav. Union v. Western Assur. Co. of Toronto (C. C.) 157 Fed. 695; *American Cereal Co. v. Western Assur. Co.* (C. C.) 148 Fed. 77.

Where it is provided by statute that a compliance with conditions precedent may be pleaded generally and that defendant must set up the condition which he alleges was not performed, an allegation of performance, drawn in accordance with the statute, is sufficient.

Home Ins. Co. v. Gagen, 76 N. E. 927, 38 Ind. App. 680; *Fireman's Fund Ins. Co. v. Finklestein*, 73 N. E. 814, 164 Ind. 376.

3404 (a). If the policy sued on does not specify a time limit for the making of proofs or the character of such proofs, an allegation in the declaration is sufficient which is to the effect that the plaintiffs, at certain specified times, delivered to the company "as particular an account of said loss and damages as the nature of the case would admit" (*Coen v. Denver Tp. Mut. Fire Ins. Co.*, 155 Ill. App. 332).

In *Nerger v. Equitable Fire Ass'n*, 107 N. W. 531, 20 S. D. 419, a complaint on a fire policy alleged that plaintiffs had duly fulfilled and performed all the conditions and requirements of the policy on their part; that plaintiffs immediately after the fire gave defendant written notice thereof and of the loss, and on October 8, 1903, and within 60 days after the fire, rendered to defendant a written statement and proof of loss as mentioned in the policy. The complaint also alleged that more than 60 days had elapsed since the fire and ascertainment by defendant of the amount of the loss. It was held that, in the absence of a demurrer, such allegations should be construed as equivalent to an allegation that the required proofs of loss had been furnished more than 60 days prior to the commencement of the action.

Where petition to recover on fire policy does not show that person to whom affidavit as to loss was delivered was agent to receive proof of loss, it fails to show compliance with stipulation requiring statement to company as condition to action (*Bailey v. First Nat. Fire Ins. Co. of Washington*, D. C., 18 Ga. App. 213, 89 S. E. 80).

3405-3407. (b) Plea or answer

3405 (b). Failure to give notice and make proof of loss according to the terms of the policy should be specially pleaded.

Wilson v. German-American Ins. Co., 133 Pac. 715, 90 Kan. 355; *Hilburn v. Phoenix Ins. Co.*, 140 Mo. App. 355, 124 S. W. 63; *Manhattan Life Ins. Co. v. Verneville*, 156 Ala. 592, 47 South. 72; *O'Neill v. Northern Assur. Co. of London, Eng.*, 119 N. W. 911, 155 Mich. 564.

A plea, in an action on a fire policy insuring household furniture, alleging that the policy provided that the insured should produce for examination all bills, and that he failed on demand to produce bills showing from whom he bought the property, was bad for failing to aver that the insured was bound to comply with the provision (*Traders' Ins. Co. v. Letcher*, 39 South. 271, 143 Ala. 400).

3407-3408. (c) Evidence—Admissibility

3407 (c). Proof of loss with attached inventory is admissible in evidence to show that insured had complied with the provisions of the policy in regard to furnishing them, but they are not proper evidence to be considered by the jury in fixing the value of the articles named therein (*Security Ins. Co. v. Slack*, 183 Ill. App. 579).

Evidence of the company's pointing out defects in proofs, and first asserted that notice of loss was not given in time by its answer

in the action, could be considered upon the question as to the insurer's recognition that service of the proofs of loss by fire gave timely notice of the loss within the requirements of the policy (*Will & Baumer Co. v. Rochester German Ins. Co.*, 125 N. Y. Supp. 606, 140 App. Div. 691).

3408 (c). When failure to make proofs as required does not render the policy void, evidence as to proofs of loss made to the insurer's general agent within the required time, the agent's promise to send insured formal proof of loss, and that the agent's failure to do so occasioned a delay in making additional proof, is admissible (*Dakin v. Queen City Fire Ins. Co. of Sioux Falls, S. D.*, 59 Or. 269, 117 Pac. 419).

So in an action on a fire policy, where insured's failure to give notice and furnish proofs of loss was set up, evidence that the insured had notified the insurer's agent of his loss, and had made proofs on a blank furnished by the agent, and that the insurer had sent an adjuster, is admissible (*Union Marine Ins. Co. v. Charlie's Transfer Co.*, 186 Ala. 443, 65 South. 78).

Where the insurer refused to accept proofs of loss, in which the claim of insured was stated to be a sum less than the amount of the insurance, such proofs were inadmissible in an action on the policy, since insured was no longer concluded by his estimate therein (*Harmon v. Stuyvesant Ins. Co. of New York*, 156 S. W. 87, 170 Mo. App. 309).

3408-3409. (d) Same—Sufficiency

3409 (d). The burden of proof was upon insured to show that he exercised due diligence in rendering statement (*Smith v. Scottish Union & National Ins. Co.*, 85 N. E. 841, 200 Mass. 50).

So insured, alleging that proofs of loss did not correctly state the amount by reason of a mistake in an adjustment by an agent of insurer and a third person acting for insured, has the burden of proving the mistake (*Frees v. National Ben Franklin Fire Ins. Co.*, 148 N. Y. Supp. 790, 163 App. Div. 57).

An insurer, however, defending on the ground of fraudulent statements as to the amount of loss contained in the proofs of loss has the burden of proving the fraud (*Cole v. North British Mercantile Ins. Co.*, 113 Me. 512, 95 Atl. 217), and has the burden to show a forfeiture by failure to give notice of the casualty, as required by the policy (*Huguenin v. Continental Casualty Co.*, 77 S. E. 751, 94 S. C. 138).

In *Thomas Orr Trucking & Forwarding Co. v. Metropolitan Surety Co.*, 77 N. J. Law, 749, 73 Atl. 541, it was held that where there is an allegation by defendant of a nonperformance of special conditions prescribed, the general performance of which has been asserted under Practice Act, § 18 (Laws 1903, p. 570, c. 247), the burden still remains with plaintiff to show performance as at common law.

The sufficiency of evidence was considered in *Schmidt v. Williamsburg City Fire Ins. Co. of Brooklyn*, N. Y., 98 Neb. 61, 151 N. W. 920; *Ferdenando v. Milwaukee Mechanics' Ins. Co.*, 81 Wash. 244, 142 Pac. 693; *Andrews v. Dirigo Mut. Fire Ins. Co.*, 91 Atl. 978, 112 Me. 258; *Mutual Fire Ins. Co. of Montgomery County v. Pickett*, 83 Atl. 1097, 117 Md. 638; *Commercial Fire Ins. Co. v. Waldron*, 88 Ark. 120, 114 S. W. 210; *Smith v. Scottish Union & National Ins. Co.*, 85 N. E. 841, 200 Mass. 50; *Hodge v. Franklin Ins. Co. of Philadelphia*, 111 Minn. 321, 126 N. W. 1098; *Same v. Mercantile Fire & Marine Ins. Co.*, 111 Minn. 540, 126 N. W. 1099; *Jenks v. Liverpool, London & Globe Ins. Co.*, 92 N. E. 998, 206 Mass. 591; *Scottish Union & Nat. Ins. Co. v. Encampment Smelting Co.*, 166 Fed. 231, 92 C. C. A. 139; *Continental Casualty Co. v. Wynne*, 36 Okl. 325, 129 Pac. 16; *Orlando v. Great Eastern Casualty Co.*, 155 N. Y. Supp. 20, 91 Misc. Rep. 539; *Gueringer v. Fidelity & Deposit Co. of Maryland* (Mo. App.) 184 S. W. 936.

The sufficiency of evidence to go to the jury was considered in *Bruger v. Princeton & St. M. Mut. Fire Ins. Co.*, 109 N. W. 95, 129 Wis. 281.

3409-3410. (e) Questions for jury

3410 (e). Where the facts are in dispute, what is a reasonable time to give the company notice is for the jury.

American Ins. Co. v. I. F. Peebles & Co., 64 S. E. 304, 5 Ga. App. 731; *Smith v. Scottish Union & National Ins. Co.*, 85 N. E. 841, 200 Mass. 50; *Will & Baumer Co. v. Rochester German Ins. Co.*, 125 N. Y. Supp. 606, 140 App. Div. 691; *National Live Stock Ins. Co. v. Elliott*, 60 Ind. App. 112, 108 N. E. 784.

Where the policy required insured to produce his books for the inspection of insurer within a reasonable time after a loss, whether production at the trial of an action on the policy is within a reasonable time is for the jury (*Continental Ins. Co. v. Rosenberg*, 7 Pennewill (Del.) 174, 74 Atl. 1073).

So in suits on fire policies, defended on the ground that insured failed to set forth all other insurance in his statement of loss it may be a jury question whether a particular policy became a binding contract (*Greenough v. Phoenix Ins. Co. of Hartford*, 92 N. E. 447, 206 Mass. 247).

In *McMillan v. Insurance Co. of North America*, 58 S. E. 1020, 78 S. C. 433; *Id.*, 78 S. C. 433, 58 S. E. 1135, it was under the evidence, held to be a question for the jury whether a cashbook was delivered to the adjuster, as required by the policy, or was destroyed by fire.

So it has been held proper to submit the question of waiver of proof of loss to the jury.

Eaton v. Globe & Rutgers Fire Ins. Co., 227 Mass. 354, 116 N. E. 536;
Kentucky Live Stock Ins. Co. v. Stout, 175 Ky. 343, 194 S. W. 318;
Eberly v. Springfield Fire & Marine Ins. Co., 51 Pa. Super. Ct. 474.

Whether the word "paid" as used in an affidavit was intended to express satisfaction in money or in a more general sense, as by exchange of the property and money, has also been held for the jury (*Bush v. Indiana & Ohio Live Stock Ins. Co.*, 74 W. Va. 244, 81 S. E. 984).

3411. (f) Trial and review

3411 (f). Waiver of forfeiture is properly proved under general denial in reply, without alleging specific facts relied on as constituting the waiver (*Pace v. American Cent. Ins. Co.*, 158 S. W. 892, 173 Mo. App. 485).

Omission of an item of loss from the proofs of loss did not preclude the insured from proving such loss on the trial (*Fidelity-Phenix Fire Ins. Co. v. Friedman*, 117 Ark. 71, 174 S. W. 215).

Where the evidence showed that proofs of loss had been sent by plaintiff to defendant, and never returned, and the principal defense relied on was that plaintiff had himself burned the building, the court did not err in refusing to dismiss the action on the ground that proofs of loss had not been furnished (*United States Fire Ins. Co. v. Sam Bynum & Co.*, 137 S. W. 771, 143 Ky. 804).

The correctness of instructions was also considered in *Burgess v. Mercantile Town Mut. Ins. Co.*, 89 S. W. 568, 114 Mo. App. 169; *Miller v. Fireman's Fund Ins. Co. of San Francisco*, 6 Cal. App. 395, 92 Pac. 332; *Robinson v. Sun Ins. Office*, 90 Misc. Rep. 390, 152 N. Y. Supp. 1022.

6. FRAUD AND FALSE SWEARING IN PROOFS OF LOSS**3412-3413. (a) Nature and effect of condition in general**

3412 (a). Willful presentation by insured, with intent to defraud, of proof of loss containing items overvalued or not lost, will prevent recovery on a policy.

Fidelity-Phenix Fire Ins. Co. v. Sadau (Tex. Civ. App.) 167 S. W. 334;
Fidelity Phenix Fire Ins. Co. v. Sadau (Tex. Civ. App.) 178 S. W. 559; Royal Ins. Co. v. Scritchfield (Okla.) 152 Pac. 97; Orient Ins. Co. v. Van Zandt-Bruce Drug Co. (Okla.) 151 Pac. 323.

Where a policy provided that it should become void in case of any fraud or false swearing as to the subject of the insurance either before or after loss, the acts of the agents of the insured in presenting fraudulent vouchers to the insurer on demand were imputable to the insured (*Mick v. Royal Exch. Assur.*, 87 N. J. Law, 607, 91 Atl. 102, 52 L. R. A. [N. S.] 1074).

3413-3414. (b) Persons affected by fraud or false swearing of insured

3413 (b). Where a policy was issued to insured, loss, if any, payable to plaintiffs, and insured was guilty of fraud in executing proofs of loss, whether plaintiffs knew of the fraud was immaterial; they being mere appointees, whose rights were only those of insured (*Chartered Bank of India, Australia and China v. North River Ins. Co.*, 121 N. Y. Supp. 399, 136 App. Div. 646).

In *Fields v. German American Ins. Co.*, 140 Mo. App. 158, 120 S. W. 697, and *Same v. Queen Ins. Co.*, 140 Mo. App. 168, 120 S. W. 700, however, it was held that where, after loss under a policy insuring firm property, the claim under the policy was assigned to plaintiff, his right of action was not defeated by the false swearing of one member of the firm as a witness in the action under a provision of the policy that it should be void if insured was guilty of false swearing touching a material matter relating to the insurance.

Where a wife in making proofs of loss under an insurance policy in the absence of her husband has no apparent authority beyond that necessary to effect the object of the implied appointment, and commits a fraud, it does not become that of the husband, unless he ratified her act with knowledge of the facts (*Evans v. Crawford County Farmers' Mut. Fire Ins. Co.*, 109 N. W. 952, 130 Wis. 189, 9 L. R. A. [N. S.] 485, 118 Am. St. Rep. 1009).

Similarly a fraudulent statement in the proofs of loss by the husband afterwards adopted by the wife without knowledge of the facts does not amount to fraud on her part (*Virginia Fire & Marine Ins. Co. v. Hogue*, 54 S. E. 8, 105 Va. 355).

3414-3415. (c) Materiality of false statement

3414 (c). In action on fire insurance policy, insured's false swearing as to the value of building, etc., for taxation, unrelated to the insurance transaction, had no bearing upon his statement of value in proof of loss (*Boskowitz v. Continental Ins. Co.*, 161 N. Y. Supp. 680, 175 App. Div. 18, appeal dismissed 220 N. Y. 648, 115 N. E. 1034).

So where the value of the goods destroyed is greater than the amount of insurance thereon, such value is immaterial to the risk, and an affidavit in which the value is overstated will not constitute a defense (*Jensen v. Palatine Ins. Co.*, 81 Neb. 523, 116 N. W. 286).

3415 (c). Provision in policy against false swearing is not violated by insured's slight overestimates in his proofs of loss of value of property insured (*Riley v. Ætna Ins. Co. [Va.]* 92 S. E. 417, L. R. A. 1917E, 983).

So insured's overstatement of losses or damages in his petition, or false statements in his testimony, will not work a forfeiture of the insurance, though the policy provides that it shall be void in case of misrepresentation in the proofs (*Goldberg v. Provident Washington Ins. Co.*, 87 S. E. 1077, 144 Ga. 783).

3415-3417. (d) Fraudulent intent—Statements made through ignorance or negligence of insured

3415 (d). A misstatement in the proofs of loss sufficient to forfeit a policy must be willfully false, and a mere innocent mistake will not amount to fraud or false swearing.

Cole v. North British Mercantile Ins. Co., 113 Me. 512, 95 Atl. 217; *Willis v. Horticultural Fire Relief of Oregon*, 77 Or. 621, 152 Pac. 259; *Miller v. Fireman's Fund Ins. Co. of San Francisco*, 6 Cal. App. 395, 92 Pac. 332; *Follett v. Standard Fire Ins. Co.*, 77 N. H. 457, 92 Atl. 956; *Warner v. Narragansett Mut. Fire Ins. Co.*, 100 Atl. 706, 111 Me. 590; *German Union Fire Ins. Co. of Baltimore v. Cohen*, 78 Atl. 911, 114 Md. 130; *Virginia Fire & Marine Ins. Co. v. Hogue*, 54 S. E. 8, 105 Va. 355.

3416 (d). In *Meyer v. Home Ins. Co.*, 106 N. W. 1087, 127 Wis. 293, it is stated that willful false swearing by the insured as to the

property destroyed by fire avoids the policy, whether it secured or was likely to secure any advantage to be insured or not.

In several cases, however, it has been stated that the false swearing must have been knowingly and willfully false, with the effect of deceiving and misleading.

Willis v. Horticultural Fire Relief of Oregon, 69 Or. 293, 137 Pac. 761, Ann. Cas. 1916A, 449; *Ward v. Queen City Fire Ins. Co. of Sioux Falls, S. D.*, 69 Or. 347, 138 Pac. 1067; *Dalton v. Milwaukee Mechanics' Ins. Co.*, 102 N. W. 120, 126 Iowa, 377; *Same v. German Ins. Co. (Iowa)* 102 N. W. 1131; *Barrett v. Connecticut Fire Ins. Co. (Mich.)* 161 N. W. 916; *Kentucky Live Stock Ins. Co. v. McWilliams*, 190 S. W. 697, 173 Ky. 92 (under statute); *Carroll v. Hartford Fire Ins. Co.*, 154 Pac. 985, 28 Idaho, 466 (under statute).

3417 (d). The act of insured in swearing to his loss as being much less than he knew it actually was could not involve an intent to defraud, and did not constitute false swearing such as to avoid the policy (*Walker v. Western Underwriters' Ass'n*, 105 N. W. 597, 142 Mich. 162).

A discrepancy between the amount of loss fixed by the insured in his claim of loss and the amount awarded by the appraisers is not of itself proof of fraudulent intent, such as will defeat insured's claim for actual loss (*L. N. Gross Co. v. Westchester Fire Ins. Co.*, 88 Misc. Rep. 327, 151 N. Y. Supp. 945).

Nor is an exaggeration of the amount of the loss a fraud, invalidating the policy, where insured had no means of positively determining the value of the goods destroyed, and was compelled to estimate the loss (*Simon Cloak & Suit Co. v. Aetna Ins. Co. [City Ct. N. Y.]* 141 N. Y. Supp. 553).

3417-3420. (e) Same—Possibility of injury to insurer

3417 (e). Where insured, who did not own all of the lumber destroyed, but only had an insurable interest in part of it, disclosed to the insurer's agent the nature of his interest, his failure to make a similar disclosure to the adjuster was not prejudicial to the insurer, and will not avoid the policy, where the agent was present at the adjustment (*Fuhrman v. Sun Ins. Office of London*, 147 N. W. 618, 180 Mich. 439, Ann. Cas. 1916A, 466).

3422. (g) Statements as to cause and circumstances of loss

3422 (g). A sworn statement of an insured as to the amount of a loss, although found to be excessive, does not constitute false

(1431)

swearing or misrepresentation which will avoid the policy, where it was made in good faith, and there was room for an honest difference of opinion as to whether the loss was total or partial (*Spring Garden Ins. Co. v. Amusement Syndicate Co.*, 178 Fed. 519, 102 C. C. A. 29).

Where a life policy required proof of loss recovery cannot be denied because insured's notice of permanent disability did not correctly state the causes of his disability (*Southern States Life Ins. Co. v. Warnock*, 89 S. E. 843, 145 Ga. 791).

3423-3424. (h) Statements regarding property not covered by policy or not destroyed

3423 (h). If plaintiff falsely and knowingly inserted in his proof of loss as burned any single article which was not in the house, or was not burned, it constituted a fraud, defeating recovery.

Pottle v. Liverpool & London & Globe Ins. Co., 81 Atl. 481, 108 Me. 401;
Rovinsky v. Northern Assur. Co., 60 Atl. 1025, 100 Me. 112.

3424-3426. (i) Statements as to value of property destroyed

3424 (i). Exaggeration by insured of the value of insured goods destroyed, unintentionally made, will not invalidate the policy, but must be material and intentional.

Phoenix Ins. Co. v. Wintersmith, 98 S. W. 987, 30 Ky. Law Rep. 369;
Hodge v. Franklin Ins. Co. of Philadelphia, 126 N. W. 1098, 111 Minn. 321; *Same v. Mercantile Fire & Marine Ins. Co., of Boston*, 126 N. W. 1099, 111 Minn. 540; *Citizens' Ins. Co. v. Herpolzheimer*, 77 Neb. 232, 109 N. W. 160; *Follett v. Standard Fire Ins. Co.*, 92 Atl. 956, 77 N. H. 457; *Pottle v. Liverpool & London & Globe Ins. Co.*, 85 Atl. 1058, 109 Me. 584; *Rovinsky v. Northern Assur. Co.*, 60 A. 1025, 100 Me. 112.

3429-3430. (l) Forfeiture of entire policy

3429 (l). Where there is a provision that the policy, or all claims under it, shall be forfeited in case of fraud or false swearing, any violation of such provision will result in the complete forfeiture of the policy.

Kavooras v. Insurance Co. of Illinois, 167 Ill. App. 220; *Southern Home Ins. Co. v. Putnal*, 49 South. 922, 57 Fla. 199; *Richard D'Aigle Co. v. Western Ins. Co. of Pittsburg*, 67 South. 827, 136 La. 777.

3430-3433. (m) Questions of practice

3430 (m). The defense, that under a provision of a fire policy it became void because of a false statement in the proof of loss, must be pleaded.

Solem v. Connecticut Fire Ins. Co., 109 Pac. 432, 41 Mont. 351; *Plunkett v. Piedmont Mut. Ins. Co.*, 61 S. E. 893, 80 S. C. 407; *Orient Ins. Co. v. Kaptur*, 95 N. E. 230, 176 Ind. 308; *Spingarn v. National Surety Co. of New York*, 134 N. Y. Supp. 817, 76 Misc. Rep. 248; *Cheever v. British-American Ins. Co.*, 73 N. E. 1121, 180 N. Y. 550, affirming 83 N. Y. Supp. 728, 86 App. Div. 333.

3431 (m). Whether false statements made by an insured in his proof of loss were intentionally made was a question of fact for the jury.

Warner v. Narragansett Mut. Fire Ins. Co., 90 Atl. 706, 111 Me. 590; *Swift v. Teutonia Ins. Co.*, 28 Pa. Super. Ct. 253; *Miller v. Fireman's Fund Ins. Co.*, 92 Pac. 332, 6 Cal. App. 395; *Lawrence v. Northwestern Nat. Ins. Co.*, 197 Ill. App. 449; *Willis v. Horticultural Fire Relief*, 152 Pac. 259, 77 Or. 621; *Royal Ins. Co. v. Scritchfield (Okla.)* 152 Pac. 97.

When disparity of insured's valuation is so out of proportion to actual value as to show his intent to defraud, question is one of law for the court, and defendant is entitled to instructed verdict (*Riley v. Ætna Ins. Co. [W. Va.]* 92 S. E. 417, L. R. A. 1917E, 983).

3432 (m). Where insurer alleges that the assured was guilty of fraud and false swearing, witnesses may testify as to the value of the goods destroyed, based on what they saw in the storehouse (*Prudential Fire Ins. Co. v. Alley*, 51 S. E. 812, 104 Va. 356), and insured may state in what manner he computed his loss, showing the amounts and value of the stock destroyed by fire to refute a defense of fraud based on proofs of loss submitted (*Cohen v. Sun Ins. Office*, 91 N. E. 265, 198 N. Y. 140, reversing 112 N. Y. Supp. 1125, 128 App. Div. 925).

So evidence as to profits earned by plaintiff during the few years preceding the fire is admissible (*Central Glass Co. v. German American Ins. Co.*, 57 South. 538, 130 La. 18).

So letters and telegrams sent plaintiff by his deceased partner while in another city, relating to the purchase there of the goods, and containing expressions of his opinion concerning the condition and value thereof, are admissible for the purpose of showing plaintiff's good faith in fixing the value in the proofs of loss (*German-American Ins. Co. v. Brown*, 87 S. W. 135, 75 Ark. 251).

Where an insurance company waives proof of loss by refusing to receive it on the ground that the policy was not in force when the loss occurred, it cannot defend an action on the policy on the ground of false statements as to the value or title in the rejected proof of loss, and evidence that insured made statements after the policy was assigned to him with consent of the company by which he exaggerated his interest in the property is inadmissible (*Havlik v. St. Paul Fire & Marine Ins. Co.*, 127 N. W. 248, 87 Neb. 427).

The insurance company has the burden of proving fraud by the insured in making proof of loss.

Coy v. Granite State Ins. Co., 88 Atl. 355, 110 Me. 551; *Kobin v. St. Paul Fire & Marine Ins. Co.*, 137 N. W. 753, 150 Wis. 591; *Newton v. Theresa Village Mut. Fire Ins. Co.*, 104 N. W. 107, 125 Wis. 289; *Virginia Fire & Marine Ins. Co. v. Hogue*, 54 S. E. 8, 105 Va. 355.

Where an insurance company waived its right to require proof of loss, the proof actually filed was only important on the question of fraud and false swearing (*Mellen v. United States Health & Accident Ins. Co.*, 75 Atl. 273, 83 Vt. 242).

Under L. O. L. §§ 793, 795, the presumption that insured is innocent of false swearing is evidence to be submitted to the jury (*Ward v. Queen City Fire Ins. Co.*, 138 Pac. 1067, 69 Or. 347).

The sufficiency of evidence was also considered in *Connecticut Fire Ins. Co. v. Union Mercantile Co.*, 171 S. W. 407, 161 Ky. 718; *Lewis v. Farmers' Mut. Fire Ins. Co. of Town of Clarno*, 150 N. W. 949, 159 Wis. 547; *Pottle v. Liverpool & London & Globe Ins. Co.*, 81 Atl. 481, 108 Me. 401; *Pottle v. Liverpool & London & Globe Ins. Co.*, 85 Atl. 1058, 109 Me. 584; *Newton v. Theresa Village Mut. Fire Ins. Co.*, 104 N. W. 107, 125 Wis. 289; *Hilburn v. Phenix Ins. Co.*, 108 S. W. 576, 129 Mo. App. 670; *Hirschman v. Firemen's Fund Ins. Co., of San Francisco, Cal.* (N. Y. City Ct.) 123 N. Y. Supp. 781; *Corn Novelty Co. v. Norwich Union Fire Ins. Soc. Limited, of Norwich, England*, 162 N. Y. Supp. 1020, 176 App. Div. 261; *Kentucky Live Stock Ins. Co. v. McWilliams*, 190 S. W. 697, 173 Ky. 92; *Lawrence v. Northwestern Nat. Ins. Co.*, 197 Ill. App. 449; *Bleznak v. Springfield Fire & Marine Ins. Co.*, 237 Fed. 589, 150 C. C. A. 471; *Arel v. First Nat. Fire Ins. Co.*, 190 S. W. 78, 195 Mo. App. 165; *Same v. Girard Fire & Marine Ins. Co.* (Mo. App.) 190 S. W. 81.

3433 (m). The correctness of instructions was considered in *Home Ins. Co. v. Rogers*, 128 S. W. 625, 60 Tex. Civ. App. 456.

In *Herzig v. Washington Fire Ins. Co.*, 128 N. Y. Supp. 565, 143 App. Div. 386, it was held that where defendant alleged that, in an examination under oath respecting an adjustment of the loss, in-

sured gave false and fraudulent testimony regarding the items of loss, the nature of the fire, the stock on hand, its value and loss thereon, etc., plaintiffs were entitled to a bill of particulars of that part of the testimony claimed to be false and fraudulent, and in what respect it was false and fraudulent.

An averment by insurers that an insured made excessive and fraudulent claims of loss under policies may be tried and determined in actions at law on the policies, and is no ground of equitable jurisdiction (*Mechanics' Ins. Co. of Philadelphia v. C. A. Hoover Distilling Co.*, 173 Fed. 888, 97 C. C. A. 400, 32 L. R. A. [N. S.] 940).

7. EFFECT OF PROOFS OF LOSS

3433-3434. (a) Proofs of loss as admissions by insured—Corrections and explanations

3434 (a). While statements contained in the proof of death are prima facie true, they may be shown to have been erroneously or inadvertently made.

Philadelphia Casualty Co. v. Fechheimer, 220 Fed. 401, 136 C. C. A. 25, Ann. Cas. 1917D, 64; *Hill v. Aetna Life Ins. Co.*, 63 S. E. 124, 150 N. C. 1; *Christy v. American Temperance Life Ins. Ass'n*, 123 N. Y. Supp. 740, 68 Misc. Rep. 178.

Only willful misstatements in proof of loss will prevent recovery on the policy.

Raulet v. Northwestern Nat. Ins. Co. of Milwaukee, 107 Pac. 292, 157 Cal. 213; *Phenix Ins. Co. of Brooklyn v. Jones*, 85 S. E. 206, 16 Ga. App. 261; *North British & Mercantile Ins. Co. v. Nidiffer*, 72 S. E. 130, 112 Va. 591, Ann. Cas. 1916A, 464; *Nugent v. Rensselaer County Mut. Fire Ins. Co.*, 94 N. Y. Supp. 605, 106 App. Div. 308; *Wall v. Continental Casualty Co.*, 86 S. W. 491, 111 Mo. App. 504.

An answer, "the property insured belonged to" insured, "and no other person or persons had any interest therein, except," the remainder of the blank not being filled out, was true, though the property was mortgaged, as it should not be construed to mean that the property was not incumbered (*Jenks v. Liverpool & London & Globe Ins. Co.*, 92 N. E. 998, 206 Mass. 591).

In *Woodward v. Pittsburg Underwriters*, 40 Pa. Super. Ct. 143, a fire insurance policy taken out in the name of partners provided that, in determining liability, the total insurance, whether valid or not, was to be taken into consideration. The goods were also insured in another company. One partner assigned his interest to

plaintiff, and defendant company indorsed on its policy its consent to the transfer, but no consent was obtained from the second company. After a fire, plaintiff submitted to the second company a proof of loss in which it was stated that the property belonged to the partnership. In the proof of loss submitted to defendant company, it was stated that it partly belonged to plaintiff. It was held that the false statement made to the second company did not relieve defendant company from its liability on the policy.

3435-3436. (b) Conclusiveness of proofs—Effect of mistake

3435 (b). One may show that a fire loss is more than that stated in the proofs, unless he has been guilty of fraud, or unless further proofs would be inequitable to insurer (*Laurenzi v. Atlas Ins. Co.*, 176 S. W. 1022, 131 Tenn. 644).

The amount of a loss stated in proofs of loss is not conclusive on insured.

Frees v. National Ben Franklin Fire Ins. Co., of Pittsburgh, Pa., 148 N. Y. Supp. 790, 163 App. Div. 57; *Continental Ins. Co. v. Rosenberg*, 74 Atl. 1073, 7 Pennewill (Del.) 174; *Teter v. Franklin Fire Ins. Co.*, 82 S. E. 40, 74 W. Va. 344; *Downey v. National Fire Ins. Co. of Hartford, Conn.*, 87 S. E. 487, 77 W. Va. 386; *Boutross v. Palatine Ins. Co., Limited*, of London, England, 164 Pac. 1069, 100 Kan. 574.

3437-3440. (c) Proofs as evidence against insurer

3438 (c). The proof of loss of property insured is not competent to prove the facts connected with the loss or the value of the property destroyed and injured.

Lundvick v. Westchester Fire Ins. Co., 104 N. W. 429, 128 Iowa, 376; *Tucker v. Colonial Fire Ins. Co.*, 51 S. E. 86, 58 W. Va. 30; *Order of United Commercial Travelers of America v. Barnes*, 82 Pac. 1099, 72 Kan. 293, 7 Ann. Cas. 809, affirming 80 Pac. 1020, 72 Kan. 293, 7 Ann. Cas. 809; *Lancashire Ins. Co. v. Lyon*, 124 Ill. App. 491; *Mutual Fire Ins. Co. of Montgomery County v. Ritter*, 77 Atl. 388, 113 Md. 163; *Goodwin v. Union Ins. Co. of Philadelphia*, 163 Mich. 41, 127 N. W. 790; *Cash v. Concordia Fire Ins. Co. of Milwaukee, Wis.*, 111 Minn. 162, 126 N. W. 524; *Same v. Des Moines Fire Ins. Co.*, 111 Minn. 538, 126 N. W. 526.

They are admissible, however, to show that proofs have been made as required by the policy.

Cash v. Concordia Fire Ins. Co. of Milwaukee, Wis., 126 N. W. 524, 111 Minn. 162; *Same v. Des Moines Fire Ins. Co.*, 126 N. W. 526, 111 Minn. 538; *Order of United Commercial Travelers of America v.*

Barnes, 82 Pac. 1099, 72 Kan. 293, 7 Ann. Cas. 809; Tucker v. Colonial Fire Ins. Co., 51 S. E. 86, 58 W. Va. 30.

8. NECESSITY AND SUFFICIENCY OF NOTICE AND PROOFS OF DEATH OR INJURY

3440-3442. (a) Necessity of notice and proofs

3440 (a). Where an accident insurance policy makes the obligation to give notice of injury and death conditions precedent, a failure to give them within a reasonable time invalidates all claim to indemnity.

Crotty v. Continental Casualty Co., 146 S. W. 833, 163 Mo. App. 628; Love v. Modern Woodmen of America, 102 N. E. 183, 259 Ill. 102, reversing 177 Ill. App. 76; Blunt v. National Fidelity & Casualty Co., 141 N. W. 1033, 93 Neb. 685; Metropolitan Life Ins. Co. v. Wagner, 109 S. W. 1120, 50 Tex. Civ. App. 233; Da Rin v. Casualty Co. of America, 41 Mont. 175, 108 Pac. 649, 27 L. R. A. (N. S.) 1164, 137 Am. St. Rep. 709; Hill v. Supreme Ruling of Fraternal Mystic Circle, 164 Ill. App. 217; United Commercial Travelers of America v. Boaz, 150 Pac. 822, 27 Colo. App. 423; Parrish v. Order of United Commercial Travelers of America, 232 Fed. 425, 146 C. C. A. 419.

But if the insurer has actual knowledge of the loss within the time stipulated for giving notice, such notice is dispensed with (Western Travelers' Acc. Ass'n v. Tomson, 72 Neb. 661, 103 N. W. 695, reversing on rehearing 101 N. W. 341, 72 Neb. 661).

3441 (a). Though a policy required proof of the death of insured within 30 days thereafter, failure to furnish the proof within that time did not forfeit the policy but the beneficiary could not recover thereon until she had furnished the proof of the death (Continental Casualty Co. v. Waters, 97 S. W. 1103, 30 Ky. Law Rep. 243).

3442 (a). Conditions in a policy of life insurance requiring proof of death to be made in writing, identification of deceased as insured and proof that beneficiary is living are reasonable requirements (Menear v. Aetna Life Ins. Co. of Hartford, Conn., 31 Ohio Cir. Ct. R. 483).

In Blackman v. United States Casualty Co., 103 S. W. 784, 117 Tenn. 578, a policy insuring against loss of time caused by illness due to enumerated diseases contained a statement of the symptoms of each disease, and required insured to give notice within 10 days after contracting any of the diseases. It was held that, construed as requiring that there should be some symptoms sufficiently dis-

tinct to call the attention of insured to the fact that he was ill, the provision of the policy was reasonable.

Under benefit certificate, requiring notice only in case of death or disability, notice of accident, resulting in broken arm, is not required (*Southern Woodmen v. Morris*, 70 South. 952, 14 Ala. App. 464).

Where an insurance company issues several policies on the life of insured and nothing contained therein requires separate proof of death to be made, such proof made under one is sufficient to make a policy under which no proof was made actionable (*Bohles v. Prudential Ins. Co. of America*, 83 Atl. 904, 83 N. J. Law, 246).

In a suit which was primarily one in equity to compel reinstatement of plaintiff's insurance where it appeared that the policy matured as an endowment subsequent to the beginning of the action and before trial, the fact that no proofs of loss were made would not prevent recovery of the amount due as an endowment, though the policy provided that it was not payable until 60 days after proofs of loss, equity having acquired jurisdiction over the parties and the controversy (*Smith v. Northwestern Nat. Life Ins. Co.*, 102 N. W. 57, 123 Wis. 586).

Proofs of death of insured need not be presented till the presumption of his death from seven years' unexplained absence arises; there being no proof without such presumption (*Benjamin v. District Grand Lodge No. 4, Independent Order B'Nai B'rith*, 152 Pac. 731, 171 Cal. 260).

Failure to give a notice of death required by mutual benefit insurance policy is not excused by unforeseen contingencies or the unreasonable nature of the requirement (*Hammill v. Order of United Commercial Travelers of America*, 178 App. Div. 338, 164 N. Y. Supp. 815).

Where notice of an injury is received by an accident company, and it acts thereon, it is immaterial as to what relationship existed between the sender of the notice and either the assured or the beneficiary.

Continental Casualty Co. v. Buchtel, 105 N. W. 707, 74 Neb. 823; *Hilmer v. Western Travelers' Accident Ass'n*, 125 N. W. 535, 86 Neb. 285, 27 L. R. A. (N. S.) 319.

A similar position seems to have been taken in other cases, without requiring that the insurer act on the notice.

Crowder v. Continental Casualty Co., 91 S. W. 1016, 115 Mo. App. 535 (notice by insured's agent at beneficiary's request); *Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845 (notice by

beneficiary); *Guy v. United States Casualty Co.*, 66 S. E. 437, 151 N. C. 465 (notice by friend or relative); *Mellen v. United States Health & Accident Ins. Co.*, 75 Atl. 273, 83 Vt. 242 (notice by party's physician).

Under Rev. St. 1895, art. 3379, as amended by Acts 1907, c. 129, § 1, providing that a notice of claim for damages required by contract may be given to the nearest or other convenient local agent of the company requiring the same, notice of injury given to the local agent of a casualty company was sufficient (*Royal Casualty Co. v. Nelson* [Tex. Civ. App.] 153 S. W. 674).

Where insurance company passed into hands of receiver prior to illness of insured, receiver was not authorized to receive notice from insured of accident or illness; nor did such receiver have any authority to investigate good faith of insured's illness or impose forfeiture provided by contract for want of notice (*Provident Life & Accident Ins. Co. v. Elliott*, 73 South. 476).

3444-3445. (c) Service of notice and proofs

3444 (c). Service of proofs of death upon the insurer, and not the making or mailing of such proofs, is the essential prerequisite to recovery (*State ex rel. Northwestern Mut. Life Ins. Co. v. Circuit Court of Waushara County*, 162 N. W. 436, 165 Wis. 387).

Where a policy of insurance against sickness provides that notice shall be given within a stated time, notice deposited in the mails properly addressed within the time stated is sufficient, though it does not reach the insurance company within the time (*Craig v. United States Health & Accident Ins. Co.*, 61 S. E. 423, 80 S. C. 151, 18 L. R. A. [N. S.] 106, 128 Am. St. Rep. 877, 15 Ann. Cas. 216).

3445-3447. (d) Sufficiency of proofs—Facts to be proved

3447 (d). Proof of death, seasonably made, may serve the purpose of both notice and proof, since the formal statement of facts made in the proof ordinarily must include all the information imparted by the notice, but a mere informal notice does not ordinarily supply the place of formal proof (*Da Rin v. Casualty Co. of America*, 108 Pac. 649, 41 Mont. 175, 27 L. R. A. [N. S.] 1164, 137 Am. St. Rep. 709).

Plaintiff must prove reasonable compliance with requirements of association as to furnishing proofs of loss (*Haskew v. Knights of Modern Maccabees* [Okl.] 159 Pac. 493); and it was said in the same case that, where beneficiary made proofs of death in ac-

cordance with rules of association, its officers could not require additional proofs not authorized by its laws and regulations.

Where member of fraternal insurance society furnished proof of disability upon forms prescribed by the society, tending to show he was permanently disabled, his right to recover was not defeated because his physician erroneously diagnosed his affliction (*Southern Woodmen v. Davis*, 187 S. W. 638, 124 Ark. 518).

One claiming the proceeds of an insurance policy and making proofs of loss on account thereof does not invalidate the same by adding after his personal signature the word "executor," where it appears that he took oath to such proofs and made claim for the proceeds of the policy in his own personal capacity (*Globe Mut. Life Ins. Ass'n v. March*, 118 Ill. App. 261).

That the beneficiary of an insurance policy, by reason of insured having disappeared, was unable to make actual proof of his death in the way specified in the policy, did not bar her right to recover (*Mannheimer v. Independent Order of Ahawas Israel*, 145 N. Y. Supp. 74, 83 Misc. Rep. 455).

The purpose of a stipulation in a policy for the payment of sick benefits that no disability shall constitute a claim for indemnity on account of any sickness, the nature of which is incapable of positive proof, is to protect insurer against fraud by preventing insured simulating illness, but it does not impose on him the burden of definitely naming the illness or its origin or cause, and, when he furnishes evidence of a physical condition as the result of illness which incapacitates him for labor, he satisfies the provision (*Jennings v. Brotherhood Acc. Co.*, 96 Pac. 982, 44 Colo. 68, 18 L. R. A. [N. S.] 109, 130 Am. St. Rep. 109).

A statement in the proof of death under an accident policy against death by external, violent, and accidental means that death was caused by poisoning, introduced by a needle, sufficiently states the cause of death, and that it was caused by external, violent, and accidental means (*Simpkins v. Hawkeye Commercial Men's Ass'n*, 126 N. W. 192, 148 Iowa, 543).

Where an accident policy required proof of claims on blanks furnished by the company, the failure to furnish an employer's affidavit, as required by one blank, because of his refusal to make it, does not defeat recovery (*Constantino v. Massachusetts Accident Co.*, 109 N. E. 447, 221 Mass. 464).

Within 15 days after insured in an accident policy was injured, and while he was sick, a relative and business partner prepared and

delivered to insurer a written notice of the injury. In response thereto the medical examiner of insurer visited insured, saw the wound, and diagnosed the case, and reported the conditions discovered. It was held that, though the facts did not show a waiver of notice, they were sufficient to warrant an inference of the fact of notice (*Simpkins v. Hawkeye Commercial Men's Ass'n*, 148 Iowa, 543, 126 N. W. 192).

A letter notifying an accident insurer that insured had been killed, written by the beneficiary, and urging an early settlement, and asking insurer to "attend to this as promptly as possible," was a sufficient request for blanks on which to make proofs (*Correll v. National Acc. Soc.*, 139 Iowa, 36, 116 N. W. 1046, 130 Am. St. Rep. 294).

Where the insured in an accident policy had complied with the terms of the policy as to notice of injury, he cannot be prejudiced by his gratuitous act in filling out and sending blanks furnished him by the company marked "preliminary notice" (*Mellen v. United States Health & Accident Ins. Co.*, 75 Atl. 273, 83 Vt. 242).

Where there was no provision in accident insurance policy or by-laws calling for written notice or proof of claim, oral notice of accident to insured was sufficient in view of verdict for insured (*Jackson v. Life & Annuity Ass'n [Mo. App.]* 195 S. W. 535).

3447-3448. (e) Same—Amount and kind of proof

3448 (e). Provision for payment of life insurance on "satisfactory proof" of death entitles insurer to demand proof with reasonable certainty, and is complied with by proof sufficient, standing alone, to support recovery.

Noyes v. Commercial Travelers' Eastern Acc. Ass'n, 76 N. E. 665, 190 Mass. 171; *Traiser v. Commercial Travelers' Eastern Accident Ass'n*, 88 N. E. 901, 202 Mass. 292; *Security Bank of Richmond v. Equitable Life Assur. Society of United States*, 71 S. E. 647, 112 Va. 462, 35 L. R. A. (N. S.) 159, Ann. Cas. 1913B, 836.

An insurer, in an accident policy requiring proof of death of insured within a specified time, can only require proofs of death necessary to establish a prima facie case, and cannot require the affidavits of persons having personal knowledge of the injuries resulting in insured's death (*Preferred Acc. Ins. Co. v. Fielding*, 83 Pac. 1013, 35 Colo. 19, 9 Ann. Cas. 916).

There was substantial compliance with an accident policy requiring written notice of injury within 10 days of the accident, where 2

days after insured's drowning the insurer was orally notified of the time and place, and a few days later the company refused to furnish claim blanks, repudiating liability, and 13 days after the accident the beneficiary telegraphed to the main office notice of the death, specifying the accident, the time, and the place, and the same day wrote, repeating the particulars and a request for blanks. (*Cornell v. Travelers' Ins. Co. of Hartford, Conn.*, 85 N. E. 1107, 192 N. Y. 587, affirming 104 N. Y. Supp. 999, 120 App. Div. 459).

3448-3449. (f) Same—Certificates and affidavits

3449 (f). In *Great Eastern Casualty* Co. of New York v. Reed*, 87 S. E. 904, 17 Ga. App. 613, it was held that insured was not entitled to recover, where he failed to comply with a requirement of the health and accident policy that he furnish a report of the attending physician as to his disability.

3449-3451. (g) Examination of body

3450 (g). Where the company, on the day following insured's death, knew of it, but did not apply for an autopsy till the day after the burial, which was three days after the death, the delay in making the application was unreasonable (*Root v. London Guarantee & Accident Co.*, 72 N. E. 1150, 180 N. Y. 527, affirming 86 N. Y. Supp. 1055, 92 App. Div. 578, 15 N. Y. Ann. Cas. 100).

Similarly a demand made for an autopsy, less than three hours before the time set for the funeral is not made at a reasonable time (*Johnson v. Bankers' Mut. Casualty Ins. Co.*, 151 N. W. 413, 129 Minn. 18, L. R. A. 1915D, 1199, Ann. Cas. 1916A, 154).

So failure to delay interment indefinitely upon request of insurance company does not avoid policy for breach of provision entitling company to hold autopsy (*Massachusetts Bonding & Insurance Co. v. Duncan*, 179 S. W. 472, 166 Ky. 515).

Similarly where the policy gave the insurer the right to an autopsy, but it was not demanded at the time of death, the insurer could not six weeks after interment insist on such right (*American Nat. Ins. Co. v. Nuckols* [Tex. Civ. App.] 187 S. W. 497).

A clause in a policy of insurance providing that there can be no recovery on it if the right to "examine" the person or body of the insured is refused the company will not preclude a recovery if a demand by the company for an autopsy or the dissection or exhumation of the body is refused (*Patterson v. Ocean Accident & Guarantee Corp.*, 25 App. D. C. 46).

Where examination of the body is refused, this will not prevent recovery on the policy, the refusal being by one not a relative of deceased, and who was not till thereafter appointed as his administrator (*Root v. London Guarantee & Accident Co.*, 72 N. E. 1150, 180 N. Y. 527, affirming 86 N. Y. Supp. 1055, 92 App. Div. 578, 15 N. Y. Ann. Cas. 100).

Where the policy provided that insurer might perform an autopsy on the body, the fact that one was performed before notice to the company, and that part of the spinal cord was lost, has been held not a defense to an action on the policy (*Crotty v. Continental Casualty Co.*, 146 S. W. 833, 163 Mo. App. 628).

In *Painter v. United States Fidelity & Guaranty Co.*, 91 Atl. 158, 123 Md. 301, however, complainant, who had insured deceased against death from accidental means, was held not to have lost its right to an examination of the vital organs of deceased, where the vitals were removed from the body to determine the cause of death, the heirs and next of kin of the insured could not deprive the insurer of the right to an examination of the vitals which was granted by the contract.

In *Eminent Household of Columbian Woodmen v. Hewitt*, 184 S. W. 52, 122 Ark. 480, it was held that under accident certificate, insured was required to submit to examination by insurer's physician and to furnish X-ray photograph with proof of loss, but was not concluded by fact that photograph did not show the fracture claimed.

3451-3453. (h) Matters peculiar to mutual benefit associations

3452 (h). There is no statutory requirement of proofs of loss as a condition precedent to the maintenance of an action for benefit or indemnity against a mutual benefit association (*Brinsmaid v. Iowa State Traveling Men's Ass'n*, 132 N. W. 34, 152 Iowa, 134, 42 L. R. A. [N. S.] 1161, Ann. Cas. 1913B, 1282); but the beneficiary is bound by the constitution and by-laws of the association providing for the manner of presenting claims for death benefits, which are made a part of the contract, as he is presumed to know all of such provisions (*Supreme Court I. O. F. v. Herlinger*, 27 Ohio Cir. Ct. R. 151).

So certificate providing that proof of death shall be made within 60 days after knowledge thereof does not require formal notice of disappearance, duty of giving notice in such case resting upon offi-

cers of local lodge under by-laws (*White v. Brotherhood of Locomotive Firemen*, 162 N. W. 441, 165 Wis. 418).

However, a mutual benefit certificate, stipulating that no action may be maintained thereon until proofs of death and of claimant's rights to benefits have been filed and passed on by the officers of the association, does not impose the duty to recite in the proofs of death the cause of death (*Queatham v. Modern Woodmen of America*, 127 S. W. 651, 148 Mo. App. 33); and a provision requiring notice of any injury, sickness, or death for which claim is made under the policy to be given in writing within 10 days, was complied with in the case of a claim for death by the inclusion of the required information in the notice and proofs of death, though no separate notice of the sickness preceding the death was given (*Shuler v. American Benev. Ass'n*, 111 S. W. 618, 132 Mo. App. 123).

Where a mutual benefit association divided its members into divisions, each policy holder being payable out of the division in which he held his policy, and insured had policies in two divisions, proof of his death in one of the divisions was sufficient (*Mutual Life Industrial Ass'n of Georgia v. Scott*, 54 South. 182, 170 Ala. 420).

3453-3456. (i) Questions of practice

3453 (i). Where the furnishing of notice and proofs of the death or injury is made a condition precedent to recovery under the policy, the complaint must contain allegations showing a compliance with such requirements.

Illinois Life Ins. Co. v. Connell, 70 S. E. 107, 8 Ga. App. 683; *Ætna Life Ins. Co. v. Bethel*, 131 S. W. 523, 140 Ky. 609; *Penn Mut. Life Ins. Co. v. Keeton*, 49 South. 736, 95 Miss. 708.

In *Supreme Tent, Knights of the Maccabees of the World v. Ethridge*, 87 N. E. 1049, 43 Ind. App. 475, it was held that a complaint on a fraternal benefit certificate, which alleges that the society issued the certificate which recited that the member had been regularly admitted as a member, and that, in accordance with the provisions of the laws of the society, he was entitled to the benefits of membership, and which makes the certificate a part of the complaint, shows that the member became a member of the society. A complaint on a fraternal benefit certificate, which alleges that the member "complied with" the conditions of the certificate, alleges performance of the contract, within *Burns' Ann. St. 1908*, § 376,

providing that it shall be sufficient to allege generally that the party performed the conditions on his part.

3454 (i). Where the petition in an action on an accident policy alleges a substantial compliance therewith in furnishing proof of loss or death, or alleges facts amounting to a waiver of such proof, the company cannot rely upon the failure to furnish such proof, unless the answer makes it an issue by alleging plaintiff's failure to do so (*Ætna Life Ins. Co. v. Bethel*, 131 S. W. 523, 140 Ky. 609).

A similar position is taken under the Texas statute in *Floyd v. Illinois Bankers' Life Ass'n of Monmouth, Ill.* (Tex. Civ. App.) 192 S. W. 607.

The statute of limitations and failure to submit proofs of death within 90 days, as required by Rev. St. Mo. 1879, § 5985, are special defenses, a matter of privilege to the defendant insurance company, but do not extinguish the cause of action, operating merely to bar the remedy (*Shearlock v. Mutual Life Ins. Co. of New York*, 182 S. W. 89, 193 Mo. App. 430).

3455 (i). The burden is on insured to excuse his failure to give notice of sickness within the time required by the policy (*North American Accident Ins. Co. v. Watson*, 64 S. E. 693, 6 Ga. App. 193); but the burden is on the association to prove that insured exposed himself to unnecessary danger (*Noyes v. Commercial Travelers' Eastern Acc. Ass'n*, 76 N. E. 665, 190 Mass. 171).

In an action under an accident policy resulting in disability for a claimed period, preliminary proofs stating a first claim for a lost eye, instead of injury to the eye, were properly admitted (*Cochburn v. Hawkeye Commercial Men's Ass'n*, 143 N. W. 1006, 163 Iowa, 28).

Where an accident policy required affirmative written proof of insured's death to be furnished "on and in conformity with blanks furnished by the company," it was not error to admit written proof of death, though not on forms supplied by the company, where it appeared that the forms supplied contained affirmative statements which plaintiff could not make, and which, if made, would have been mere conclusions from the facts actually stated, and the written proof offered was, in substance, a compliance with the requirement, and the forms furnished did not contain sufficient space to allow the written answers to questions propounded (*Metropolitan Casualty Ins. Co. v. McAuley*, 67 S. E. 393, 134 Ga. 165).

3456 (i). In a suit on life policies, it is the duty of the court to

determine in the first instance whether the preliminary proofs of death are satisfactory.

Continental Life Ins. Co. v. Searing, 240 Fed. 653, 153 C. C. A. 451; Security Bank of Richmond v. Equitable Life Assur. Society of United States, 71 S. E. 647, 112 Va. 462, 35 L. R. A. (N. S.) 159, Ann. Cas. 1913B, 836; Da Rin v. Casualty Co. of America, 108 Pac. 649, 41 Mont. 175, 27 L. R. A. (N. S.) 1164, 137 Am. St. Rep. 709.

The provisions of a benefit certificate, requiring "affirmative proof" of death as the proximate result of external, violent, and accidental means, meant such evidence of the truth of the matters asserted as tended to establish them, regardless of its character, so as to show prima facie that death occurred, and that it resulted from the cause stated (Jenkins v. Hawkeye Commercial Men's Ass'n, 124 N. W. 199, 147 Iowa, 113, 30 L. R. A. [N. S.] 1181).

Where, in an action on an accident policy, the insurer's agent stated that he could not say whether proofs of death were handed in at the office of the agent or sent directly to the company without examining his record, such evidence did not show that the proofs were sent either to the office of the agent or to the office of the insurer (Fisher v. Travelers' Ins. Co., 124 Tenn. 450, 138 S. W. 316, Ann. Cas. 1912D, 1246).

Under a policy providing that proofs of death should be evidence of the facts therein stated in behalf of, but not against, insurer it has been held that a statement in such proofs, made and sworn to by insured's attending physician, that insured died of cystic disease of the kidneys, which was found to be of long standing, was a mere statement of opinion founded on the history of the case, and, though evidence in behalf of insurer, was not binding on plaintiff in an action on the policy (Barker v. Metropolitan Life Ins. Co., 84 N. E. 490, 198 Mass. 375).

The sufficiency of evidence was also considered in National Life Ass'n v. Parsons (Tex. Civ. App.) 170 S. W. 1038; Hummer v. Midland Casualty Co., 148 N. W. 413, 181 Mich. 386; Blunt v. National Fidelity & Casualty Co., 141 N. W. 1033, 93 Neb. 685; Reed v. Loyal Protective Ass'n, 117 N. W. 600, 154 Mich. 161; Gilles v. United States Casualty Co. (Sup.) 114 N. Y. Supp. 54; Lamontagne v. Standard Life & Accident Ins. Co., 115 N. E. 244, 226 Mass. 161.

The sufficiency of evidence to go to the jury was considered in Monjeau v. Metropolitan Life Ins. Co., 94 N. E. 302, 208 Mass. 1; Hildebrand v. United Artisans, 91 Pac. 542, 50 Or. 159.

9. TIME WITHIN WHICH NOTICE AND PROOFS OF DEATH OR INJURY MUST BE FURNISHED**3456-3458. (a) Necessity of furnishing notice and proofs within time stipulated**

3456 (a). Where the policy provides that giving of notice within a certain time shall be a condition precedent to recovery, a compliance therewith is essential prerequisite to recovery.

Hatch v. United States Casualty Co., 83 N. E. 398, 197 Mass. 101, 14 L. R. A. (N. S.) 508, 125 Am. St. Rep. 332, 14 Ann. Cas. 290; *McCord v. Masonic Casualty Co.*, 88 N. E. 6, 201 Mass. 473; *Blunt v. National Fidelity & Casualty Co.*, 141 N. W. 1033, 93 Neb. 685; *Blackman v. United States Casualty Co.*, 103 S. W. 784, 117 Tenn. 578.

Noncompliance, however, with a provision of an insurance policy requiring the beneficiary to furnish proofs within one year after the death of insured, to which no penalty is subjoined for nonobservance, does not forfeit the policy, but merely requires the furnishing of proofs during the time within which an action may be maintained on the policy, as a condition precedent to the right of action (*Stinchcombe v. New York Life Ins. Co.*, 80 Pac. 213, 46 Or. 316).

Such provisions in the by-laws with reference to notice have been held to contemplate a distinction between injuries to the member and claims made by the beneficiary in case of the death of the member; such beneficiary therefore not being required to give notice of claim for death until the period stipulated after the insured's death.

United Commercial Travelers of America v. Sain, 186 Fed. 271, 108 C. C. A. 317; *Crotty v. Continental Casualty Co.*, 146 S. W. 833, 163 Mo. App. 628; *Continental Casualty Co. v. Colvin*, 95 Pac. 565, 77 Kan. 561.

In a clause in an accident policy, which required notice of injury to be given as soon as might be reasonably possible, a notice given by a physician, of loss of sight due to infection from an operation, five months after the injury was received, but as soon as he learned that his sight was destroyed, was sufficient (*Maryland Casualty Co. of Baltimore v. Ohle*, 87 Atl. 763, 120 Md. 371).

Where it is a condition precedent to recovery that proofs of death be presented to insurer within a named time, mailing such proofs to insurer, is not a presentment (*Martin v. Illinois Commercial Men's Ass'n*, 195 Ill. App. 421).

So evidence that proofs of loss were placed in a sealed envelope, directed to the insurance company at its home office, and that the envelope was thereafter placed in the hands of the local agent of the company, with no proof that it was ever deposited in the mail, is not sufficient to meet the requirement of the policy that, within 20 days from the happening of the accident, proofs of loss must be filed with the company or furnished in due form at its home office (*Pacific Mut. Life Ins. Co. v. Barnes*, 35 Ohio Cir. Ct. R. 380).

In *Brix v. American Fidelity Co. of Montpelier, Vt.*, 171 Mo. App. 518, 153 S. W. 789, it was said that failure to give early notice, as required by an accident insurance policy, at the most merely authorized the insurer to declare a forfeiture for that cause.

Where the testimony shows that notice of death was given within 30 days, as provided by an accident insurance policy, and that good faith was shown by the beneficiary in making formal proofs of death as soon as the requirements were made known to him, a forfeiture for failure of a literal compliance therewith should not be declared (*Simmons v. Western Travelers' Acc. Ass'n*, 79 Neb. 20, 112 N. W. 365).

3457 (a). A clause in an accident policy limiting the time for the giving of notice and the furnishing of proof of an accident covered by the policy must be strictly construed against insurer.

Reynolds v. Maryland Casualty Co., 30 Pa. Super. Ct. 456; *Breeden v. Aetna Life Ins. Co.*, 122 N. W. 348, 23 S. D. 417.

3458 (a). Code Iowa 1897, § 1820, providing that no stipulation in an insurance policy issued by any company or association referred to in the chapter, limiting the time to a period of less than a year after knowledge by the beneficiary within which notice or proofs of loss or injury must be given, shall be valid, is applicable to an accident insurance company doing business within the state (*Kenny v. Bankers' Acc. Ins. Co. of Des Moines*, 113 N. W. 566, 136 Iowa, 140); and to a mutual assessment association (*Connell v. Iowa State Traveling Men's Ass'n*, 116 N. W. 820, 139 Iowa, 444).

Under Rev. St. Tex. 1911, art. 5714, provision of policy, insuring against sickness, requiring report from attending physician every 30 days is void (*First Texas State Ins. Co. v. Herndon* [Tex. Civ. App.] 184 S. W. 283); and so is a stipulation in a health insurance policy requiring notice within 90 days from the beginning of illness (*First Texas State Ins. Co. v. Hare* [Tex. Civ. App.] 180 S. W. 282).

3458-3461. (b) "Immediate" notice and "reasonable" time

3458 (b). Provision in insurance policy requiring "immediate notice" of loss means as soon as practicable after beneficiary obtains knowledge of loss.

Graves v. Order of United Commercial Travelers of America, 162 N. W. 425, 165 Wis. 427; Continental Casualty Co. v. Lindsay, 69 S. E. 344, 111 Va. 389; Curran v. National Life Ins. Co. of United States of America, 96 Atl. 1041, 251 Pa. 420; Cady v. Fidelity & Casualty Co. of New York, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260; Simpkins v. Hawkeye Commercial Men's Ass'n, 148 Iowa, 543, 126 N. W. 192; Ætna Life Ins. Co. v. Bethel, 131 S. W. 523, 140 Ky. 609; Maryland Casualty Co. v. Burns, 149 S. W. 867, 149 Ky. 550. And see Pacific Mut. Life Ins. Co. v. Adams, 27 Okl. 496, 112 Pac. 1026.

So where plaintiff's husband died in 1897, and she sued on the policy in 1915, the cause was barred, in the absence of waiver or estoppel of the company, since she had at most only a reasonable time after her husband's death in which to make proof of death (Shearlock v. Mutual Life Ins. Co. of New York, 182 S. W. 89, 193 Mo. App. 430).

In United States Fidelity & Guaranty Co. v. Pressler (Tex. Civ. App.) 185 S. W. 326, it was held that under Rev. Civ. St. art. 5714, notice by insured of accident 16 days after it occurred was sufficient to satisfy the requirement of the policy for immediate notice.

Under the same provision it has also been held that under its language making a stipulation fixing the time within which notice of a claim for damages shall be given at less than 90 days void, a provision of a casualty policy requiring notice of injury within 10 days was void.

Ætna Life Ins. Co. of Hartford, Conn., v. Griffin, 58 Tex. Civ. App. 198, 123 S. W. 432; Royal Casualty Co. v. Nelson (Tex. Civ. App.) 153 S. W. 674.

An ineffective attempt to comply with chapter 235, p. 313, Laws Wis. 1901, relating to memorandum in policy as to time for notice of injury, does not extend beyond the intent of the law as applying to the insured so as to relate to the beneficiary, unless the language of the notice is unmistakably to the contrary (Cady v. Fidelity & Casualty Co. of New York, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. [N. S.] 260).

3459 (b). Where the serious results of an accident do not make themselves apparent until sometime thereafter account may be tak-

en of such fact in determining whether the notice given was immediate (*Young v. Railway Mail Ass'n*, 103 S. W. 557, 126 Mo. App. 325).

3461 (b). Where a policy requires the furnishing of proof of death but fixes no time, proofs must be furnished within a reasonable time.

Behlmer v. Grand Lodge A. O. U. W. of Minnesota, 123 N. W. 1071, 109 Minn. 305, 26 L. R. A. (N. S.) 305; *Palmer v. Loyal Mystic Legion of America*, 126 N. W. 285, 86 Neb. 596; *Metropolitan Life Ins. Co. v. Frankel*, 103 N. E. 501, 58 Ind. App. 115, transfer to Supreme Court denied 104 N. E. 856; **Metropolitan Life Ins. Co. v. People's Trust Co.*, 98 N. E. 513, 177 Ind. 578, 41 L. R. A. (N. S.) 285.

Under such circumstances 30 days has been held a reasonable time (*Palmer v. Loyal Mystic Legion of America*, 126 N. W. 285, 86 Neb. 596); but delay of 90 days inexcusable (*Metropolitan Life Ins. Co. v. Frankel*, 103 N. E. 501, 58 Ind. App. 115, transfer to Supreme Court denied 104 N. E. 856). Yet where insured died in a place where he had no relatives, and his relatives and next of kin did not know of the existence of the policy, two years and two months has been held not an unreasonably long time to delay the filing of proofs of death; the proofs being furnished within a few days after the discovery of the policy and the appointment of an administrator (*Metropolitan Life Ins. Co. v. People's Trust Co.*, 98 N. E. 513, 177 Ind. 578, 41 L. R. A. [N. S.] 285).

3461-3462. (c) Same—Question for court and jury

3461 (c). Primarily the question whether the notice was given and proof furnished within a reasonable time is for the jury.

National Life Ins. Co. v. Bean, 84 S. E. 152, 15 Ga. App. 661; *Friereson v. United States Casualty Co.*, 84 S. E. 535, 100 S. C. 162; *Ætna Life Ins. Co. v. Bethel*, 131 S. W. 523, 140 Ky. 609; *Mellen v. United States Health & Accident Ins. Co.*, 75 Atl. 273, 83 Vt. 242; *Correll v. National Acc. Soc.*, 116 N. W. 1046, 139 Iowa, 36, 130 Am. St. Rep. 294; *Hughes v. Central Accident Ins. Co.*, 71 Atl. 923, 222 Pa. 462; *Tromblee v. North American Acc. Ins. Co.*, 158 N. Y. Supp. 1014, 173 App. Div. 174.

Yet if the delay is considerable and unexplained and the facts undisputed, it is a question of law (*Metropolitan Life Ins. Co. v. Frankel*, 103 N. E. 501, 58 Ind. App. 115, transfer to Supreme Court denied 104 N. E. 856).

So where a policy required insured to give notice as soon as possible after injury, and the insured's evidence showed that he could have given early notice, it was error to submit to the jury the question whether the notice was given within a reasonable time (*Hummer v. Midland Casualty Co.*, 148 N. W. 413, 181 Mich. 386).

3462-3465. (d) Specific time—Impossibility of performance

3462 (d). Where one is accidentally injured so as to render him unconscious and thereafter cloud his mind so that he cannot within the time limited intelligently give notice to the insurer of such accident, he will be excused from giving the notice while so disabled (*Tomson v. Iowa State Traveling Men's Ass'n*, 129 N. W. 529, 88 Neb. 399).

So it has been stated that stipulations in accident policies providing for giving notice of injury within specified time should not be construed to require notice before it is possible to do so (*Graves v. Order of United Commercial Travelers of America*, 162 N. W. 425, 165 Wis. 427).

Where insured's mental condition or physical suffering is such that he cannot give the insurer notice as required by the policy, he will be excused for not doing so while so disabled.

Guy v. United States Casualty Co., 66 S. E. 437, 151 N. C. 465; *Roseberry v. American Benev. Ass'n*, 142 Mo. App. 552, 121 S. W. 785; *North American Accident Ins. Co. v. Watson*, 64 S. E. 693, 6 Ga. App. 193; *Reed v. Loyal Protective Ass'n*, 117 N. W. 600, 154 Mich. 161; *Hilmer v. Western Travelers' Accident Ass'n*, 125 N. W. 535, 86 Neb. 285, 27 L. R. A. (N. S.) 319.

So where insured in an accident policy stipulating for written notice within 15 days from date of accident was so dangerously ill after the sixth day after the accident as to render him unable to give notice, failure to give notice did not defeat a recovery, though from the third to the sixth day after the accident he could have given notice (*Continental Casualty Co. v. Mathis*, 150 S. W. 507, 150 Ky. 477).

Similarly it has been held that where, because of circumstances, it is impossible to give the insurer notice of an accident within the time specified in the policy, notice within a reasonable time after removal of the obstacle is sufficient (*Shafer v. United States Casualty Co.*, 156 Pac. 861, 90 Wash. 687).

In some cases, however, it has been held that insured is not excused from performing the condition of the policy as to notice

even though his failure to do so is the result of accident, mistake, or misfortune.

Whiteside v. North American Accident Ins. Co. of Chicago, 93 N. E. 948, 200 N. Y. 320, 35 L. R. A. (N. S.) 696, reversing 104 N. Y. Supp. 1150, 119 App. Div. 915; *Northern Assur. Co. v. Standard Leather Co.*, 165 Fed. 602, 91 C. C. A. 440, reversing (C. C.) 156 Fed. 689; *Johnson v. Maryland Casualty Co.*, 60 Atl. 1009, 73 N. H. 259, 111 Am. St. Rep. 609.

In *James v. United States Casualty Co.*, 88 S. W. 125, 113 Mo. App. 622, however, it was stated that, where an accident policy provided that notice should be given the company within 10 days after the accident, a further provision that no claim should be valid unless the provisions and conditions of the contract were complied with did not work a forfeiture for failure to comply with the provision as to notice.

3464 (d). A policy provided that notice of any illness for which claim can be made must be given within 10 days from the beginning of illness. It was held that a notice given within 10 days of the second week of an illness at which time the physician started to attend the assured is sufficient to base a claim for the full amount, since in view of other provisions of the policy, the liability of the company did not start until the second week of the sickness (*Craig v. United States Health & Accident Ins. Co.*, 61 S. E. 423, 80 S. C. 151, 18 L. R. A. [N. S.] 106, 128 Am. St. Rep. 877, 15 Ann. Cas. 216).

A policy stipulated that no benefits should become due unless notice was received by insurer within 10 days from the commencement of total disability resulting from sickness. Insured became worse gradually until about the 20th of January, when he became totally disabled from doing any work. On the following day notice was sent to insurer. The notice stated that insured's disability began about January 1st, but showed that insured's illness was not sufficiently serious from its inception to entitle him to the benefits under the policy. It was held that the notice of insured's disability was served within the time required (*Jennings v. Brotherhood Acc. Co.*, 44 Colo. 68, 96 Pac. 982, 18 L. R. A. [N. S.] 109, 130 Am. St. Rep. 109).

In somewhat similar cases of disability or injury from accident, it has also been held that the notice was sufficient under the terms of the policies.

Fidelity & Casualty Co. of New York v. Hart, 142 Ky. 25, 133 S. W. 996; *Baumister v. Continental Casualty Co.*, 101 S. W. 152, 124

Mo. App. 38; *Pacific Mut. Life Ins. Co. v. Carter*, 123 S. W. 384, 92 Ark. 378; *Id.*, 124 S. W. 764, 92 Ark. 378; *Rocci v. Massachusetts Accident Co.*, 110 N. E. 972, 222 Mass. 336.

A requirement that proofs of loss must be furnished "as soon as possible" means that they must be presented within a reasonable time under the circumstances (*Great American Co-op. Fire Ass'n v. Jenkins*, 76 S. E. 159, 11 Ga. App. 784); and the phrases "after loss" and "after the fire" are synonymous (*Hogl v. Aachen & Munich Ins. Co.*, 65 W. Va. 437, 64 S. E. 441, 131 Am. St. Rep. 972).

The phrase "event causing injury," in an accident policy against loss caused by bodily injury, provided notice thereof is given within 10 days of the "event causing injury," and binding the insurer to pay a specified amount in case of loss of life occurring within 90 days of the "event causing injury," etc., means the accident causing the injury, and the notice must be given within 10 days of the accident (*Hatch v. United States Casualty Co.*, 197 Mass. 101, 83 N. E. 398, 14 L. R. A. [N. S.] 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290).

Provision in an accident policy that, in case of loss of time, affirmative proof be furnished within 30 days from termination of the period for which the insurer is liable, does not necessarily mean that the proof cannot be furnished before recovery of insured, as would appear proper if the indemnity be payable weekly (*Mossop v. Continental Casualty Co.*, 118 S. W. 680, 137 Mo. App. 399).

The provision of an accident policy that failure to give written notice of accident or illness within 10 days from the beginning thereof shall limit liability to one-tenth of amount otherwise payable did not constitute condition precedent to liability, but created simply a basis for diminution of recovery (*Provident Life & Accident Ins. Co. v. Elliott* [Ala.] 73 South. 476).

3465-3466. (e) Computation of time in accident insurance

3466 (e). Under an accident policy requiring notice to the insurer "within twenty days from the date of any accident upon which claim is based," where the death of the insured occurs more than 20 days after an accident, the provision as to notice has no application to the beneficiary (*Robison v. United States Health & Accident Ins. Co.*, 192 Ill. App. 475).

Compliance by the beneficiary, within the time specified, with a provision of an accident insurance policy requiring that proof of death be made within 30 days entitles the beneficiary to recover

without notice of death being given within 10 days (*Barnes v. General Accident, Fire & Life Assur. Corp.*, 153 Pac. 489, 96 Kan. 679).

Under accident insurance policy, beneficiary is only required to give notice of death, and not to anticipate that death would occur and give notice of accident (*Moore v. General Accident, Fire & Life Assur. Corp.*, 92 S. E. 362, 173 N. C. 532).

Where, however, insured injured his hand, and upon learning of serious nature of injury did not notify insurer within ten days provided, although time had not expired, he was bound by policy terms (*Graves v. Order of United Commercial Travelers of America*, 162 N. W. 425, 165 Wis. 427).

10. EFFECT OF NOTICE AND PROOFS OF DEATH OR INJURY

3466-3467. (a) Effect of proofs as against company—Admissions by company

3467 (a). It is proper, in an action upon an insurance policy, to receive upon behalf of the plaintiff proofs of death submitted to the insurance company, as these proofs are an essential element of the plaintiff's case unless waived by the defendant (*Modern Woodmen of America v. Graber*, 128 Ill. App. 585).

3467-3470. (b) Admissibility of proofs against plaintiff

3467 (b). In an action on a life insurance policy, proofs of death furnished by the beneficiary are admissible in evidence against her.

Haughton v. Aetna Life Ins. Co., 73 N. E. 592, 165 Ind. 32, transferred from Appellate Court, 72 N. E. 652; *Libre v. Brotherhood of American Yeomen*, 168 Ill. App. 328.

3468 (b). So especially where the policy stipulates that the contents of such proofs shall be evidence in behalf of, but not against, the company.

Fair v. Metropolitan Life Ins. Co., 63 S. E. 812, 5 Ga. App. 708; *Krapp v. Metropolitan Life Ins. Co.*, 106 N. W. 1107, 143 Mich. 369, 114 Am. St. Rep. 651.

Before a beneficiary is estopped by any statement in the proofs of death, however, it must be shown that she was identified with the proofs when they were taken (*Smith v. Royal Highlanders*, 148 N. W. 952, 96 Neb. 790).

3469 (b). The sending to insurer by the beneficiary's attorney with the proofs of death of the coroner's finding of suicide is not

an admission by the beneficiary, who knew nothing of the coroner's investigation or report of the fact of suicide (*De Garcia v. Cherokee Life Ins. Co. of Rome, Ga.* [Tex. Civ. App.] 180 S. W. 153).

3470 (b). In *Continental Casualty Co. v. Colvin*, 95 Pac. 565, 77 Kan. 561, it was held that proofs of loss could not be introduced in evidence, except for the purpose of showing that the requirements of the policy in that respect have been fulfilled.

So it has been held that plaintiff's preliminary proof was admissible only on the issue of the sufficiency of the proof submitted by plaintiff to defendant's directors to show a valid claim under the policy, and could not be considered on the issue as to the real cause of decedent's death (*Traiser v. Commercial Travelers' Eastern Accident Ass'n*, 88 N. E. 901, 202 Mass. 292).

Similarly, it has been held that where proofs of death are offered for the sole purpose of showing compliance with the condition precedent of the policy to the right to sue, and the defendant offers no evidence, the proofs cannot be used as proof of a breach of warranty apparent on the face of the papers.

Baldi v. Metropolitan Life Ins. Co., 30 Pa. Super. Ct. 213; *Rondinella v. Metropolitan Life Ins. Co.*, 30 Pa. Super. Ct. 223.

3470-3471. (c) Same—Physician's certificate and verdict of coroner's jury

3471 (c). While a copy of the verdict of the coroner's jury, if furnished by the beneficiary as a part of the proofs of death, is competent as an admission against interest, yet such copy furnished by the insurer's agent, without the knowledge of the beneficiary, could not be received as an admission against his interest (*Krogh v. Modern Brotherhood of America*, 141 N. W. 276, 153 Wis. 397, 45 L. R. A. [N. S.] 404).

Where, under the evidence in an action on a life insurance policy, the jury could have determined the question whether or not a self-inflicted wound caused the death of insured in favor of either party, a statement in the proofs of death by the attending physician that such wound was one of the causes of death, while an admission entitled to weight as evidence was not controlling (*Ferris v. Loyal Americans of the Republic*, 116 N. W. 445, 152 Mich. 314).

Where the statements of the medical examiner were in conflict with those of the physician who furnished the proofs of death, the question is for the jury (*Buchholz v. Metropolitan Life Ins. Co.*, 160 S. W. 573, 177 Mo. App. 683).

In *Minnesota Mut. Life Ins. Co. v. Link*, 131 Ill. App. 89, judgment affirmed *Same v. Welsh*, 82 N. E. 637, 230 Ill. 273, it was said that an instruction, in an action on a policy of life insurance, which pertained to the proofs of death, was not erroneous, which told the jury that they must not take the physician's statements made in such proofs of death "as evidence tending to prove facts injurious to the case of the plaintiff in this action."

3471-3473. (d) Conclusiveness of proofs

3472 (d). Proofs of death by beneficiary in a life policy are, when not contradicted or explained, conclusive on him.

Leonard v. John Hancock Mut. Life Ins. Co., 135 N. Y. Supp. 564, 76 Misc. Rep. 529; *Furey v. Metropolitan Life Ins. Co.*, 49 Pa. Super. Ct. 592; *Healy v. Metropolitan Life Ins. Co.*, 37 App. D. C. 240; *Stephens v. Metropolitan Life Ins. Co.*, 176 S. W. 253, 190 Mo. App. 673.

But statements in the proof of loss as to the cause of the death of an insured, may be contradicted by plaintiff in an action on the policy of insurance, unless the elements of estoppel are present.

Hart v. Knights of Maccabees of the World, 119 N. W. 679, 83 Neb. 423; *Frazier v. Metropolitan Life Ins. Co.*, 141 S. W. 936, 161 Mo. App. 709; *Lowenstein v. Old Colony Life Ins. Co.*, 166 S. W. 889, 179 Mo. App. 364; *Continental Casualty Co. v. Jennings*, 99 S. W. 423, 45 Tex. Civ. App. 14; *Prudential Ins. Co. of America v. Hummer*, 84 Pac. 61, 36 Colo. 208; *Lockway v. Modern Woodmen of America*, 141 N. W. 1, 121 Minn. 170; *Metropolitan Life Ins. Co. v. Thomas*, 106 S. W. 1175, 32 Ky. Law Rep. 770.

In *Clarkston v. Metropolitan Life Ins. Co.*, 176 S. W. 437, 190 Mo. App. 624, it was held that, where recitals in proof of death are explained, the question of the conclusiveness of the recitals is for the jury, under Rev. St. 1909, § 6937. See *Remfry v. Mutual Life Ins. Co. of New York* (Mo. App.) 196 S. W. 775; *International Travelers' Ass'n v. Powell* (Tex. Civ. App.) 196 S. W. 957; *Michalek v. Modern Brotherhood of America* (Iowa) 161 N. W. 125; *Vail v. North American Union*, 191 Ill. App. 297.

3473-3474. (e) Necessity of notice of error

3473 (e). Notice of defect in proof of death is not necessary if repeated notices have been given by the insurance company that no proof of death has been filed with it (*Menear v. Ætna Life Ins. Co. of Hartford, Conn.*, 31 Ohio Cir. Ct. R. 483).

3474-3476. (f) Statements not required by the policy

3475 (f). Where the by-laws of a fraternal benefit association required satisfactory proof of death, and the attending physician made statements beyond those necessary to establish death, and gave information obtained in a professional way as to the state of deceased's health several months prior to his death, such statements and information are not admissions of the beneficiary made in connection with his proof of death (*Triple Tie Benefit Ass'n v. Wheatley*, 91 Pac. 59, 76 Kan. 251).

An undertaker's affidavit contained in the proofs of death furnished by the beneficiary was immaterial (*Wheelock v. Home Life Ins. Co.*, 131 N. W. 1081, 115 Minn. 177).

Under the guise of requiring proofs of death, an insurance company may not compel a claimant to procure and introduce in evidence, in an action on one of its policies, proofs of health (*Healy v. Metropolitan Life Ins. Co.*, 37 App. D. C. 240).

3476-3477. (g) Burden of proof and weight of evidence

3476 (g). The weight as evidence of statements in proofs of death was considered in the following cases:

Waterstrow v. National Americans, 183 Ill. App. 82; *Security Bank of Richmond v. Equitable Life Assur. Society of United States*, 71 S. E. 647, 112 Va. 462, 35 L. R. A. (N. S.) 159, Ann. Cas. 1913B, 836; *McClure v. Great Western Acc. Ass'n*, 118 N. W. 269, 141 Iowa, 350; *Hill v. Aetna Life Ins. Co.*, 63 S. E. 124, 150 N. C. 1; *Mellen v. United States Health & Accident Ins. Co.*, 75 Atl. 273, 83 Vt. 242.

11. WAIVER OF NOTICE AND PROOF OF LOSS, DEATH, OR INJURY—GENERAL RULES

3477-3478. (a) What may be waived

3477 (a). Provisions of a policy requiring notice and proof of loss, being for the benefit of the insurer, may be waived by it.

Aetna Ins. Co. of Hartford, Conn., v. Jones (Ind. App.) 115 N. E. 697; *Mun v. New York Life Ins. Co.* (Mo. App.) 181 S. W. 606; *Shearlock v. Mutual Life Ins. Co. of New York*, 182 S. W. 89, 193 Mo. App. 430; *American Nat. Ins. Co. v. Euce*, 2 Ohio App. 299, 35 Ohio Cir. Ct. R. 169; *Lee v. Casualty Co. of America*, 96 Atl. 952, 90 Conn. 202; *Massock v. Royal Ins. Co.*, 196 Ill. App. 394; *Liebing v. Mutual Life Ins. Co. of New York*, 191 S. W. 250, 269 Mo. 509; *Ramat v. California Ins. Co. of San Francisco*, 164 Pac. 219, 95 Wash. 571; *Flynn v. Orient Ins. Co.*, 92 Atl. 737, 77 N. H. 431; *Levi v. Palatine Ins. Co.*, 78 Atl. 617, 75 N. H. 551; *Chandler v.*

John Hancock Mut. Life Ins. Co., 167 S. W. 1162, 180 Mo. App. 394; McLeod v. John Hancock Mut. Life Ins. Co., 176 S. W. 234, 190 Mo. App. 653; Brix v. American Fidelity Co. of Montpelier, Vt., 153 S. W. 789, 171 Mo. App. 518; Western Underwriters' Ass'n v. Hankins, 77 N. E. 447, 221 Ill. 304, affirming judgment 122 Ill. App. 600; Breeden v. Aetna Life Ins. Co., 122 N. W. 348, 23 S. D. 417; American Ins. Co. v. Haynie, 120 S. W. 825, 91 Ark. 43.

3478-3480. (b) Nature of waiver—Waiver by estoppel

3478 (b). Where a waiver of conditions is relied on by the insured, he must show that the company, with knowledge of the facts, dispensed with observance of the conditions (Union Mut. Ins. Co. v. Huntsberry [Okl.] 156 Pac. 327).

3479 (b). In the following cases a waiver is said on the facts presented to arise from an estoppel:

Loewenstein v. Queen Ins. Co., 127 S. W. 72, 227 Mo. 100; Tomuschat v. North British & Mercantile Ins. Co., 92 Atl. 329, 77 N. H. 388, Ann. Cas. 1915D, 1155; Griffith v. Anchor Fire Ins. Co., 120 N. W. 90, 143 Iowa, 88; Castell v. Woodcock (Sup.) 121 N. Y. Supp. 585; Bakhaus v. Caledonian Ins. Co., 77 Atl. 310, 112 Md. 676; Citizens' Mut. Fire Ins. Co. of Cecil County v. Conowingo Bridge Co., 82 Atl. 372, 116 Md. 422.

In Aronson v. Frankfort Accident & Plate Glass Ins. Co., 99 Pac. 537, 9 Cal. App. 473, it is stated that to hold that insurer waived the written notice required by the policy, insurer must have done something inconsistent with its intention to claim notice, which operated to mislead insured and justified him in omitting to give notice; and in Chandler v. John Hancock Mut. Life Ins. Co., 167 S. W. 1162, 180 Mo. App. 394, it is said that where the act relied on to constitute a waiver by insurer of the right to receive notice and proof of death of insured within 90 days occurs after the 90 days, the act must possess some elements of estoppel.

3480-3482. (c) Same—Waiver by election or intention

3481 (c). That insurer and insured made a nonwaiver agreement did not preclude the insurer from orally waiving proof of loss.

Hatcher v. Sovereign Fire Assur. Co. of Canada, 127 Pac. 588, 71 Wash. 79; Arkansas Mut. Fire Ins. Co. v. Witham, 101 S. W. 721, 82 Ark. 226.

Parol evidence of a waiver of proof of loss is admissible, though the policy provides that all waivers must be in writing.

Reed v. Continental Ins. Co., 6 Pennewill (Del.) 204, 65 Atl. 569; Williams v. American Ins. Co., 196 Ill. App. 370; St. Landry Whole-

sale Mercantile Co. v. Teutonia Ins. Co. of New Orleans, 37 South. 967, 113 La. 1053, 1054; Same v. Springfield Fire & Marine Ins. Co., 37 South. 988, 114 La. 1; Citizens' Trust & Guaranty Co. of West Virginia v. Globe & Rutgers Fire Ins. Co., 229 Fed. 326, 143 C. C. A. 446, Ann. Cas. 1917C, 416.

While the terms "waiver" and "estoppel," as applied to the law of insurance contracts, are usually considered as synonymous, yet there are some essential differences between them, as a waiver involves the act or conduct of one of the parties to the contract only, and is the intentional relinquishment of a known right, and does not necessarily imply that one has been misled to his prejudice, while an estoppel involves the act or conduct of both parties, and may arise where there is no intent to mislead, and also involves the misleading of one party to his prejudice (Webster v. State Mut. Fire Ins. Co., 69 Atl. 319, 81 Vt. 75).

3482-3483. (d) Time of waiver

3483 (d). A waiver of a provision of a fire policy requiring proof of loss to be furnished within 60 days after loss is effectual, though the conduct constituting such waiver occurs after the 60 days provided in the policy (Hatcher v. Sovereign Fire Assur. Co. of Canada, 127 Pac. 588, 71 Wash. 79).

3483-3485. (e) Effect of waiver

3485 (e). Insurer, admitting in its answer that it waived any further proof of injury, waived additional proofs of injury no matter how inadequate the proofs given were (McClure v. Great Western Acc. Ass'n, 118 N. W. 269, 141 Iowa, 350).

Where insurance company waived its right to have proofs of loss filed, plaintiff was not limited in his recovery to the period of disability shown by the proof he did file (Mellen v. United States Health & Accident Ins. Co., 75 Atl. 273, 83 Vt. 242); nor could the insurer thereafter recall the waiver and declare forfeiture (Brix v. American Fidelity Co. of Montpelier, Vt., 153 S. W. 789, 171 Mo. App. 518).

If there is a waiver by which the assured is relieved of the obligation to file proofs of loss, such waiver is complete and operates upon every provision of the policy affected by the primary one on that subject (Hess v. Hartford Fire Ins. Co., 38 Pa. Super. Ct. 158).

(1459)

12. POWERS OF OFFICERS AND AGENTS TO WAIVE NOTICE AND PROOFS OF LOSS, DEATH, OR INJURY

3486-3488. (a) In general

3487 (a). Where insured relies on the act of an agent as waiver, he must show, either that the agent had express authority to make the waiver, or that the insurer, with knowledge of the facts, ratified the agent's act.

Aachen & Munich Fire Ins. Co. v. Arabian Toilet Goods Co., 64 South. 635, 10 Ala. App. 395; *Rockwell v. Hamburg-Bremen Fire Ins. Co.*, 98 N. E. 1086, 212 Mass. 318; *Union Mut. Ins. Co. v. Huntsberry* (Okl.) 156 Pac. 327.

Where agents of company had apparent authority to receive proofs of loss, any limitation thereof not known to an insurer who had sustained the loss did not affect him (*Walker v. Lancashire Ins. Co.*, 75 N. E. 66, 188 Mass. 560).

3488 (a). An agent of insurer may be the agent of insured in giving notice and furnishing proofs of loss to insurer, and the agent of insurer in giving insured the information furnished by insurer, and insurer, having knowledge of the facts and assenting thereto, cannot complain on the ground that the agent acted for both (*Griffith v. Anchor Fire Ins. Co.*, 120 N. W. 90, 143 Iowa, 88).

3488-3490. (b) Powers of officers

3490 (b). The general superintendent of an insurance company in a city may bind the company by conversations with the holder of a life policy with respect to the sufficiency of proofs of death (*Monjeau v. Metropolitan Life Ins. Co.*, 94 N. E. 302, 208 Mass. 1).

3490-3493. (c) Powers of adjusters

3490 (c). An agent of a company having the duty of adjusting its losses can waive the giving of notice and proofs of loss.

Teasdale v. City of New York Ins. Co., 145 N. W. 284, 163 Iowa, 596, Ann. Cas. 1916A, 591; *Gleason v. Canterbury Mut. Fire Ins. Co.*, 64 Atl. 187, 73 N. H. 583; *Fidelity-Phenix Fire Ins. Co. v. Friedman*, 174 S. W. 215, 117 Ark. 71; *Ft. Scott Building & Loan Ass'n v. Palatine Ins. Co., Limited*, of London, 86 Pac. 142, 74 Kan. 272; *St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co.*, 99 Pac. 647, 23 Okl. 79; *Burgess v. Mercantile Town Mut. Ins. Co.*, 89 S. W. 568, 114 Mo. App. 169; *Johnson v. Lumber Ins. Co. of New York*, 118 S. W. 112, 137 Mo. App. 380; *Providence Washington Ins. Co. v. Wolf*, 80 N. E. 26, 168 Ind. 690, 120 Am. St. Rep. 395; *Farrell v. Farmers' & Merchants' Ins. Co.*, 120 N. W. 929, 84

Neb. 72; *Burbank v. Pioneer Mut. Ins. Ass'n*, 110 Pac. 1005, 60 Wash. 253, Ann. Cas. 1912B, 762; *Queen of Arkansas Ins. Co. v. Forlines*, 126 S. W. 719, 94 Ark. 227; *Milwaukee Mechanics' Ins. Co. v. Fuquay*, 179 S. W. 497, 120 Ark. 330; *American Nat. Ins. Co. v. Nuckols* (Tex. Civ. App.) 187 S. W. 497; *Reed v. Continental Ins. Co.*, 65 Atl. 569, 6 Pennewill (Del.) 204.

3491 (c). An adjuster may waive proofs of loss either directly, or by denial of liability, or refusal to pay on other grounds.

St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co. of New Orleans, 37 South. 967, 113 La. 1053, 1054; *Same v. Springfield Fire & Marine Ins. Co.*, 37 South. 988, 114 La. 1; *Popa v. Northern Ins. Co. of New York*, 158 N. W. 945, 192 Mich. 237; *Fisk v. Fire Ass'n of Philadelphia*, 158 N. W. 947, 192 Mich. 243.

3492 (c). After an adjustment of the loss under a fire policy, the fact that insurer had no knowledge of facts which, if known, might have been effectual to defeat the claim under the policy, is of no avail, if the insurer might have known them upon inquiry, and was not fraudulently prevented from learning them by the insured (*German Ins. Co. of Freeport, Ill. v. Gibbs, Wilson & Co.*, 92 S. W. 1068, 42 Tex. Civ. App. 407, rehearing denied 96 S. W. 760, 42 Tex. Civ. App. 407).

3493-3494. (d) Powers of general agents

3494 (d). Where the constitution and by-laws of a mutual benefit association provided that the division secretary should forthwith notify the secretary when a member died, and that the secretary should forward to the division secretary blanks to make up proofs of death the division secretary was the agent of the association for the purpose of securing blanks and making and submitting proofs of death, and his failure to perform such duty would not relieve the association from payment of the claim, if the member died while the policy was in force (*Kelly v. Ancient Order of Hibernians Life Ins. Fund of Minnesota*, 113 Minn. 355, 129 N. W. 846).

In *Massock v. Royal Ins. Co.*, 196 Ill. App. 394, it was held that an agent may waive a condition in a policy requiring proofs of loss, where he has authority to solicit insurance and negotiate contracts therefor within a named territory, though his authority may be local as to such territory.

3494-3499. (e) Powers of local agents

3495 (e). In Kentucky it has been held that the agent who takes the application, and is the only person with whom the parties deal.

(1461)

has authority to waive verification of the proofs (*Fidelity & Casualty Co. of New York v. Cooper*, 126 S. W. 111, 137 Ky. 544).

In Arkansas it has been held that a local insurance agent, with authority to receive applications for insurance, issue policies, receive premiums, and adjust losses, may waive the condition in a policy as to proof of loss (*Citizens' Fire Ins. Co. v. Lord*, 100 Ark. 212, 139 S. W. 1114); that a local agent, authorized to solicit fire insurance, write and deliver policies, collect premiums, and notify the company of losses, has prima facie authority to waive presentation of proofs of loss (*Liverpool & London & Globe Ins. Co. v. Payton*, 128 Ark. 528, 194 S. W. 503); and that where an agent, authorized to solicit and write fire insurance and required to report losses, represented to insured that the person whom he introduced was an adjuster, the insurer is bound by the purported adjuster's waiver of proofs of loss other than an itemized list of property destroyed (*Concordia Fire Ins. Co. v. Mitchell*, 183 S. W. 770, 122 Ark. 357).

3496 (e). In several states, however, it has been held that a local insurance agent, from the fact that he was authorized to solicit insurance, and had received and delivered the policy to insured, was not authorized to waive proofs of loss.

Ferdenando v. Milwaukee Mechanics' Ins. Co., 81 Wash. 244, 142 Pac. 693; *Perry v. Caledonian Ins. Co.*, 93 N. Y. Supp. 50, 103 App. Div. 113; *Love v. Modern Woodmen of America*, 102 N. E. 183, 259 Ill. 102, reversing judgment 177 Ill. App. 76; *Hottner v. Aachen & Munich Fire Ins. Co. of Aix-la-Chapelle*, 31 Pa. Super. Ct. 461; *Kness v. Anchor Fire Ins. Co.*, 31 Pa. Super. Ct. 521.

In Georgia, too, insured has been held not entitled to rely on the assurance of the insurer's agent that he need not comply with a condition of the policy requiring report of his attending physician as to his disability (*Great Eastern Casualty Co. of New York v. Reed*, 17 Ga. App. 613, 87 S. E. 904).

3497 (e). In Florida it is held that a local agent of a fire insurance company, with authority to issue policies for the company and collect premiums therefor, has authority to waive required proofs of loss, by repudiating on behalf of the company, after a loss, all liability on the policy, either in writing, by parol, or by matter in pais (*Ætna Ins. Co. v. Holmes*, 59 Fla. 116, 52 South. 801).

3498 (e). Where the by-laws of a mutual benefit society provided that on a member's death the officers of the local society to which he belonged should furnish full proof of death on printed

blanks prepared for that purpose and give their opinion of the validity of the beneficiary's claim, such local officers must be considered the agents of the general society (*Hildebrand v. United Artisans*, 50 Or. 159, 91 Pac. 542); and where the local order of a fraternal benefit society was as well informed of the facts concerning the death of a member as the beneficiary, and knew the member was dead, the failure of the order to give the society, as required by a by-law, notice of the death of the member did not deprive the beneficiary of her right to payment under the certificate (*Supreme Tent, Knights of the Maccabees of the World v. Ethridge*, 43 Ind. App. 475, 87 N. E. 1049).

3501-3504. (h) Provisions of policy limiting powers of agents and methods of waiver

3502 (h). A clause in a policy of fire insurance providing that in any matter relating to the insurance no person, unless duly authorized in writing, shall be deemed the agent of the insurer, is for the benefit of, and subject to waiver by, the insurer.

Reed v. Continental Ins. Co., 6 Pennewill (Del.) 204, 65 Atl. 569; *Frost v. North British & Mercantile Ins. Co. of London & Edinburgh*, 60 Atl. 803, 77 Vt. 407.

3503 (h). Provisions of an insurance policy, requiring waiver to be in writing, have no reference to proofs of loss and stipulations to be performed after loss.

McCullough v. Home Ins. Co. of New York, 102 Pac. 814, 155 Cal. 659, 18 Ann. Cas. 862; *Morgenstern v. Insurance Co. of North America*, 89 Neb. 459, 131 N. W. 969; *Frost v. North British Mercantile Ins. Co. of London & Edinburgh*, 60 Atl. 803, 77 Vt. 407; *Breeden v. Aetna Life Ins. Co.*, 23 S. D. 417, 122 N. W. 348 (general managing agent); *Farley v. Western Assur. Co.*, 62 Or. 41, 124 Pac. 199; *Frost v. North British Mercantile Ins. Co.*, 60 Atl. 803, 77 Vt. 407; *Ohio Farmers' Ins. Co. v. Glaze*, 55 Ind. App. 147, 101 N. E. 734; *Lusk v. American Cent. Ins. Co. (W. Va.)* 91 S. E. 1073; *Massock v. Royal Ins. Co.*, 196 Ill. App. 394; *Bernhard v. Rochester German Ins. Co.*, 65 Atl. 134, 79 Conn. 388, 8 Ann. Cas. 298; *Emory v. Glens Falls Ins. Co.*, 7 Pennewill (Del.) 101, 76 Atl. 230.

3504 (h). A nonwaiver clause in a fire policy, the purpose of which is to enable the company's agent to negotiate in regard to the loss without any waiver by the company of its right to contest its liability, does not apply after an adjustment of the loss has been made (*German Ins. Co. of Freeport, Ill. v. Gibbs, Wilson &*

Co., 92 S. W. 1068, 42 Tex. Civ. App. 407, rehearing denied 96 S. W. 760, 42 Tex. Civ. App. 407); and submitting the question of the amount of the loss to arbitration waives the requirements of the policy regarding proofs of loss, although the policy stipulates that no provision shall be waived except by written indorsement (*Funk v. Fire Ass'n of Philadelphia*, 157 Ill. App. 602).

In a federal case it has been held that, where a policy provided that no representative of the company should waive any of its conditions except in writing, the failure to make such proof of loss is not excused by a claimed waiver, not in writing, by an agent not shown to have any express authority to make it (*Scottish Union & Nat. Ins. Co. v. Encampment Smelting Co.*, 166 Fed. 231, 92 C. C. A. 139); and in West Virginia it has been held that an adjuster of an insurance company has no authority as such to waive proof of loss, required by the policy, as a condition precedent to a right of action, by denying liability on the part of the insurer on other grounds, when the policy limits the authority of agents as provided by the standard insurance policy (*Slater v. Williamsburg City Fire Ins. Co.*, 71 S. E. 197, 68 W. Va. 779).

13. ACTS AND CONDUCT CONSTITUTING WAIVER AND ESTOPPEL AS TO NOTICE AND PROOFS—IN GENERAL

3510-3514. (a) Waiver by direct statement

3510 (a). A letter by the attorney of an insurer and his retention of proofs has been held not to be a waiver for the company of a provision of the policy requiring insured to give notice of his illness as soon as reasonably possible.

Rockwell v. Hamburg-Bremen Fire Ins. Co., 212 Mass. 318, 98 N. E. 1086; *Scheeler v. Casualty Co. of America* (Sup.) 137 N. Y. Supp. 811.

3511 (a). A request by the company for certain proofs and evidence as to the loss, accompanied by statements or intimations that such proof will be sufficient, will excuse a compliance by the insured with any further requirements in the policy.

Walker v. Lancashire Ins. Co., 75 N. E. 66, 188 Mass. 560; *Sidebotham v. Merchants' Fire Ass'n*, 83 Pac. 1028, 41 Wash. 436; *Pacific Mut. Life Ins. Co. v. Carter*, 123 S. W. 384, 92 Ark. 378, Id., 92 Ark. 378, 124 S. W. 764; *Hess v. Hartford Fire Ins. Co.*, 38 Pa. Super. Ct. 158; *Bakhaus v. Caledonian Ins. Co.*, 77 Atl. 310, 112 Md. 676; *Lake Superior Produce & Cold Storage Co. v.*

Concordia F. Ins. Co., 104 N. W. 560, 95 Minn. 492; Williams v. American Ins. Co., 196 Ill. App. 370.

3514-3516. (b) Acts or conduct in general

3514 (b). A condition in an insurance policy requiring insured to furnish proofs of loss as a prerequisite to the liability of insured thereon may be waived by its agent without express words, by conduct inconsistent with an intention to enforce a strict compliance with the condition and which conduct is calculated to lead insured to believe that insurer does not intend to require such compliance.

Morgenstern v. Insurance Co. of North America of Philadelphia, Pa., 89 Neb. 459, 131 N. W. 969; Teasdale v. City of New York Ins. Co., 163 Iowa, 596, 145 N. W. 284, Ann. Cas. 1916A, 591; Padgett v. North Carolina Home Ins. Co., 82 S. E. 409, 98 S. C. 244; Lee v. Casualty Co. of America, 96 Atl. 952, 90 Conn. 202; American Nat. Ins. Co. v. Euce, 2 Ohio App. 299, 35 Ohio Cir. Ct. R. 169; Milwaukee Mechanics' Ins. Co. v. Fuquay, 120 Ark. 330, 179 S. W. 497; Theriault v. California Ins. Co. of San Francisco, 149 Pac. 719, 27 Idaho, 476, Ann. Cas. 1917D, 818; Same v. Springfield Fire & Marine Ins. Co. of Springfield, 149 Pac. 722, 27 Idaho, 485; Montano v. Missanellese Soc. of Mut. Aid, 130 N. Y. Supp. 455, 72 Misc. Rep. 515; Hess v. Hartford Fire Ins. Co., 38 Pa. Super. Ct. 158; Lusk v. American Cent. Ins. Co. (W. Va.) 91 S. E. 1078; Massock v. Royal Ins. Co., 196 Ill. App. 394; Bachman v. Travelers' Ins. Co., 78 N. H. 100, 97 Atl. 223; Eminent Household of Columbian Woodmen v. Gaunt, 128 Ark. 626, 194 S. W. 700.

In the following cases, however, the facts were held not to show a waiver: Fidelity-Phenix Fire Ins. Co. v. Sadau (Tex. Civ. App.) 167 S. W. 334; Talbot v. Atlantic Horse Ins. Co., 193 Ill. App. 587; Bailey v. First Nat. Fire Ins. Co. of Washington, D. C., 18 Ga. App. 213, 89 S. E. 80; Styles v. American Home Ins. Co., 146 Ga. 92, 90 S. E. 718; Seattle Merchants' Ass'n v. Germania Fire Ins. Co. of New York, 64 Wash. 115, 116 Pac. 585.

In Jackson v. Life & Annuity Ass'n (Mo. App.) 195 S. W. 535, it was held that waiver cannot be predicated on that which is unknown.

Where the conduct of an insurer in a fire policy is such as to render the production of proofs of loss useless or unavailing, they are deemed waived.

Shuford v. Life Ins. Co. of Virginia, 167 N. C. 547, 83 S. E. 821; Yousey v. Queen Ins. Co. (Sup.) 148 N. Y. Supp. 125; Bank of Anderson v. Home Ins. Co. of New York, 14 Cal. App. 208, 111 Pac. 507.

So a beneficial insurance order waived its right to insist on proofs of death, where it refused to receive proofs of death based on

absence on which the beneficiary relied (*Miller v. Sovereign Camp Woodmen of the World*, 122 N. W. 1126, 140 Wis. 505, 28 L. R. A. [N. S.] 178, 133 Am. St. Rep. 1095).

3515 (b). Where an insurer returned the preliminary proofs of death with the statement that, as neither of the affiants had personal knowledge of the circumstances connected with the alleged injury and death of insured, they did not afford any proof that the death resulted proximately and solely from accidental causes, and thereby in effect demanded proofs which the policy did not require, it waived the preliminary proofs which the policy called for (*Preferred Acc. Ins. Co. v. Fielding*, 83 Pac. 1013, 35 Colo. 19, 9 Ann. Cas. 916).

3516 (b). The rejection of the proofs of death after the time within which they are required does not show a waiver on the part of the insurer of the right to demand proofs of death.

Mutual Trust & Deposit Co. v. Travelers' Protective Ass'n, 57 Ind. App. 329, 104 N. E. 880, reversing 100 N. E. 451; *Travelers' Ins. Co. v. Nax*, 142 Fed. 653, 73 C. C. A. 649, reversing (C. C.) 130 Fed. 985.

Any conduct of an insurer or its agents which induces delay in giving notice of loss or furnishing proofs, so that they cannot be furnished within the time required, constitutes a waiver of the delay (*American Ins. Co. v. Dannehower*, 115 S. W. 950, 89 Ark. 111).

In *Walker v. Knights of Maccabees*, 177 Mo. App. 50, 163 S. W. 274, it was held that where a mutual benefit association defended a suit on a certificate on the ground of lack of proofs of loss and, after plaintiff had taken a voluntary nonsuit, furnished plaintiff with blanks on which were made proofs of loss, such action constituted a waiver of the failure of plaintiff to make proofs of loss within the time limited.

Insurer, however, does not waive a provision requiring insured to give notice of a disability at insurer's office within two weeks of its commencement by sending a blank for proof on receipt of notice after the time expired, where the letter sending the blank states that it must not be construed as an admission of any claim (*McCord v. Masonic Casualty Co.*, 88 N. E. 6, 201 Mass. 473).

Mere silence of insurer, even with knowledge of loss, and failure to require insured to file proofs of loss within required time will not constitute waiver thereof.

Glazer v. Home Ins. Co., 96 N. Y. Supp. 136, 48 Misc. Rep. 515, judgment affirmed *Glazer v. Same*, 98 N. Y. Supp. 979, 113 App. Div.

235, reversed 82 N. E. 727, 190 N. Y. 6; *Home Fire Ins. Co. v. Driver*, 87 Ark. 171, 112 S. W. 200; *Parker v. Farmers' Fire Ins. Co.*, 74 N. E. 286, 188 Mass. 257; *Ætna Ins. Co. of Hartford, Conn., v. Jones* (Ind. App.) 115 N. E. 697.

Mere negotiations between the insured, who has not furnished proof of loss, and the insurance company's adjuster, or mere expectation of a settlement without any change of position of the insured to his detriment, are not sufficient to establish waiver of proof of loss by the company.

Kness v. Anchor Fire Insurance Co., 31 Pa. Super. Ct. 521; *North River Ins. Co. v. Walker*, 161 Ky. 368, 170 S. W. 983; *Dunn v. Farmers' Fire Ins. Co.*, 34 Pa. Super. Ct. 245.

3516-3518. (c) Refusal to furnish blanks or deliver policy

3516 (c). Where delay in furnishing proofs is caused by failure of the insurer to furnish with reasonable promptness the blank upon which the proof was made out, the beneficiary will not be held to a strict compliance with the policy stipulation relative to the time within which final proofs of death should be submitted.

Metropolitan Casualty Ins. Co. v. McAuley, 134 Ga. 165, 67 S. E. 393; *Gleason v. Prudential Fire Ins. Co.*, 127 Tenn. 8, 151 S. W. 1030.

It was held, however, in *Martin v. Illinois Commercial Men's Ass'n*, 195 Ill. App. 421, that the fact that insurer delayed sending blanks for proof when requested has no tendency to prove a waiver of the condition, where insurer is not required to furnish such blanks.

Where a mutual benefit insurance company refused to furnish its forms for proof of death to plaintiff, it waived the requirement of its policy that such proofs be made on blanks furnished by it (*Page v. Modern Woodmen of America*, 162 Wis. 259, 156 N. W. 137, L. R. A. 1916F, 438); and where a policy provided for notice, and for final proofs on blanks furnished by insurer, insurer's failure to furnish the blanks in time for the final proofs to be made after timely notice of insured's death constituted a waiver of the condition requiring them.

Rosenstein v. Court of Honor, 142 N. W. 331, 122 Minn. 310; *Correll v. National Acc. Soc.*, 139 Iowa, 36, 116 N. W. 1046, 130 Am. St. Rep. 294; *Phoenix Accident & Sick Ben. Ass'n v. Stiver*, 42 Ind. App. 636, 84 N. E. 772; *Continental Casualty Co. v. Buchtel*, 105 N. W. 707, 74 Neb. 823; *Supreme Tent Knights of Maccabees of the World v. Fisher*, 45 Ind. App. 419, 90 N. E. 1044.

3517 (c). In Missouri and Louisiana under statutory provisions, failure of the company to furnish blanks has been held to waive the furnishing of proofs by insured.

Young v. Pennsylvania Fire Ins. Co., 269 Mo. 1, 187 S. W. 856; J. B. Clark & Sons v. Franklin Ins. Co., 58 South. 345, 130 La. 584; Monteleone v. Seaboard Fire & Marine Ins. Co., 52 South. 1032, 126 La. 807.

3518 (c). In International Travelers' Ass'n v. Powell (Tex. Civ. App.) 196 S. W. 957, it was held that an accident insurer cannot defeat a claim for insurance on the ground that there was no proof of loss, where the assignee of the insured made application for blanks upon which to make the proper claim and was refused.

So it has been held that insurer, issuing a policy insuring the lives of animals, must furnish a form on which to make proof of loss in conformity with the policy (Atlantic Horse Ins. Co. v. Nero, 108 Miss. 321, 66 South. 780).

3522-3526. (f) Recognition of liability in general

3522 (f). A distinct recognition of liability by the company, made under such circumstances as reasonably to show that it is satisfied as to the loss, will amount to a waiver of formal notice and proofs, or of defects therein.

Lord v. Des Moines Fire Ins. Co., 99 Ark. 476, 138 S. W. 1008; Tomuschat v. North British & Mercantile Ins. Co., 77 N. H. 388, 92 Atl. 329, Ann. Cas. 1915D, 1155; Curnen v. Law Union & Rock Ins. Co., 144 N. Y. Supp. 499, 159 App. Div. 493; Continental Casualty Co. v. Hunt, 53 Ind. App. 657, 101 N. E. 519; Griffith v. Anchor Fire Ins. Co., 143 Iowa, 88, 120 N. W. 90; Liverpool & London & Globe Ins. Co. v. Payton, 128 Ark. 528, 194 S. W. 503; McCollough v. Home Ins. Co. of New York, 102 Pac. 814, 155 Cal. 659, 18 Ann. Cas. 862.

3523 (f). A recognition of liability for only a portion of the loss will have the same effect.

Melancon v. Phoenix Ins. Co., 40 South. 718, 116 La. 324; Western Underwriters' Ass'n v. Hankins, 122 Ill. App. 600, judgment affirmed 77 N. E. 447, 221 Ill. 304; Hartford Fire Ins. Co. v. Hammond, 41 Colo. 323, 92 Pac. 686; Liverpool & London & Globe Ins. Co. v. Same, Id.; Greenwich Ins. Co. v. State, 84 S. W. 1025, 74 Ark. 72; Burgess v. Mercantile Town Mut. Ins. Co., 89 S. W. 568, 114 Mo. App. 169.

3524 (f). A mere rejected offer to pay a certain sum in settlement of a loss does not amount to a waiver of the condition requiring formal proofs.

Glazer v. Home Ins. Co., 96 N. Y. Supp. 136, 48 Misc. Rep. 515, affirmed *Glazer v. Same*, 98 N. Y. Supp. 979, 113 App. Div. 235, reversed 82 N. E. 727, 190 N. Y. 6; *Lapcevic v. Lebanon Mut. Ins. Co.*, 40 Pa. Super. Ct. 294; *Same v. Ohio Ins. Co.*, Id. 301; *Same v. Concordia Ins. Co.*, Id.

It has been held, however, that a tender of a substantial sum in full settlement of insured's claims operated as a waiver of all claimed defects in the proof of loss, notwithstanding policy provision that no one could waive such proofs (*Ring v. Phoenix Assur. Co., Limited*, of London, 100 Kan. 341, 164 Pac. 303).

3526-3528. (g) Investigation of circumstances of loss

3526 (g). The insurance company, by entering on an examination of the loss, acquiesces in the sufficiency of the notice given.

Crowder v. Continental Casualty Co., 91 S. W. 1016, 115 Mo. App. 535; *State Mut. Ins. Co. v. Green (Okla.)* 166 Pac. 105, L. R. A. 1917F, 663; *Douville v. Pacific Coast Casualty Co.*, 138 Pac. 506, 25 Idaho, 396, Ann. Cas. 1917A, 112; *Scottish Union & National Ins. Co. v. McKone*, 227 Fed. 813, 142 C. C. A. 337.

Conduct of the company in the investigation, showing a satisfaction with the knowledge thus obtained, or inducing reasonable belief in insured that it is so satisfied, will amount also to a waiver of formal proofs.

State Mut. Ins. Co. v. Green (Okla.) 166 Pac. 105, L. R. A. 1917F, 663 (sent its agents to investigate and agreed on settlement); *Merchants' & Bankers' Fire Underwriters v. Brooks (Tex. Civ. App.)* 188 S. W. 243 (examination of the insured); *American Ins. Co. v. Dannehower*, 115 S. W. 950, 89 Ark. 111; *Ray v. Fidelity-Phoenix Fire Ins. Co.*, 187 Ala. 91, 65 South. 536.

So an insurer's demand for an autopsy to discover the cause of death constituted a waiver of proofs of death (*Fisher v. Travelers' Ins. Co.*, 124 Tenn. 450, 138 S. W. 316, Ann. Cas. 1912D, 1246).

So in *Queen of Arkansas Ins. Co. v. Laster*, 108 Ark. 261, 156 S. W. 848, proof of loss was held to be waived where the adjuster, after investigating the loss, told insured in response to his offer of information that he had all the proof he wanted, notwithstanding an agreement that any action in investigating the origin of the fire or in ascertaining the amount of the loss should not be a waiver of any of the conditions of the policy.

3527 (g). The insurer's mere investigation of the loss for its own satisfaction, without more, would not constitute a waiver of the insured's breach of the stipulations for a sworn statement of the circumstances of the loss.

Rockwell v. Hamburg-Bremen Fire Ins. Co., 212 Mass. 318, 98 N. E. 1086; *Ray v. Fidelity-Phoenix Fire Ins. Co.*, 187 Ala. 91, 65 South. 536.

So especially where the policy declared that no provision or condition of the policy should be waived by any act of insurer relating to appraisal of loss, insurer's investigation of loss by an adjuster did not waive forfeiture for insured's failure to furnish proofs of loss.

Billings v. National Ins. Co., 27 Ohio Cir. Ct. R. 552; *Lancashire Ins. Co. v. Lyon*, 124 Ill. App. 491; *Kuck v. Citizens' Ins. Co. of Missouri*, 90 Wash. 35, 155 Pac. 406; *Smith v. Western Assur. Co. of Canada*, 18 Ga. App. 461, 89 S. E. 533.

3528-3531. (h) Submission to arbitration

3528 (h). By entering into arbitration within the time allowed for proof of loss according to the policy, an insurer waives all questions as to the fact and sufficiency of the proofs of loss.

Union Marine Ins. Co. v. Charlie's Transfer Co., 186 Ala. 443, 65 South. 78; *Ross v. Phenix Ins. Co.*, 114 Pac. 1054, 84 Kan. 572; *Commercial Union Assur. Co., Limited, of London, England, v. Parker*, 119 Ill. App. 126; *Funk v. Fire Ass'n of Philadelphia*, 157 Ill. App. 602; *McInturff v. Insurance Co. of North America*, 155 Ill. App. 225, judgment affirmed 248 Ill. 92, 93 N. E. 369, 140 Am. St. Rep. 153, 21 Ann. Cas. 176; *Western Underwriters Ass'n v. Hankins*, 77 N. E. 447, 221 Ill. 304, affirming 122 Ill. App. 600.

3529 (h). In *Perry v. Greenwich Ins. Co.*, 49 S. E. 889, 137 N. C. 402, an agreement to arbitrate the loss under a policy of insurance was held a waiver of the want of due proofs of loss.

In *Providence Washington Ins. Co. v. Wolf* (Ind. App.) 73 N. E. 1093, modifying 72 N. E. 606, however, where an agreement for submission of a loss under a fire insurance policy to appraisers was entered into on the ninth day after the loss, the failure of the insurer to answer a telegram sent by the insured on the seventeenth day after the loss, stating that his adjuster was at the place of the fire at heavy expense, and asking insurer to state when his appraiser would be there, was held not to be a waiver of proofs of loss required by the policy to be made by insured within 60 days after the loss.

14. WAIVER OF NOTICE AND PROOFS OF LOSS, DEATH, OR INJURY BY DENIAL OF LIABILITY

3531-3532. (a) The general rule

3531 (a). A failure to give notice or furnish proofs of loss, or defects in the notice and proofs, is waived by a denial of liability on other grounds.

Jensen v. Palatine Ins. Co., 81 Neb. 523, 116 N. W. 286; *Atlantic Horse Ins. Co. v. Nero*, 108 Miss. 321, 66 South. 780; *Kutschenreuter v. Providence Washington Ins. Co.*, 159 N. W. 552, 164 Wis. 63; *Horwitz v. United States Fidelity & Guaranty Co.*, 95 Wash. 455, 164 Pac. 77; *Frost v. North British & Mercantile Ins. Co. of London and Edinburgh*, 60 Atl. 803, 77 Vt. 407; *Continental Casualty Co. v. Lindsay*, 111 Va. 389, 69 S. E. 344; *Rochester German Ins. Co. of Rochester, N. Y., v. Schmidt (C. C.)* 151 Fed. 681; *Ennis v. Retail Merchants' Ass'n Mut. Fire Ins. Co.*, 33 N. D. 20, 156 N. W. 234; *Stockwell v. German Mut. Ins. Ass'n of Le Mars*, 37 S. D. 348, 158 N. W. 450; *Anderson v. Aetna Life Ins. Co.*, 74 Atl. 1051, 75 N. H. 375; *Andrews v. Dirigo Mut. Fire Ins. Co.*, 91 Atl. 978, 112 Me. 258; *Fidelity & Casualty Co. of New York v. Dulany*, 91 Atl. 574, 123 Md. 486; *Johnson v. Bankers' Mut. Casualty Ins. Co.*, 129 Minn. 18, 151 N. W. 413, L. R. A. 1915D, 1199, Ann. Cas. 1916A, 154; *Popa v. Northern Ins. Co. of New York*, 192 Mich. 237, 158 N. W. 945; *St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co. of New Orleans*, 37 South. 967, 113 La. 1053, 1054; *Same v. Springfield Fire & Marine Ins. Co.*, 37 South. 988, 114 La. 1; *Mutual Life Industrial Ass'n of Georgia v. Scott*, 170 Ala. 420, 54 South. 182; *International Salt Co. v. Tennant*, 144 Ill. App. 30; *National Life Ins. Co. v. Jackson*, 89 S. E. 633, 18 Ga. App. 494; *Price v. North American Acc. Ins. Co.*, 152 Pac. 805, 28 Idaho, 136; *Keeton v. National Union (Mo. App.)* 182 S. W. 798; *Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co.*, 113 S. W. 217, 133 Mo. App. 57; *Hilburn v. Phoenix Ins. Co.*, 140 Mo. App. 355, 124 S. W. 63; *Burgess v. Mercantile Town Mut. Ins. Co.*, 89 S. W. 568, 114 Mo. App. 169; *McLeod v. John Hancock Mut. Life Ins. Co.*, 190 Mo. App. 653, 176 S. W. 234; *Brix v. American Fidelity Co. of Montpelier, Vt.*, 171 Mo. App. 518, 153 S. W. 789; *Keane v. Century Fire Ins. Co.*, 150 Iowa, 658, 130 N. W. 724; *Cottrell v. Munterville Mut. Fire & Lightning Ins. Ass'n*, 145 Iowa, 651, 124 N. W. 612; *T. M. Sinclair & Co. v. National Surety Co.*, 107 N. W. 184, 132 Iowa, 549; *Binder v. National Masonic Acc. Ass'n*, 102 N. W. 190, 127 Iowa, 25; *Springfield Fire & Marine Ins. Co. v. Fields (Ind.)* 113 N. E. 756; *Continental Ins. Co. v. Bair (Ind. App.)* 114 N. E. 763; *Ohio Farmers' Ins. Co. v. Vogel*, 76 N. E. 977, 166 Ind. 239, 3 L. R. A. (N. S.) 966, 117 Am. St. Rep. 382, 9 Ann. Cas. 91, transferred from Appellate Court 73 N. E. 612, and 75 N. E. 849; *Rutherford v.*

(1471)

Prudential Ins. Co., 73 N. E. 202, 34 Ind. App. 531; Southern Life Ins. Co. v. Hazard, 146 S. W. 1107, 148 Ky. 465; Continental Casualty Co. v. Mathis, 150 S. W. 507, 150 Ky. 477; Fidelity & Casualty Co. of New York v. Cooper, 126 S. W. 111, 137 Ky. 544; Fidelity & Casualty Co. of New York v. Hart, 142 Ky. 25, 133 S. W. 996; Shawnee Fire Ins. Co. v. Roll, 140 S. W. 49, 145 Ky. 113; National Life & Accident Ins. Co. v. O'Brien's Ex'r, 159 S. W. 1134, 155 Ky. 498; Planters' Fire Ins. Co. v. Nichols, 103 Ark. 387, 147 S. W. 68; Arkansas Mut. Fire Ins. Co. v. Witham, 82 Ark. 226, 101 S. W. 721; Yates v. Thomason, 83 Ark. 126, 102 S. W. 1112; Dodge v. Thomason, 94 Ark. 21, 125 S. W. 648; Queen of Arkansas Ins. Co. v. Forlines, 94 Ark. 227, 126 S. W. 719; Commercial Union Fire Ins. Co. v. King, 108 Ark. 130, 156 S. W. 445; Queen of Arkansas Ins. Co. v. Laster, 108 Ark. 261, 156 S. W. 848; Queen of Arkansas Ins. Co. v. Malone, 111 Ark. 229, 163 S. W. 771; Phoenix Assur. Co. of London v. Boyett, 90 S. W. 284, 77 Ark. 41; Security Mut. Ins. Co. v. Woodson & Co., 95 S. W. 481, 79 Ark. 266, 116 Am. St. Rep. 75; Continental Ins. Co. of New York v. Buchanan, 108 S. W. 355, 32 Ky. Law Rep. 1298; Orient Ins. Co. v. Wingfield, 49 Tex. Civ. App. 202, 108 S. W. 788; Commonwealth Bonding & Casualty Ins. Co. v. Knight (Tex. Civ. App.) 185 S. W. 1037; Hanover Fire Ins. Co. of New York v. Huff (Tex. Civ. App.) 175 S. W. 465; Guarraia v. Metropolitan Life Ins. Co. (N. J.) 101 Atl. 298; Thomas Orr Trucking & Forwarding Co. v. Metropolitan Surety Co., 77 N. J. Law, 749, 73 Atl. 541; Czerweny v. National Fire Ins. Co. of Hartford (Sup.) 139 N. Y. Supp. 345; Lloyd v. North British & Mercantile Ins. Co. of London & Edinburgh, 161 N. Y. Supp. 271, 174 App. Div. 371; Moore v. General Accident, Fire & Life Assur. Corp., 173 N. C. 532, 92 S. E. 362; Higson v. North River Ins. Co., 67 S. E. 509, 152 N. C. 206; O'Neil v. American Assur. Co., 52 Pa. Super. Ct. 577; Hughes v. Central Acc. Ins. Co., 71 Atl. 923, 222 Pa. 462; United States Health & Accident Ins. Co. v. Harvey, 129 Ill. App. 104; United States Health & Accident Ins. Co. v. Clark, 41 Ind. App. 345, 83 N. E. 760; Wortham v. Illinois Life Ins. Co., 107 S. W. 276, 32 Ky. Law Rep. 827; Hays v. General Assembly American Benev. Ass'n, 104 S. W. 1141, 127 Mo. App. 195; Gibson v. Iowa Legion of Honor (Iowa) 159 N. W. 639; Werner v. Fraternal Bankers' Reserve Soc., 172 Iowa, 504, 154 N. W. 773, Ann. Cas. 1918A, 1005; Union Fraternal League v. Sweeney, 184 Ind. 378, 111 N. E. 305; Moran v. Knights of Columbus, 46 Utah, 397, 151 Pac. 353.

So where an insurer had denied liability, the fact that proofs of death, subsequently made, were defective, would not bar recovery (Meisenbach v. Supreme Tent, Knights of Maccabees of the World, 140 Mo. App. 76, 119 S. W. 514).

In Norman v. Order of United Commercial Travelers of America (1472)

ca, 145 S. W. 853, 163 Mo. App. 175, it was held that, where a fraternal accident insurance association denied all liability for an accident which caused the death of the insured, it thereby waived proofs of death and the benefit of a provision giving a stipulated time in which to make payment.

3532-3535. (b) What constitutes such a denial of liability as will operate as waiver

3532 (b). The denial of liability which will operate as a waiver of notice or proofs, or of defects therein, may consist in a statement that the policy has never been in force or has been forfeited.

Barrett v. Grand Lodge A. O. U. W., 117 N. Y. Supp. 125, 63 Misc. Rep. 429; *Houseman v. Home Ins. Co.*, 78 W. Va. 203, 88 S. E. 1048, L. R. A. 1917A, 299; *National Union Fire Ins. Co. v. Burkholder*, 116 Va. 942, 83 S. E. 404; *North British & Mercantile Ins. Co. v. Edmundson*, 52 S. E. 350, 104 Va. 486; *Planters' Mut. Ins. Ass'n v. Hamilton*, 90 S. W. 283, 77 Ark. 27, 7 Ann. Cas. 55; *Mutual Trust & Deposit Co. v. Travelers' Protective Ass'n*, 57 Ind. App. 329, 104 N. E. 880, reversing judgment on rehearing (Ind. App.) 100 N. E. 451; *Walker v. Knights of Maccabees*, 177 Mo. App. 50, 163 S. W. 274; *Bachman v. Travelers' Ins. Co.*, 97 Atl. 223, 78 N. H. 100; *Fisher v. Supreme Lodge Knights and Ladies of Honor*, 190 Mo. App. 606, 176 S. W. 269; *Marcus v. National Council of Knights and Ladies of Security*, 127 Minn. 196, 149 N. W. 197; *Supreme Lodge K. of P. v. Connelly*, 185 Ala. 301, 64 South. 362; *Grand Fraternity v. Mulkey*, 62 Tex. Civ. App. 147, 130 S. W. 242, 185 S. W. 582; *Arrison v. Supreme Council of Mystic Tilters*, 105 N. W. 580, 129 Iowa, 303; *Elliott v. Home Mut. Hail Ass'n of Cherokee*, 160 Iowa, 105, 140 N. W. 431; *Bohles v. Prudential Ins. Co. of America*, 84 N. J. Law, 315, 86 Atl. 438, affirming 83 Atl. 904, 83 N. J. Law, 246; *Singer v. National Fire Ins. Co. of Hartford, Conn.*, 139 N. Y. Supp. 375, 154 App. Div. 783; *Linglebach v. Theresa Village Mut. Fire Ins. Co.*, 143 N. W. 688, 154 Wis. 595; *Continental Ins. Co. v. Parkes*, 39 South. 204, 142 Ala. 650; *Havlik v. St. Paul Fire & Marine Ins. Co.*, 87 Neb. 427, 127 N. W. 248; *Metropolitan Life Ins. Co. v. Maddox (Ky.)* 127 S. W. 503; *Miles v. Casualty Co. of America*, 120 N. Y. Supp. 1135, 136 App. Div. 908, affirming (Sup.) 115 N. Y. Supp. 1; *Munson v. German Fire Ins. Co.*, 33 Pa. Super. Ct. 551; *National Mut. Fire Ins. Co. v. Sprague*, 92 Pac. 227, 40 Colo. 344; *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 482, 88 Pac. 941; *Kennedy v. Agricultural Ins. Co. of Sioux Falls*, 21 S. D. 145, 110 N. W. 116; *W. P. Parker & Co. v. Continental Ins. Co.*, 55 S. E. 717, 143 N. C. 339; *Spring Garden Ins. Co. v. Whayland*, 64 Atl. 925, 103 Md. 699; *Mun v. New York Life Ins. Co. (Mo. App.)* 181 S. W. 606; *Bohles v. Prudential Ins. Co. of America*, 83 N. J. Law, 246, 83 Atl. 904; *White v. Empire State Degree of Honor*, 47 Pa. Super. Ct. 52.

3533 (b). Sometimes the denial of liability is partially expressed by a refusal to furnish blanks for making proofs.

Jackson v. Life & Annuity Ass'n (Mo. App.) 195 S. W. 535; *Hanley v. Fidelity & Casualty Co.* (Iowa) 161 N. W. 114; *Same v. Travelers' Protective Ass'n* (Iowa) Id. 125; *American Nat. Ins. Co. v. Bird* (Tex. Civ. App.) 174 S. W. 939; *Lanier v. Eastern Life Ins. Co. of America*, 142 N. C. 14, 54 S. E. 786.

The action of an agent of a life insurance company in wrongfully obtaining possession of a policy by means of fraudulent misrepresentation has been held to amount to a denial of liability, which constitutes a waiver of the requirement of proof of loss (*Pioneer Life Ins. Co. v. Cox*, 112 Ark. 582, 166 S. W. 951).

3534 (b). In *Western Travelers' Acc. Ass'n v. Tomson*, 103 N. W. 695, 72 Neb. 661, reversing 101 N. W. 341, 72 Neb. 661, it was held that if an insurance company, sued for an alleged loss, denies the same it waives proof of notice of the loss.

Such waiver is also found where rejection of claim was on the ground that the animal insured was killed by a law officer (*National Live Stock Ins. Co. v. Elliott*, 60 Ind. App. 112, 108 N. E. 784).

Similarly a waiver has been found where, in an action on an accident insurance policy, the company claimed that insured died from disease and not from accident (*Johnson v. Continental Casualty Co.*, 99 S. W. 473, 122 Mo. App. 369).

On the basis that slight acts indicating a denial of liability will amount to a waiver of proof of death, it has been held that where, after the company was notified of the injury, it sent its adjuster to investigate the claim, and he represented that he desired the names of the witnesses to the accident and the attending physicians, and that, as soon as his investigation was made, the company would notify plaintiff whether her claim would be paid, but she was not so notified after the investigation, or requested to furnish further proof of death, the company thereby waived such proof (*Ætna Life Ins. Co. v. Bethel*, 131 S. W. 523, 140 Ky. 609).

On the other hand, in *Mutual Life Ins. Co. of Baltimore v. Thomas*, 61 Atl. 293, 101 Md. 501, it was held that where the beneficiary in a policy filed proofs of death, and insurer declined to pay the claim on the ground that the proofs which plaintiff supplied showed that insured was afflicted with consumption before the policy was issued, and that there was therefore a breach of warranty, and there was no evidence that insurer knew or had reason to believe that the proofs furnished did not relate to insured, there was no waiver

of the production of the necessary proofs required by the policy, so as to entitle plaintiff to recover on evidence that the proofs furnished related to another.

So by refusing to pay because the final proof showed that assured had not been confined for the required period, insurer waived any objection to the sufficiency of the proofs, but did not admit the truth of the statements in the proofs (*General Acc. Ins. Co. v. Hayes*, 52 Tex. Civ. App. 272, 113 S. W. 990).

Unless there is a bona fide attempt by an insurer to adjust a fire loss by an offer to pay a sum approximating the loss, there is "an absolute refusal to pay," within Civ. Code 1910, § 2490, waiving proofs of loss (*Great American Co-op. Fire Ass'n v. Jenkins*, 76 S. E. 159, 11 Ga. App. 784).

3535-3537. (c) Denial of liability without assigning reason or with reservation

3535 (c). An insurer's positive refusal to pay a claim, without assigning any reason is a waiver of the notice and proof of loss (*Ray v. Fidelity-Phenix Fire Ins. Co.*, 187 Ala. 91, 65 South. 536).

3537-3540. (d) Waiver by denial of liability as dependent on time of denial

3537 (d). Denial of liability of insurer within time allowed to furnish proof of loss is waiver of such proof.

Morris v. Dutchess Ins. Co., 67 W. Va. 368, 68 S. E. 22; *Jordan v. Hanover Fire Ins. Co.*, 66 S. E. 206, 151 N. C. 341; *American Nat. Ins. Co. v. Donahue* (Okl.) 153 Pac. 819; *Scott & Callaway v. Dixie Ins. Co.*, 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. (N. S.) 152; *Moore v. National Acc. Soc.*, 80 Pac. 171, 38 Wash. 31; *Mellen v. United States Health & Accident Ins. Co.*, 75 Atl. 273, 83 Vt. 242; *O'Rourke v. John Hancock Mut. Life Ins. Co.* (Dist. Ct.) 30 N. Y. Supp. 215; *Pauley v. Sun Ins. Office*, 79 W. Va. 187, 90 S. E. 552; *Neal, Clark & Neal Co. v. Liverpool & London & Globe Ins. Co., Limited*, 178 App. Div. 730, 165 N. Y. Supp. 204; *Oklahoma Fire Ins. Co. v. Wagester*, 38 Okl. 291, 132 Pac. 1071; *Hartford Fire Ins. Co. v. Enoch*, 96 S. W. 393, 79 Ark. 475; *Cullen v. Insurance Co. of North America*, 104 S. W. 117, 126 Mo. App. 412; *Continental Ins. Co. v. Chance*, 48 Okl. 324, 150 Pac. 114.

3538 (d). Similarly, insurer does not waive proof of loss by denying liability, where the demand is not made until after the time has elapsed for furnishing proof, and it has done nothing to lead to the delay or to estop itself in any manner.

Commercial Fire Ins. Co. v. Waldron, 88 Ark. 120, 114 S. W. 210; *Harp v. Fireman's Fund Ins. Co.*, 61 S. E. 704, 130 Ga. 726, 14 Ann. Cas.

299; *Boren v. Brotherhood of Railroad Trainmen*, 145 Mo. App. 136, 129 S. W. 491; *Aetna Life Ins. Co. v. Fitzgerald*, 75 N. E. 262, 165 Ind. 317, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232, 6 Ann. Cas. 551; *Great Eastern Casualty Co. of New York v. Reed*, 17 Ga. App. 613, 87 S. E. 904.

Thus failure to give notice of injury within ten days was not waived by insurer's denial of liability on another ground without referring to the failure to give such notice (*Smith v. American Nat. Ins. Co.*, 111 Ark. 32, 162 S. W. 772); and a condition in a health policy that notice should be given within 10 days of the beginning of the illness was not waived because the defendant repudiated its liability on the ground that the premium was not paid in time (*Dewey v. National Casualty Co.*, 72 Misc. Rep. 23, 129 N. Y. Supp. 136).

3539 (d). In some cases the estoppel theory is not applied. Thus, in an action upon a life policy, where insurer denies liability, the fact that notice of claim was not given and proofs of death furnished within 90 days after the death of the insured has been held not to bar recovery (*Dodge v. New York Life Ins. Co.* [Mo. App.] 189 S. W. 609).

Where the grounds on which insurer denied liability did not appear, and there was no showing as to when an alleged waiver of proofs of loss thereby was claimed to have become effective, insured has been held not relieved of the requirement of furnishing such proofs (*Fire Ass'n of Philadelphia v. Yeagley*, 72 N. E. 1035, 34 Ind. App. 387).

3541-3543. (e) Same—Denial of liability in the answer

3543 (e). The rule that denial of liability on a policy is a waiver of proof of loss does not apply where the only denial of liability was contained in the insurer's answer to a suit against it on the policy.

Abramovitz v. National Council of Knights and Ladies of Security, 134 Minn. 302, 159 N. W. 624; *Palatine Ins. Co. v. Lynn*, 141 Pac. 1167, 42 Okl. 486; *Ferdenando v. Milwaukee Mechanics' Ins. Co.*, 81 Wash. 244, 142 Pac. 693.

(1476)

15. WAIVER OF DEFECTS IN NOTICE OR PROOFS BY FAILURE TO OBJECT

3544-3548. (a) Failure to object in general

3544 (a). Receiving and retaining notice or proofs of loss, without objecting to any defects therein, is a waiver of the objection.

Globe & Rutgers Ins. Co. v. Johnson (Ky.) 127 S. W. 765; Gash v. Home Ins. Co., 153 Ill. App. 31; Wakely v. Sun Ins. Office of London, Eng., 246 Pa. 268, 92 Atl. 136; Alezunus v. Granite State Fire Ins. Co., 111 Me. 171, 88 Atl. 413; Stanley v. Sterling Mut. Life Ins. Co., 12 Ga. App. 475, 77 S. E. 664; Great American Co-op. Fire Ass'n v. Jenkins, 76 S. E. 159, 11 Ga. App. 784; Continental Casualty Co. v. Ogburn, 175 Ala. 357, 57 South. 852, Ann. Cas. 1914D, 377; Monahan v. Metropolitan Surety Co. (Sup.) 114 N. Y. Supp. 862; Correll v. National Acc. Soc., 139 Iowa, 36, 116 N. W. 1046, 130 Am. St. Rep. 294; Globe Mut. Life Ins. Ass'n v. March, 118 Ill. App. 261; Carpenter v. Modern Woodmen of America, 160 Iowa, 602, 142 N. W. 411; Security Mut. Life Ins. Co. v. Calvert, 101 Tex. 128, 105 S. W. 320, reversing (Tex. Civ. App.) 100 S. W. 1033; Arkansas Ins. Co. v. Cox, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808; Caledonian Ins. Co. v. Indiana Reduction Co. (Ind. App.) 115 N. E. 596; Insurance Co. of North America v. Cochran (Okl.) 159 Pac. 247; Citizens' Trust & Guaranty Co. of West Virginia v. Globe & Rutgers Fire Ins. Co., 229 Fed. 326, 143 C. C. A. 446, Ann. Cas. 1917C, 416; Farmers' Mut. Ins. Ass'n of Alabama v. Tankersley, 13 Ala. App. 524, 69 South. 410; White v. Brotherhood of Locomotive Firemen, 165 Wis. 418, 162 N. W. 441; Haskew v. Knights of Modern Maccabees (Okl.) 159 Pac. 493.

3545 (a). In *Stinchcombe v. New York Life Ins. Co.*, 80 Pac. 213, 46 Or. 316, it is said that the retention, without objection, of proofs of death by the insurer, constitutes an approval of such proofs; and in *Young v. Railway Mail Ass'n*, 126 Mo. App. 325, 103 S. W. 557, it is said that by such retention defendant either accepted the notice as sufficient or waived the time of giving it.

3547 (a). Where the insurer made no objection to the payment of a fire loss on the ground that the insured had failed to furnish a certificate of a justice of the peace as required by the policy, failure to furnish such certificate was no bar to an action on the policy (*Norris v. Equitable Fire Ass'n*, 102 N. W. 306, 19 S. D. 114).

Delay in objecting to proofs of loss waives defects in such proofs but does not waive any defense other than the insufficiency of such proofs (*Novak v. Rochester German Ins. Co.*, 156 Ill. App. 352).

3548-3549. (b) Failure to make specific objection

3548 (b). Under the principle that those defects upon which the company intends to rely must be pointed out, an objection to certain defects in the proofs will amount to a waiver of all those not mentioned.

Metropolitan Life Ins. Co. v. Thomas, 106 S. W. 1175, 32 Ky. Law Rep. 770; *Fosmark v. Equitable Fire Ass'n*, 23 S. D. 102, 120 N. W. 777; *District Grand Lodge No. 23, U. O. O. F. in America, v. Hill*, 3 Ala. App. 483, 57 South. 147; *First Nat. Bank of New Bethlehem v. Maikranz*, 44 Pa. Super. Ct. 225; *Houseman v. Globe & Rutgers Fire Ins. Co.*, 78 W. Va. 586, 89 S. E. 269; *Saul v. Supreme Court of Daughters of Columbia*, 172 Ill. App. 272; *Foiles v. Detroit Fire & Marine Ins. Co.*, 175 Mich. 716, 141 N. W. 879; *Same v. Dixie Fire Ins. Co.*, 175 Mich. 723, 141 N. W. 882; *Pacific Mut. Life Ins. Co. of California v. O'Neil*, 36 Okl. 792, 130 Pac. 270; *Hanover Fire Ins. Co. of New York v. Huff* (Tex. Civ. App.) 175 S. W. 465; *Niagara Fire Ins. Co. v. Layne*, 162 Ky. 665, 172 S. W. 1090.

3549 (b). Failure of insurer of household goods to point out specifically defects in proof of loss has been held a waiver of any defects (*Fidelity Phenix Fire Ins. Co. v. Sadau* [Tex. Civ. App.] 178 S. W. 559).

3549-3552. (c) Nature of waiver by failure to object as related to waiver of delay in furnishing proofs

3549 (c). An insurer, dissatisfied with the proof of loss furnished by insured, must notify insured of the objections, and afford him an opportunity to make corrections.

Johnson v. Lumber Ins. Co. of New York, 137 Mo. App. 380, 118 S. W. 112; *Liverpool & London & Globe Ins. Co. v. Cargill*, 44 Okl. 735, 145 Pac. 1134; *Wachs & Co. v. Fidelity & Deposit Co. of Maryland*, 248 Pa. 263, 93 Atl. 1007; *Thaxton v. Metropolitan Life Ins. Co.*, 143 N. C. 33, 55 S. E. 419; *Da Rin v. Casualty Co. of America*, 41 Mont. 175, 108 Pac. 649, 27 L. R. A. (N. S.) 1164, 137 Am. St. Rep. 709; *Planters' Mut. Ins. Ass'n v. Hamilton*, 90 S. W. 283, 77 Ark. 27, 7 Ann. Cas. 55.

3550 (c). In some cases it is said that the retention by the insurer of proofs of loss furnished it after the time for furnishing the same has elapsed, and insured's rights have thus been lost, does not prejudice insured, and is not a waiver of the requirement of timely service of such proofs, and does not estop the insurer to assert the delay in their service as a cause of forfeiture.

Perry v. Caledonian Ins. Co., 93 N. Y. Supp. 50, 103 App. Div. 113.
Chandler v. John Hancock Mut. Life Ins. Co., 167 S. W. 1162, 180

Mo. App. 394; *Polizzi v. Commercial Fire Ins. Co.*, 255 Pa. 297, 99 Atl. 907.

In other cases it has been held that a delay in furnishing proofs, as well as any other defect, may be waived by the failure of the insurer to object.

Ramsey v. General Accident Fire & Life Ins. Co., 160 Mo. App. 236, 142 S. W. 763; *St. Paul Fire & Marine Ins. Co. v. Griffin*, 33 Okl. 178, 124 Pac. 300; *Jackson v. Life & Annuity Ass'n (Mo. App.)* 195 S. W. 535; *Breeden v. Aetna Life Ins. Co.*, 23 S. D. 417, 122 N. W. 348; *Hummer v. Midland Casualty Co.*, 181 Mich. 386, 148 N. W. 413.

3552-3555. (d) Effect of failure to object as dependent on duration of silence

3553 (d). Under a fire policy requiring the insurer to give notice to the insured within 20 days after filing proof of loss of its disagreement as to the amount claimed, the mailing of such notice on the twentieth day is too late, but it must have been received by the insured within 20 days (*Covey v. National Union Fire Ins. Co. of Pittsburgh*, 161 Pac. 35, 31 Cal. App. 579).

3554 (d). Where insured transmits proofs of loss within the time required in the policy, the insurers must, if they are dissatisfied, notify the insured, giving him opportunity to rectify his mistake, and silence for any considerable time may be a waiver of any other proofs (*Bush v. Hartford Fire Ins. Co.*, 71 Atl. 916, 222 Pa. 419).

16. QUESTIONS OF PRACTICE RELATING TO WAIVER OF NOTICE AND PROOFS OF LOSS, DEATH, OR INJURY

3556-3557. (a) Necessity of allegation of waiver by plaintiff

3556 (a). Waiver by insurer of proofs of death must generally be pleaded.

Shuford v. Life Ins. Co. of Virginia, 167 N. C. 547, 83 S. E. 821; *American Nat. Life Ins. Co. v. Rowell (Tex. Civ. App.)* 175 S. W. 170; *Hoffman v. Metropolitan Life Ins. Co.*, 119 N. Y. Supp. 978, 135 App. Div. 739; *McLeod v. Travelers' Ins. Co.*, 70 S. E. 157, 8 Ga. App. 765; *Menear v. Aetna Life Ins. Co. of Hartford, Conn.*, 31 Ohio Cir. Ct. R. 483; *Aronson v. Frankfurt Accident & Plate Glass Ins. Co.*, 99 Pac. 537, 9 Cal. App. 473; *Ryer v. Prudential Ins. Co. of America*, 77 N. E. 727, 185 N. Y. 6, reversing 95 N. Y. Supp. 1158, 110 App. Div. 897, and affirming 82 N. Y. Supp. 971, 85 App. Div. 7; *Hartford Fire Ins. Co. v. Mathis (Okl.)* 157 Pac. 134; *Continental Ins. Co. v. Chance*, 48 Okl. 324, 150 Pac. 114; *Palatine Ins. Co. v. Lynn*, 141 Pac. 1167, 42 Okl. 486.

In some cases it has been held that evidence of waiver of notice or proofs should be admitted under allegations of performance.

Burgess v. Mercantile Town Mut. Ins. Co., 89 S. W. 568, 114 Mo. App. 169; *Moran v. Franklin Life Ins. Co.*, 160 Mo. App. 407, 140 S. W. 955; *Citizens' Fire Ins. Co. v. Lord*, 100 Ark. 212, 139 S. W. 1114.

3557 (a). In other cases it has been held that waiver of notice and proofs need not be pleaded by plaintiff.

Hess v. Hartford Fire Ins. Co., 38 Pa. Super. Ct. 158; *Downs v. Michigan Commercial Ins. Co.*, 157 Ill. App. 32; *Keeton v. National Union*, 178 Mo. App. 301, 165 S. W. 1107; *Fire Ass'n of Philadelphia v. Yeagley*, 72 N. E. 1035, 34 Ind. App. 387.

Admission of liability in the answer is a waiver of proof (*Thompson v. Equitable Life Assur. Society of the United States*, 78 S. E. 439, 95 S. C. 16).

Pleas to a declaration, alleging waiver by refusal to furnish blanks and denial of liability, admit the allegation of waiver, where they allege only that the board of directors did not refuse to furnish blanks or deny liability (*Benjamin v. Bankers' Union of the World*, 173 Ill. App. 620).

3558-3559. (b) Sufficiency of allegation of waiver

3558 (b). Allegations of particular facts amounting to waiver are sufficient, without using the word "waiver" in the pleadings.

Glazer v. Home Ins. Co., 82 N. E. 727, 190 N. Y. 6, reversing 98 N. Y. Supp. 979, 113 App. Div. 235, and 96 N. Y. Supp. 136, 48 Misc. Rep. 515; *Supreme Tent, Knights of the Maccabees of the World, v. Fisher*, 90 N. E. 1044, 45 Ind. App. 419; *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Tex. Civ. App.) 185 S. W. 979; *Bank of Anderson v. Home Ins. Co. of New York*, 111 Pac. 507, 14 Cal. App. 208.

3559 (b). Where plaintiff contended that defendant had waived, defendant was entitled to a bill of particulars setting out the particular acts of omission or commission upon which plaintiff relied (*Cunningham v. United States Casualty Co.*, 109 N. Y. Supp. 1014, 125 App. Div. 916).

An allegation that conditions of a life policy were definitely performed on a designated date and an allegation that a condition as to proofs of death was subsequently waived are inconsistent (*Mearns v. Aetna Life Ins. Co. of Hartford, Conn.*, 31 Ohio Cir. Ct. R. 483).

Where a policy provided for adjustment of the loss after preliminary proofs, and that the loss should be payable within a certain

time thereafter, a mere allegation that the sum sued for was long since due did not show that conditions had been performed or that the time for payment had expired before suit brought (*Borger v. Connecticut Fire Ins. Co.*, 142 Pac. 115, 24 Cal. App. 696).

3559-3561. (c) Province of court and jury

3559 (c). Whether or not acts amount to a waiver of proofs of loss is a question for the jury.

Ætna Life Ins. Co. v. Bethel, 131 S. W. 523, 140 Ky. 609; *American Nat. Ins. Co. v. Ence*, 2 Ohio App. 299, 35 Ohio Cir. Ct. R. 169; *Western Underwriters' Ass'n v. Hankins*, 77 N. E. 447, 221 Ill. 304, affirming 122 Ill. App. 600; *Ball v. Royal Ins. Co.*, 107 S. W. 1097, 129 Mo. App. 34; *Glazer v. Home Ins. Co.*, 82 N. E. 727, 190 N. Y. 6, reversing 98 N. Y. Supp. 979, 113 App. Div. 235, and 96 N. Y. Supp. 136, 48 Misc. Rep. 515; *St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co.*, 37 South. 967, 113 La. 1053, 1054; *Same v. Springfield Fire & Marine Ins. Co.*, 37 South. 988, 114 La. 1; *Webster v. State Mut. Fire Ins. Co.*, 69 Atl. 319, 81 Vt. 75; *Continental Casualty Co. v. Ogburn*, 57 South. 852, 175 Ala. 357, Ann. Cas. 1914D, 377; *Bouchard v. Dirigo Mut. Fire Ins. Co.*, 92 Atl. 899, 113 Me. 17, L. R. A. 1915D, 187; *National Life & Accident Ins. Co. v. O'Brien's Ex'x*, 159 S. W. 1134, 155 Ky. 498; *Greengrass v. North River Ins. Co.*, 139 N. Y. Supp. 937, 79 Misc. Rep. 237.

3560 (c). Where the facts are undisputed, however, the question is one of law for the court.

Foiles v. Detroit Fire & Marine Ins. Co., 175 Mich. 716, 141 N. W. 879; *Same v. Dixie Fire Ins. Co.*, 175 Mich. 723, 141 N. W. 882; *Same v. Michigan Commercial Ins. Co.*, 176 Mich. 79, 141 N. W. 882.

The sufficiency of evidence to justify submission to the jury was considered in the following cases:

Brashear v. American Patriots, 144 S. W. 163, 161 Mo. App. 566; *Glaser v. Home Ins. Co.*, 93 N. Y. Supp. 524, 47 Misc. Rep. 89; *First Nat. Bank of New Bethlehem v. Maikranz*, 44 Pa. Super. Ct. 225; *Mellen v. United States Health & Accident Ins. Co.*, 75 Atl. 273, 83 Vt. 242; *Morgenstern v. Insurance Co. of North America*, 131 N. W. 969, 89 Neb. 459; *Ray v. Fidelity-Phoenix Fire Ins. Co.*, 65 South. 536, 187 Ala. 91; *Bank of Brunson v. Ætna Ins. Co. of Hartford, Conn.*, 203 Fed. 810, 122 C. C. A. 128; *Allen v. Phoenix Assur. Co.*, 88 Pac. 245, 12 Idaho, 653, 8 L. R. A. (N. S.) 903, 10 Ann. Cas. 328.

3561-3562. (d) Evidence, trial, and review

3561 (d). In an action on a fire policy, the burden was upon plaintiff to prove waiver of notice and proof of loss (*Globe & Rut-*

gers Ins. Co. v. Johnson [Ky.] 127 S. W. 765); but an insurance company which retains proofs of loss without objection for over a month will be presumed to have waived defects (*Bingell v. Royal Ins. Co.*, 87 Atl. 955, 240 Pa. 412).

The admissibility of evidence to prove waiver of notice or proofs was considered in the following cases:

Thompson v. Loyal Protective Ass'n, 132 N. W. 554, 167 Mich. 31; *Hughes v. Central Accident Ins. Co.*, 71 Atl. 923, 222 Pa. 462; *Higson v. North River Ins. Co.*, 67 S. E. 509, 152 N. C. 206; *Edelson v. Norwich Union Fire Ins. Co.*, 59 Pa. Super. Ct. 379; *Moran v. Franklin Life Ins. Co.*, 140 S. W. 955, 160 Mo. App. 407; *Morgenstern v. Insurance Co. of North America*, 89 Neb. 459, 131 N. W. 969; *Downs v. Michigan Commercial Ins. Co.*, 157 Ill. App. 32; *Citizens' Mut. Fire Ins. Co. v. Conowingo Bridge Co.*, 77 Atl. 378, 113 Md. 430; *Simmons v. Western Travelers' Acc. Ass'n*, 112 N. W. 365, 79 Neb. 20; *Bolton v. Inter-Ocean Life & Casualty Co.*, 187 Mo. App. 167, 172 S. W. 1187; *Southern Idaho Conference Ass'n of Seventh Day Adventists v. Hartford Fire Ins. Co.*, 145 Pac. 502, 26 Idaho, 712; *North River Ins. Co. v. Walker*, 170 S. W. 983, 161 Ky. 368; *Keeton v. National Union*, 165 S. W. 1107, 178 Mo. App. 301; *Citizens' Mut. Fire Ins. Co. v. Conowingo Bridge Co.*, 77 Atl. 378, 113 Md. 430; *Hess v. Hanover Fire Ins. Co.*, 38 Pa. Super. Ct. 151; *Royle Mining Co. v. Fidelity & Casualty Co. of New York*, 142 S. W. 438, 161 Mo. App. 185; *Germania Fire Ins. Co. v. McChristy* (Tex. Civ. App.) 101 S. W. 822.

The sufficiency of evidence to support a finding of waiver was considered in the following cases:

Rostetter v. American Ins. Co., 184 Ill. App. 157; *Thaxton v. Metropolitan Life Ins. Co.*, 55 S. E. 419, 143 N. C. 33; *Queen of Arkansas Ins. Co. v. Forlines*, 126 S. W. 719, 94 Ark. 227; *Ætna Ins. Co. of Hartford, Conn., v. Jones* (Ind. App.) 115 N. E. 697; *Bolton v. Inter-Ocean Life & Casualty Co.*, 172 S. W. 1187, 187 Mo. App. 167; *Fisk v. Fire Ass'n of Philadelphia*, 158 N. W. 947, 192 Mich. 243; *American Nat. Ins. Co. v. Donahue* (Okla.) 153 Pac. 819; *Great Eastern Casualty Co. of New York v. Reed*, 87 S. E. 904, 17 Ga. App. 613; *United Commercial Travelers of America v. Sain*, 186 Fed. 271, 108 C. C. A. 317; *Bank of Anderson v. Home Ins. Co. of New York*, 111 Pac. 507, 14 Cal. App. 208; *Citizens' Mut. Fire Ins. Co. v. Conowingo Bridge Co.*, 77 Atl. 378, 113 Md. 430; *Breeden v. Ætna Life Ins. Co.*, 122 N. W. 348, 23 S. D. 417; *Loewenstein v. Queen Ins. Co.*, 127 S. W. 72, 227 Mo. 100; *Greenough v. Phoenix Ins. Co. of Hartford*, 92 N. E. 447, 206 Mass. 247, 138 Am. St. Rep. 388; *Glazer v. Home Ins. Co.*, 82 N. E. 727, 190 N. Y. 6, reversing 98 N. Y. Supp. 979, 113 App. Div. 235, and 96 N. Y. Supp. 136, 48 Misc. Rep. 515; *Arkansas Mut. Fire Ins. Co. v. Witham*, 101 S. W. 721, 82 Ark. 226; *Continental Casualty Co. v. Mathis*, 150 S.

W. 507, 150 Ky. 477; *McCrea v. Patrons' Mut. Fire Ins. Co. of Southern Pennsylvania*, 46 Pa. Super. Ct. 618; *McLeod v. John Hancock Mut. Life Ins. Co.*, 176 S. W. 234, 190 Mo. App. 653; *Fidelity-Phoenix Fire Ins. Co. v. Sadau* (Tex. Civ. App.) 167 S. W. 334; *Utah Ass'n of Credit Men v. Home Fire Ins. Co. of Utah*, 102 Pac. 631, 36 Utah, 20; *Continental Casualty Co. v. Ogburn*, 64 South. 619, 186 Ala. 398.

3562 (d). Instruction that plaintiff could not recover because of defects in proofs of loss are properly refused, where there is evidence of a waiver.

American Ins. Co. v. Haynie, 120 S. W. 825, 91 Ark. 43; *Fidelity & Casualty Co. of New York v. Dulany*, 91 Atl. 574, 123 Md. 486.

Where a petition on a fire policy alleged specific acts as a waiver of proof of loss and on the trial uncontradicted evidence was introduced, without objection, sufficient to show a waiver thereof, but upon other grounds, the petition may be considered as amended so as to conform to the proof, and a waiver so proved fairly in issue (*St. Paul Fire & Marine Ins. Co. v. Mittendorf*, 104 Pac. 354, 24 Okl. 651, 28 L. R. A. [N. S.] 651).

17. NOTICE AND PROOFS OF MARINE LOSSES

3563. (a) Notice of loss

3563 (a). Notice given nearly a month after the boat sank was not "prompt" within the requirement of the policy and avoided the policy; no reason appearing why the owner could not have given such notice at once (*Whalen v. Western Assur. Co. of Toronto*, 185 Fed. 490, 107 C. C. A. 590).

3569. (e) Questions of practice

3569 (e). Formal proof of loss is not essential to a recovery on a marine policy under an abandonment, where the right of abandonment is the only issue (*Royal Exch. Assur. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66).

18. NOTICE AND PROOFS OF LOSS IN GUARANTY AND INDEMNITY INSURANCE

3570-3571. (a) Employers' liability insurance—Nature and necessity of notice of accident or claim

3570 (a). A provision for notice of accidents in an employer's liability policy is of essence of contract, and a breach of such pro-

vision by assured will prevent a recovery under policy on ground of nonperformance of a condition precedent, although policy contains no stipulation for forfeiture (*United States Fidelity & Guaranty Co. v. W. P. Carmichael Co.*, 190 S. W. 648, 195 Mo. App. 93).

So it is stated in *Sherwood Ice Co. v. United States Casualty Co.* (R. I.) 100 Atl. 572, that the requirement of immediate written notice of any accident must be complied with, irrespective of whether the insurer is prejudiced by the failure to give such notice, although the policy indemnifies against liability under Workmen's Compensation Act, which confines defenses to narrow limits.

In *Shafer v. United States Casualty Co.*, 156 Pac. 861, 90 Wash. 687, however, it is stated that an indemnity policy, requiring the insured to give notice of all accidents and claims therefor at the insurer's home office, and requiring all possible co-operation with the insurer, does not make such notice a condition precedent to recovery under the policy, or even of the essence of the contract.

3571-3572. (b) Same—Sufficiency of notice

3571 (b). Where in a city there was a custom, among insurance companies indemnifying employers against liability for accidents to employes, for the broker who solicits the insurance to receive notices of accidents and summonses for actions brought on account of such accidents, and the defendant company had permitted brokers to receive and transmit to it notices of accidents in and suits thereon, the delivery of a summons in such an action to the broker who effected such insurance for plaintiff with defendant, was a delivery to defendant (*Pringle v. Aetna Life Ins. Co.*, 101 S. W. 130, 123 Mo. App. 710).

So in *Maryland Casualty Co. v. W. C. Robertson & Co.* (Tex. Civ. App.) 194 S. W. 1140, evidence was held to show that agent writing employer's indemnity insurance was the agent of the insurer, so that a notice to such agent of the occurrence of the injury was sufficient.

On the other hand, where defendant casualty company's local agent was also a stockholder and general manager of plaintiff corporation which defendant had insured against injuries to employes, such agent's knowledge of an accident within the policy was not imputable to defendant so as to relieve plaintiff from the duty to give immediate notice as required by the policy (*Utica Sanitary Milk Co. v. Casualty Co. of America*, 104 N. E. 918, 210 N. Y. 399, reversing 136 N. Y. Supp. 353, 152 App. Div. 898).

3572 (b). Where under a policy the assured should give immediate notice of accident, with fullest particulars, etc., it was not intended that the answers to questions furnished by the company in case of an accident should be as certain as an answer to a complaint, and the fact that assured stated that the injured employé and another erected a staging, the fall of which caused the injury, whereas in fact the staging was erected by carpenters, did not constitute a failure to comply with the terms of the policy (*Moran Bros. Co. v. Pacific Coast Casualty Co.*, 48 Wash. 592, 94 Pac. 106).

3572-3575. (c) Same—Time of notice

3572 (c). A provision of a policy of employer's liability insurance, requiring notice of injury to an employé to be given to the insurer "at once," means within a reasonable time in view of all the circumstances.

National Surety Co. v. Western Pac. Ry. Co., 200 Fed. 675, 119 C. C. A. 91; *Empire State Surety Co. v. Northwest Lumber Co.*, 203 Fed. 417, 121 C. C. A. 527; *National Paper Box Co. v. Aetna Life Ins. Co.*, 156 S. W. 740, 170 Mo. App. 361 (delay of two years too long); *Employers' Liability Assur. Corp. v. Jones County Lumber Co.*, 72 South. 152, 111 Miss. 759 (two months' delay no defense); *Maryland Casualty Co. v. W. C. Robertson & Co.* (Tex. Civ. App.) 194 S. W. 1140 (six weeks' delay no defense); *Hagstrom v. American Fidelity Co. of Montpelier, Vt.*, 163 N. W. 670, 137 Minn. 391 (fifty-two days' delay too long); *Edgefield Mfg. Co. v. Maryland Casualty Co.*, 58 S. E. 969, 78 S. C. 73 (delay of one month no defense); *Bartels Brewing Co. v. Employers' Indemnity Co.*, 95 Atl. 919, 251 Pa. 63.

3573 (c). In some cases it is said that delay in giving insurer notice of injury to employé is not a defense, where the insurer received notice in time to make full investigation and suffered no loss or injury by reason of the delay.

Hope Spoke Co. v. Maryland Casualty Co., 143 S. W. 85, 102 Ark. 1; *Maryland Casualty Co. v. W. C. Robertson & Co.* (Tex. Civ. App.) 194 S. W. 1140.

3574 (c). Where an employer's liability policy required "immediate" notice, it did not require notice prior to the time that the assured itself acquired knowledge.

John B. Stevens & Co. v. Frankfort Marine Accident & Plate Glass Ins. Co., 207 Fed. 757, 125 C. C. A. 295, 47 L. R. A. (N. S.) 1214; *Employers' Liability Assur. Corp. v. Jones County Lumber Co.*, 72 South. 152, 111 Miss. 759.

However, insured is not excused from giving notice of an accident merely because none of its general officers or directors or any one who had the duty of adjusting differences between it and the insurer had knowledge thereof; but, while the knowledge of the driver who caused the accident is not imputable to insured, yet, if he reported it to one whose duty it was in the ordinary and natural conduct of the business to receive reports of accidents and transmit them to the general superintendent, and he failed to transmit such knowledge, insured is chargeable for his delay and neglect. *Woolverton v. Fidelity & Casualty Co. of New York*, 82 N. E. 745, 190 N. Y. 41, 16 L. R. A. (N. S.) 400, reversing 100 N. Y. Supp. 1151, and 89 N. Y. Supp. 292, 96 App. Div. 275.

3575 (c). Whether an insured in a policy of employer's liability insurance gave notice of an injury to an employé within the time required by the terms of the policy is for the jury.

Empire State Surety Co. v. Northwest Lumber Co., 203 Fed. 417, 121 C. C. A. 527; *Edgefield Mfg. Co. v. Maryland Casualty Co.*, 58 S. E. 969, 78 S. C. 73.

Where insured did not give notice of accident, but gave immediate notice of suit, insurer was required to defend at its expense; otherwise insured was required to defend at insurer's expense (*Southern States Fire Ins. Co. v. Hand-Jordan Co.*, 73 South. 578, 112 Miss. 565).

3575-3577. (d) Same—Waiver of notice

3576 (d). A prohibition in an indemnity policy against waiver of its conditions except in writing does not apply to stipulations to be performed after loss, such as giving notice and furnishing preliminary proof, and especially when the insurer actually assumes control of the litigation involved.

See *J. Frank & Co. v. New Amsterdam Casualty Co. (Cal.)* 165 Pac. 927; *Wilson v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 91 Atl. 913, 77 N. H. 344; *Rogers v. Western Indemnity Co. of Dallas, Tex.*, 173 S. W. 1087, 189 Mo. App. 82.

Similarly notice and proofs are waived by a denial of liability.

Lowe v. Fidelity & Casualty Co. of New York, 87 S. E. 250, 170 N. C. 445; *United Zinc Cos. v. General Accident Assur. Corporation*, 128 S. W. 836, 144 Mo. App. 380; *Butter Bros. v. American Fidelity Co.*, 139 N. W. 355, 120 Minn. 157, 44 L. R. A. (N. S.) 609.

An offer without prejudice to compromise, after notice unreasonably delayed, however, is not a waiver of the requirement as

to notice (*Bartels Brewing Co. v. Employers' Indemnity Co.*, 95 Atl. 919, 251 Pa. 63).

Whether the defendant insurer waived the written notice stipulated for in the policy is for the jury (*Wachs & Co. v. Fidelity & Deposit Co. of Maryland*, 93 Atl. 1007, 248 Pa. 263).

3577-3581. (e) Fidelity insurance

3577 (e). A clause in a fidelity bond requiring proof of loss within six months, is valid (*American Bonding Co. of Baltimore v. Ballard County Bank's Assignee*, 176 S. W. 368, 165 Ky. 63).

There is no merit in contention that a second notice of claim under an indemnity bond waived aggregate of net sum asserted to have been lost in first notice and in complaint in action on the bond, particularly where second notice was supplemental (*Alabama Fidelity & Casualty Co. v. Alabama Penny Sav. Bank [Ala.]* 76 South. 103).

3579 (e). A provision in a bond requiring the pledgee to give notice of any acts creating a liability at the earliest practical moment contemplates only such delay as may be reasonably necessary to acquire precise information.

Employers' Liability Assur. Corporation v. Stanley Deposit Bank, 149 S. W. 1025, 149 Ky. 735; *Rankin v. United States Fidelity & Guaranty Co.*, 99 N. E. 314, 86 Ohio St. 267.

And this is primarily a question for the jury.

Employers' Liability Assur. Corporation v. Stanley Deposit Bank, 149 S. W. 1025, 149 Ky. 735; *Fidelity & Guaranty Co. of New York v. Western Bank*, 94 S. W. 3, 29 Ky. Law Rep. 639; *Fidelity & Casualty Co. v. Bank of Timmons ville*, 139 Fed. 101, 71 C. C. A. 299; *Rankin v. United States Fidelity & Guaranty Co.*, 99 N. E. 314, 86 Ohio St. 267.

In *Dixie Fire Ins. Co. v. American Bonding Co.*, 78 S. E. 430, 162 N. C. 384, however, it was said that whether a delay of five days in giving notice of an employé's embezzlement to a company which had agreed to indemnify it against such embezzlement after the employer learned thereof was an unreasonable delay was a question of law for the court.

The sufficiency of evidence to show notice within the requirements of the policy was considered in the following cases:

Equitable Surety Co. v. Bank of Hazen, 121 Ark. 422, 181 S. W. 279; *Id.*, 121 Ark. 630, 181 S. W. 1200; *Crystal Ice Co. v. United Surety Co.*, 123 N. W. 619, 159 Mich. 102; *Ætna Indemnity Co. v. J.*

R. Crowe Coal & Mining Co., 154 Fed. 545, 83 C. C. A. 431; Dixie Fire Ins. Co. v. American Bonding Co., 78 S. E. 430, 162 N. C. 384.

3580 (e). Where the secretary and director of the corporation had knowledge on November 19th of an embezzlement by an employé, and did not notify the insurer until December 7th, such knowledge of the secretary was the knowledge of the corporation, and his neglect was a failure to perform a condition precedent to a recovery on the bond (National Discount Co. v. United States Fidelity & Guaranty Co., 94 N. Y. Supp. 457, 47 Misc. Rep. 678).

The agent of a surety company, who issued a bond insuring an employer against loss from the defalcation of a certain employé, has authority to receive notice of the employé's defalcation (Crystal Ice Co. v. United Surety Co., 123 N. W. 619, 159 Mich. 102).

Unconditional denial of liability is a waiver of the provision requiring the giving of notice.

Equitable Surety Co. v. Bank of Hazen, 121 Ark. 422, 181 S. W. 279; Id., 121 Ark. 630, 181 S. W. 1200.

The insurer's acting on the notice given waives its insufficiency.

Roark v. City Trust, Safe Deposit & Surety Co., 110 S. W. 1, 130 Mo. App. 401; United States Fidelity & Guaranty Co. v. Paxton, 106 S. W. 841, 32 Ky. Law Rep. 707; Goldman v. Fidelity & Deposit Co. of Maryland, 104 N. W. 80, 125 Wis. 390.

Where proofs of loss were retained by the company so long that, when returned with a request for new proofs, the time limited for the making of proofs had expired, any objection for insufficiency of the proofs was waived (T. M. Sinclair & Co. v. National Surety Co., 107 N. W. 184, 132 Iowa, 549).

3581 (e). Recital in supplemental statement of loss to which no objection or effort to limit was made was to be considered as evidence of fact it purported to recite (Alabama Fidelity & Casualty Co. v. Alabama Penny Sav. Bank [Ala.] 76 South. 103).

3581-3582. (f) Credit insurance

3581 (f). Compliance with the provision of a policy insuring one against losses by insolvency of customers, in excess of a certain per cent. of the total sales of insured during the term of the policy, that insured shall within 20 days after receiving information of the insolvency of any customer give insurer notice thereof, does not take the place of compliance with the provision that, in case of any claim for such an excess loss, insured shall make a final

statement of claim, to be in insurer's hands within 30 days after expiration of the policy; as in the absence of such final statement insured cannot know whether there is any excess loss (*Shedd v. American Credit-Indemnity Co. of New York*, 95 N. E. 316, 48 Ind. App. 23).

3582 (f). A provision of a bond, that the loss on any customer with whom insured had had previous experience should not be covered by the bond unless the preliminary notice of loss had attached to it a copy of the account showing the prior experience with such debtor is valid (*Steinwender v. Philadelphia Casualty Co.*, 126 N. Y. Supp. 271, 141 App. Div. 432).

In *Koblitz v. American Credit Indemnity Co.*, 110 N. E. 919, 92 Ohio St. 272, knowledge and notice to an officer of the credit indemnity company of the insolvency of a debtor were notice to the company, where by beginning an investigation it waived the mere formal notice provided for in the bond.

So where a company denied liability on other grounds, but made no complaint as to the sufficiency of the proofs of loss submitted, it could not thereafter on the trial object that the proofs of loss were insufficient (*American Credit Indemnity Co. of New York v. Hecht & Co.*, 137 Ky. 261, 125 S. W. 697, rehearing denied 137 Ky. 261, 129 S. W. 340).

The provision of a policy relating to time for proof of loss was not waived by the fact that in case of prior policies of insurer, an authorized agent of insurer had each year, and within 30 days after expiration of each policy, come to insured, and prescribed the manner in which his claim against insurer should be made out; such acts not having been subsequent to and with respect to the last contract (*Shedd v. American Credit-Indemnity Co. of New York*, 95 N. E. 316, 48 Ind. App. 23). It was also stated in the same case that under the provision in order to make insurer liable insured shall make a final statement of claim for loss, in the manner prescribed by insurer, on blanks to be furnished on application, which statement shall be in insurer's possession within 30 days after expiration of the policy, insurer is not required to prescribe the manner of making the statement prior to any application by insured for blanks.

3582. (g) New. Other forms of guaranty and indemnity insurance

3582 (g). An indemnity insurance policy providing for notice of accident requires notice in case of all accidents, not merely those

which the assured might believe likely to be made the basis of a claim.

Oakland Motor Car Co. v. American Fidelity Co., 155 N. W. 729, 190 Mich. 74; Haas Tobacco Co. v. American Fidelity Co., 178 App. Div. 267, 165 N. Y. Supp. 230; Melcher v. Ocean Accident & Guarantee Corp., 161 N. Y. Supp. 586, 175 App. Div. 77 (accidents in and adjacent to building); Aronson v. Frankfort Accident & Plate Glass Ins. Co., 99 Pac. 537, 9 Cal. App. 473 (elevator accident); A. M. Forbes Cartage Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. of Frankfort-on-the-Main, Germany, 195 Ill. App. 75 (accident caused by vehicles of assured); Piercy v. Frankfort Marine, Accident & Plate Glass Ins. Co., etc., 127 N. Y. Supp. 354, 142 App. Div. 839.

Where summons and complaint in action fixed date of accident before commencement of liability insurance policy, but were amended to allege a date within the policy, and insurer was promptly notified, failure to immediately forward the summons and first complaint to insurer, as required by the policy, does not relieve it from liability (*Press Pub. Co. v. General Accident, Fire & Life Assur. Corporation, of Perth, Scotland*, 145 N. Y. Supp. 711, 160 App. Div. 537).

Under a policy of indemnity insurance providing for notice to insurer of accidents, claims, and suits, notification and delivery of papers in matter to agent of defendant for that purpose, is a sufficient compliance with conditions of policy (*E. W. Edwards & Son v. Pacific Coast Casualty Co.*, 161 N. Y. Supp. 895, 98 Misc. Rep. 30).

But testimony that the witness sent two letters, return addressed, to the insured in an indemnity policy, containing notice of an accident to a person in his elevator, and that they were not returned, is insufficient to show notice in opposition to positive testimony that they were not received (*Shafer v. United States Casualty Co.*, 156 Pac. 861, 90 Wash. 687).

A provision in an accident indemnity policy that the insured shall give immediate written notice of any accident is a reasonable requirement, but the "immediately" is to be reasonably construed in connection with the circumstances.

Chapin v. Ocean Accident & Guarantee Corporation, 147 N. W. 465, 96 Neb. 213, 52 L. R. A. (N. S.) 227; *Sherwood Ice Co. v. United States Casualty Co.* (R. I.) 100 Atl. 572.

Under a policy of accident indemnity insurance, stipulating for immediate written notice by the assured of accident, only duty of
(1490)

assured is to give notice when he receives notice, or in exercise of reasonable care would have received notice thereof.

Frank Parmelee Co. v. *Ætna Life Ins. Co.*, 166 Fed. 741, 92 C. C. A. 403; *Christatos v. New England Casualty Co.*, 159 N. Y. Supp. 700, 95 Misc. Rep. 534; *Lucas v. New Amsterdam Casualty Co.*, 162 N. Y. Supp. 191, 97 Misc. Rep. 618; *Piercy v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, etc., 127 N. Y. Supp. 354, 142 App. Div. 839; *Schambelan v. Preferred Accident Ins. Co.*, 62 Pa. Super. Ct. 445; *Melcher v. Ocean Accident & Guarantee Corp.*, 161 N. Y. Supp. 586, 175 App. Div. 77.

Nor is notice required where the party injured makes disclaimer (*Lucas v. New Amsterdam Casualty Co.*, 162 N. Y. Supp. 191, 97 Misc. Rep. 618).

Where, however, insured knew of an accident immediately after its occurrence, and within a month knew that the injured person intended to hold him for damages, but gave insurer no notice until two months thereafter, and then merely by means of a telephone message as to the occurrence of the accident, insurer was not liable (*Barclay v. London Guarantee & Accident Co.*, 105 Pac. 865, 46 Colo. 558).

So it has been held that "immediate notice" is not satisfied by notice given nine months after the accident (*Aronson v. Frankfurt Accident & Plateglass Ins. Co.*, 99 Pac. 537, 9 Cal. App. 473); nor by notice three months after the accident (*Oakland Motor Car Co. v. American Fidelity Co.*, 155 N. W. 729, 190 Mich. 74).

Insured has the burden of showing that a due and timely notice has been given where the receipt thereof is not admitted (*Piercy v. Frankfort Marine Accident & Plate Glass Ins. Co.*, etc., 127 N. Y. Supp. 354, 142 App. Div. 839); and what would be a reasonable time within which to give notice, in view of all the circumstances, is ordinarily a question of fact, though if the facts are undisputed, and only one reasonable conclusion can be drawn therefrom, it is a question of law (*George A. Hormel & Co. v. American Bonding Co. of Baltimore*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. [N. S.] 513).

In *Le Blanc v. Standard Ins. Co.*, 95 Atl. 284, 114 Me. 6, under Rev. St. c. 49, § 93, a stipulation in an indemnity policy as to written notice of claim was held waived by the local agent and attorneys of insurer.

In *Barclay v. London Guarantee & Accident Co., Limited*, 105 Pac. 865, 46 Colo. 558, however, the conduct of insurer's agent and

his attorney in taking statements of various persons as to the accident did not amount to a waiver of the conditions as to notice; the agent having previously informed insured that the insurer would not accept liability.

So it has been held that an insurer's undertaking of the defense of an action covered by its policy, in ignorance of the fact that the insured, though it had knowledge of the accident, failed to give notice as required, is not a waiver of the provision in the policy requiring notice (*Oakland Motor Car Co. v. American Fidelity Co.*, 155 N. W. 729, 190 Mich. 74).

In *Kitsap County Transp. Co. v. Pacific Coast Casualty Co.*, 121 Pac. 457, 67 Wash. 297, evidence of neglect of insurer to defend claim was held inadmissible for assured in a suit on a casualty policy.

(1492)

XXVI. ADJUSTMENT OF LOSS

1. ADJUSTMENT IN GENERAL

3584-3588. (a) Effect of adjustment

3585 (a). Where an insured and insurer have adjusted a loss, the insured need not, if the insurer refuses to pay, prove his loss or any of the circumstances concerning it; the parties being bound by their voluntary agreement, regardless of any defenses, in the absence of mistake or fraud.

Ralph Brown Co. v. Norwich Union Fire Ins. Society (C. C.) 180 Fed. 933; Gaffey v. St. Paul Fire & Marine Ins. Co., 221 N. Y. 113, 116 N. E. 778, overruling 164 App. Div. 381, 149 N. Y. Supp. 859; Michigan Idaho Lumber Co. v. Northern Fire & Marine Ins. Co., 160 N. W. 130, 35 N. D. 244; McDonald v. Aetna Life Ins. Co. of Hartford, Conn. (Tex. Civ. App.) 187 S. W. 1005; Beerly v. Globe Indemnity Co. of New York, 194 Ill. App. 334; O'Connell v. American Fire Ins. Co. of Philadelphia (C. C.) 189 Fed. 1018; Gerlach v. Grain Shippers' Mut. Fire Ins. Ass'n, 156 Iowa, 333, 136 N. W. 691; Roane v. Union Pac. Life Ins. Co., 67 Or. 264, 135 Pac. 892; Brady v. New Jersey Fidelity Ins. Co., 167 S. W. 1171, 180 Mo. App. 214; Smith v. Mutual Reserve Fund Life Ass'n, 140 Ill. App. 409; Bergeron v. Modern Brotherhood of America, 119 N. W. 681, 83 Neb. 419; Booth & Boyd Lumber Co. v. Caledonian Ins. Co. (Mich.) 162 N. W. 955; Pennsylvania Fire Ins. Co. v. Draper, 65 South. 923, 187 Ala. 103; Gerlach v. Grain Shippers' Mut. Fire Ins. Ass'n, 136 N. W. 691, 156 Iowa, 333.

3586 (a). The question of the validity of a life insurance policy, because insured falsely stated in his application that he had not applied to any other insurer for insurance and been rejected, is one about which reasonable men may entertain a substantial doubt, and a compromise of the claim under the policy is not without consideration (Western & Southern Life Ins. Co. v. Quinn, 113 S. W. 456, 130 Ky. 397).

Where a payment of a sum less than due on a life policy was not made by way of compromise, the beneficiary could sue on the policy for the full amount due.

Dodt v. Prudential Ins. Co. of America, 171 S. W. 655, 186 Mo. App. 168; Mecca Fire Ins. Co. v. Blohopolo (Tex. Civ. App.) 141 S. W. 358; Northwestern Nat. Life Ins. Co. v. Blasingame, 85 S. W. 819, 38 Tex. Civ. App. 402; Head v. New York Life Ins. Co., 241 Mo.

403, 147 S. W. 827; *Id.*, 241 Mo. 420, 147 S. W. 832; *Biddlecom v. General Accident Assur. Corporation*, 152 S. W. 103, 167 Mo. App. 581.

Where an adjustment of fire losses was completed and agreed to, and the total amount of the loss was properly ascertained, but the amount chargeable to one company was erroneous, because of a coinsurance clause in its policy, there was an implied promise to pay the sum justly apportionable to such company according to its policy, and it was not required to pay a larger sum because of a misconception of its adjuster and the insured (*Hayes Pump & Planter Co. v. Assurance Co. of America*, 182 Ill. App. 380).

Some cases have stated that after the adjustment, the adjustment was prima facie proof of the amount due under the policy (*German Fire Ins. Co. of Freeport, Ill., v. Gibbs, Wilson & Co.*, 92 S. W. 1068, 42 Tex. Civ. App. 407, rehearing denied 96 S. W. 760, 42 Tex. Civ. App. 407).

In *Bond v. National Fire Ins. Co.*, 88 S. E. 389, 77 W. Va. 736, however, it was stated that an ascertainment of an insurance loss does not necessarily import a promise to pay it. An adjustment of the amount of loss is not equivalent to an agreement to pay the amount as adjusted.

3587 (a). Where a fire insurance company neglected to promptly settle a loss in accordance with an agreement of the adjuster representing them, the insured was released from the agreement and not precluded by it from claiming the full amount of her loss (*Wanner v. Manufacturers' & Merchants' Mut. Fire Ins. Co.*, 91 Atl. 498, 245 Pa. 80).

3588-3589. (b) Fraud in adjustment

3588 (b). An adjustment of a loss under a fire policy may be set aside, on a showing that it was fraudulent, or made through a mistake of fact.

German Ins. Co. v. Gibbs, Wilson & Co., 92 S. W. 1068, 42 Tex. Civ. App. 407, rehearing denied 96 S. W. 760, 42 Tex. Civ. App. 407; *Shockey v. Fidelity-Phenix Fire Ins. Co. of New York* (Mo. App.) 191 S. W. 1049; *Prussian Nat. Ins. Co. of Stettin, Germany, v. Terrell*, 135 S. W. 416, 142 Ky. 732; *Travelers' Protective Ass'n of America v. Smith* (Ind.) 101 N. E. 817; *Johnson v. Minnesota Farmers' Mut. Ins. Co.*, 150 N. W. 174, 128 Minn. 1; *Independent Life Ins. Co. v. Evans*, 172 S. W. 105, 162 Ky. 150; *Sovereign Camp, Woodmen of the World, v. Bridges*, 165 Fed. 342, 91 C. C. A. 328, reversing 104 S. W. 672, 7 Ind. T. 433; *Hartford Life Ins. Co. v.*

Sherman, 78 N. E. 923, 223 Ill. 329, affirming 123 Ill. App. 202; Steinberg v. Boston Ins. Co., 144 App. Div. 110, 128 N. Y. Supp. 994.

A misstatement of fact in the proof of loss, made after the insurer and the insured have settled the damages in dispute, is not a proper subject of suit or defense, where the insurer did not rely on the misstatement, and it was perfunctorily made without fraudulent intent.

Springfield Fire & Marine Ins. Co. v. Peterson, 140 N. W. 760, 93 Neb. 446; Peterson v. Hartford Fire Ins. Co., 140 N. W. 761, 93 Neb. 448.

3589 (b). The owner of a vessel, who, after obtaining complete knowledge of the facts, delayed several years in seeking to set aside his compromise settlement of loss with insurers, was guilty of laches (*Loud v. Federal Ins. Co.* [Mich.] 161 N. W. 928).

3589-3590. (d) Persons bound by adjustment

3590 (d). In a suit brought by an assignee of the policy, defendant is not bound by an adjustment of a loss under the policy, made after the assignment between the insurer and the assignor, unless the assignor acted as the authorized agent of the assignee (*Georgia Co-operative Fire Ass'n v. Borchardt & Co.*, 51 S. E. 429, 123 Ga. 181, 3 Ann. Cas. 472).

So the assignee of the owner of matches covered by a policy, and stored with insured as a bailee for hire, is not affected by a settlement between the insured and the insurer with knowledge of the owner's claim; there being no estoppel or waiver (*Czerweny v. National Fire Ins. Co. of Hartford* [Sup.] 139 N. Y. Supp. 345).

3590. (e) Powers of agents

3590 (e). The company will be bound by an adjustment or compromise by any officer or agent whom it authorizes to represent it in the adjustment of the loss.

Wilms v. New Hampshire Fire Ins. Co., 161 N. W. 940, 194 Mich. 656; *Bond v. National Fire Ins. Co.*, 88 S. E. 389, 77 W. Va. 736; *Yost v. Empire State Surety Co.*, 125 Pac. 167, 69 Wash. 397; *St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co.*, 157 Fed. 625, 87 C. C. A. 14, 14 L. R. A. (N. S.) 1161; *Gray v. Merchants' Ins. Co.*, 125 Ill. App. 370; *Continental Ins. Co. v. Rosenberg*, 74 Atl. 1073, 7 Pennewill (Del.) 174.

So, even though claim agent of liability insurer was without actual authority to make settlement which he did make, insurer could

waive want of authority and ratify settlement, and did so by failing to repudiate it.

Griffith v. Frankfort General Ins. Co., 159 N. W. 19, 34 N. D. 540;
Roane v. Union Pac. Life Ins. Co., 135 Pac. 892, 67 Or. 264.

The adjuster of a company which insured plaintiff's automobile against theft has, however, no implied authority to bind the company to pay the cost of repairs made necessary by causes not covered by the policy (*Chisholm v. Royal Ins. Co.*, 114 N. E. 715, 225 Mass. 428); and an attorney, whom an employer's liability insurer forbade to make a settlement with an employé of a railroad company of a policy for more than \$500, but whom the railroad company authorized to pay \$2,500 if necessary, and who made settlement for \$2,150, acted for the railroad company, and not for the insurer; and hence his acts created no estoppel against the insurer as to the amount of its liability to the railroad company (*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.*, 52 South. 787, 97 Miss. 165).

An "adjuster" or "insurance adjuster," defined by *Laws Wash.* 1911, p. 163, § 2, is without authority to waive any rights of insurer, unless authority is conferred (*Manheim v. Standard Fire Ins. Co. of Hartford, Conn.*, 145 Pac. 992, 84 Wash. 16).

Whether the agents who issued the policy were treated by the parties as the agents of the defendant may under the evidence be a question for the jury (*Frost v. North British & Mercantile Ins. Co. of London & Edinburgh*, 60 Atl. 803, 77 Vt. 407).

3590-3591. (f) Actions on adjustment

3590 (f). In *Hall v. Allemannia Fire Ins. Co. of Pittsburgh*, 161 N. Y. Supp. 1091, 175 App. Div. 289, it was held that insurer had no absolute right to require insured to elect whether he would rely on cause of action on policy or on insurer's adjustment agreement.

3591 (f). A letter of an insurance adjuster, stating that the company could replace the property for a stated sum, and, "as this represents the value of the car destroyed, * * * we inclose proof of loss for \$750 for execution and return," is an admission of liability for the amount stated (*Hart v. Springfield Fire & Marine Ins. Co.*, 66 South. 558, 136 La. 114).

3594. (j) Employers' liability insurance

3594 (j). In *Mears Mining Co. v. Maryland Casualty Co.*, 144 S. W. 883, 162 Mo. App. 178, acts of employer and an indemnity in-
(1496)

insurance company were held not to amount to an agreement to pro-rate the amount of a judgment paid.

Employers' liability insurer cannot avail itself of favorable settlement with employ   injured, and keep back money it agreed on settlement to pay employer, under claim that advance by employer to employ   of such sum was in violation of insurance contract (*Griffith v. Frankfort General Ins. Co.*, 159 N. W. 19, 34 N. D. 540).

2. NECESSITY OF ARBITRATION OR APPRAISAL

3595-3598. (a) Validity of arbitration clause—General rules

3597 (a). It is competent to stipulate in a fire policy that the submission to arbitration of the amount of damage or any similar matters shall be a condition precedent to a right of action; such an agreement not depriving the courts of jurisdiction of the general question of liability.

Knapp v. Brotherhood of American Yeomen, 117 N. W. 298, 139 Iowa, 136; *Early v. Providence & Washington Ins. Co.*, 31 R. I. 225, 76 Atl. 753, 140 Am. St. Rep. 750; *Same v. Royal Exch. Assur. Co.* (R. I.) 76 Atl. 756; *Dunton v. Westchester Fire Ins. Co.*, 71 Atl. 1037, 104 Me. 372, 20 L. R. A. (N. S.) 1058; *Second Society of Universalists in Town of Boston v. Royal Ins. Co.*, 109 N. E. 384, 221 Mass. 518, Ann. Cas. 1917E, 491; *Doherty v. Phoenix Ins. Co.*, 112 N. E. 940, 224 Mass. 310 (under statute); *Messler v. Williamsburgh City Fire Ins. Co. of Brooklyn, N. Y.* (R. I.) 94 Atl. 875, rehearing denied *Same v. Williamsburgh City Fire Ins. Co. of Brooklyn, N. Y.* (R. I.) 95 Atl. 601.

3598 (a). In construing provisions requiring submission of controversies under a fire insurance policy to disinterested persons, it is immaterial whether the persons are designated as referees or appraisers, and whether their decision is called an award or an appraisal (*Hanley v.   tna Ins. Co.*, 102 N. E. 641, 215 Mass. 425, Ann. Cas. 1914D, 53).

In *Riddell v. Rochester German Ins. Co. of New York*, 36 R. I. 240, 89 Atl. 833, rehearing denied (R. I.) 90 Atl. 170, it was held that an agreement in a fire policy to submit the amount of loss to appraisers contemplates the making of an appraisal and also of an "award," which is the finding or judgment based upon the appraisal.

3598-3601. (b) Same—Variations and exceptions to the rule

3600 (b). A covenant in a policy that any disagreement as to the amount of a loss shall be referred to two appraisers chosen by

(1497)

the parties, and to an umpire selected by the appraisers, is revocable, and the insured may bring an action at law on the policy without taking any steps to have a dispute between himself and the company as to the amount of the loss referred to the appraisers (*Rubenstein v. Dixie Fire Ins. Co.*, 51 Pa. Super. Ct. 447).

3602-3605. (d) Same—Statutory provisions

3603 (d). Rev. St. Mo. 1899, § 7979 (Ann. St. 1906, p. 3793), declares that no company shall take a risk on any property for more than three-fourths of its value, and, when taken, its value shall not be questioned in any proceeding. Under this statute it has been held that where, on a claim of total loss, defendant's adjusters did not deny the value of the property insured at the time of the insurance, but asserted that the amount of goods destroyed did not equal in value the amount insured by from 20 to 35 per cent. to which insured refused to agree, he could not recover on the policy without complying with a condition that, in the event of a disagreement as to the amount of the loss, it should be settled by appraisers (*Gragg & Gragg v. Northwestern Nat. Ins. Co.*, 111 S. W. 1184, 132 Mo. App. 405).

3605 (d). The fact that the Legislature put forward the standard fire policy as a form for a contract to be executed by the parties affords no reason for giving to the arbitration clause any different construction from that before given by the courts to all similar contracts made without legislative sanction (*Dunton v. Westchester Fire Ins. Co.*, 71 Atl. 1037, 104 Me. 372, 20 L. R. A. [N. S.] 1058).

3605-3606. (e) Compliance with agreement to submit to arbitration as essential or collateral—General rules

3605 (e). Where no condition making the arbitration a condition precedent to action is expressed in the contract, or necessarily to be implied from its terms, the agreement for submitting the amount to arbitration is collateral and independent.

Chadwick v. Phoenix Accident & Sick Ben. Ass'n, 106 N. W. 1122, 143 Mich. 481, 8 Ann. Cas. 170; *National Live Stock Ins. Co. v. Wolfe*, 106 N. E. 390, 59 Ind. App. 418; *Graham v. German American Ins. Co.*, 79 N. E. 930, 75 Ohio St. 374, 15 L. R. A. (N. S.) 1055, 9 Ann. Cas. 79.

3606 (e). If there is an express stipulation forbidding any suit or action on the policy until after compliance with the provisions in (1498)

relation to appraisement or arbitration, there can be no action maintained until such provisions have been met.

Stevens v. Norwich Union Fire Ins. Co., 96 S. W. 684, 120 Mo. App. 88; *North British & Mercantile Ins. Co. v. Robinett & Green*, 112 Va. 754, 72 S. E. 668; *Commercial Union Assur. Co. v. Dalzell*, 210 Fed. 605, 127 C. C. A. 241; *Wilson v. Central Ins. Co., Limited*, 119 N. Y. Supp. 955, 135 App. Div. 649; *Graham v. German American Ins. Co.*, 79 N. E. 930, 75 Ohio St. 374, 15 L. R. A. (N. S.) 1055, 9 Ann. Cas. 79; *Baumgarth v. Firemen's Fund Ins. Co. of San Francisco, California*, 116 N. W. 449, 152 Mich. 479; *St. Paul Fire & Marine Ins. Co. v. Kirkpatrick*, 164 S. W. 1186, 129 Tenn. 55; *Grady v. Home Fire & Marine Ins. Co.*, 63 Atl. 173, 27 R. I. 435, 4 L. R. A. (N. S.) 288.

An effort, however, to obtain arbitration of a disputed claim arising under a fire insurance policy is not a condition precedent to suit if it appears that an effort at arbitration would have been idle and unavailing (*Retail Merchants' Ass'n Mut. Fire Ins. Co. of Illinois v. Cox*, 138 Ill. App. 14), as where the company denies liability.

Harowitz v. Concordia Fire Ins. Co., 168 S. W. 163, 129 Tenn. 691; *Oklahoma Fire Ins. Co. v. Mundel*, 141 Pac. 415, 42 Okl. 270; *Bank of Anderson v. Home Ins. Co. of New York*, 111 Pac. 507, 14 Cal. App. 208.

In *Teter v. Norfolk Fire Ins. Corporation*, 74 W. Va. 461, 82 S. E. 201, it was held that proof of compliance with a stipulation to arbitrate a loss, or of excuse for noncompliance, is a condition precedent to the right to recover for a partial loss on a valued fire insurance policy on real estate.

3607-3609. (g) Same—"Loss not payable" until after appraisement

3607 (g). Where the policies provide the sum for which the insurer is liable shall not become payable until 60 days after the award by the arbitrators has been received by the insurer, when an appraisal has been required, or that no suit on the policy shall be sustainable until compliance by insured with such requirements, arbitration and award are conditions precedent to right of action, where the insurer has demanded the same.

Southern Home Ins. Co. v. Faulkner, 49 South. 542, 57 Fla. 194, 131 Am. St. Rep. 1098; *Grady v. Home Fire & Marine Ins. Co.*, 63 Atl. 173, 27 R. I. 435, 4 L. R. A. (N. S.) 288.

3610. (i) Same—Co-operative societies

3610 (i). A member of a mutual fire insurance company cannot sue on a policy until he has exhausted the remedy for adjustment provided by the contract (*Allen v. Patrons' Mut. Fire Ins. Co. of Michigan*, 165 Mich. 18, 130 N. W. 196).

3610-3612. (j) Compliance with submission to arbitration as essential or collateral

3610 (j). Under Rev. St. Mo. 1909, § 868, provisions in insurance policies which enforce arbitration or settlement are unenforceable, and compliance therewith is not a condition precedent to a suit on such a contract (*Young v. Pennsylvania Fire Ins. Co.*, 269 Mo. 1, 187 S. W. 856).

3612-3614. (k) Necessity of disagreement

3612 (k). Where the value of insured property was uncertain and the quantity of that which was destroyed by fire was in dispute, a case was presented for an appraisal under a clause providing for an appraisal in the event of a disagreement as to the amount of the loss (*James v. Insurance Co. of State of Illinois*, 115 S. W. 478, 135 Mo. App. 247).

So a provision in a fire policy, imposing a duty on insured, in the event of disagreement as to the amount of loss, to procure an award or ascertainment of the loss by appraisers, does not constitute a condition precedent, unless there is a disagreement as to the amount of the loss.

Phoenix Ins. Co. of Hartford, Conn., v. Adams (Ky.) 127 S. W. 1008; *Phoenix Fire Assur. Co. v. Murray*, 187 Fed. 809, 109 C. C. A. 569; *Kelly v. Liverpool & London & Globe Ins. Co.*, 102 N. W. 380, 94 Minn. 141, 110 Am. St. Rep. 351; *Ohio Farmers' Ins. Co. v. Titus*, 82 Ohio, 161, 92 N. E. 82; *Williams v. American Ins. Co.*, 196 Ill. App. 370; *Bergeron v. Mechanics' & Traders' Ins. Co.*, 226 Mass. 236, 115 N. E. 318.

3614 (k). An agreement that the appraisers should submit their differences to an umpire means that, on failure to agree on certain items, they should be submitted to him for his independent judgment (*Kirkham v. German American Ins. Co.*, 141 Pac. 1012, 92 Kan. 941).

3616-3617. (m) Necessity of demand—"When appraisal has been required"

3616 (m). Under a provision for an appraisal, it is as much the duty of the insurer as the insured to demand an appraisal;

(1500)

and such demand by the insured is not a condition precedent to an action on a policy.

Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35; American Ins. Co. of Newark, N. J., v. Rodenhouse, 36 Okl. 211, 128 Pac. 502; Rochester German Ins. Co. of Rochester, N. Y., v. Rodenhouse, 36 Okl. 378, 128 Pac. 508; Blake v. Farmers' Mut. Lightning Protected Fire Ins. Co. of Michigan, 194 Mich. 589, 161 N. W. 890; Goldberg v. Provident Washington Ins. Co., 87 S. E. 1077, 144 Ga. 783.

3617 (m). It was stated in American Ins. Co. of Newark, N. J., v. Rodenhouse, 36 Okl. 211, 128 Pac. 502, that the word "required" implies more than the existence of some fact making a thing necessary, and includes a request or demand as an element of the necessity.

All verbal demands for an appraisement are merged in a subsequent written demand therefor (Citizens' Ins. Co. v. Herpolsheimer, 77 Neb. 232, 109 N. W. 160).

That assignees of a fire policy instituted suit without demanding appraisal will not, where they dismissed the suit and demanded appraisal within time, prevent recovery in a subsequent action (Jacobs v. Queen Ins. Co. of America [Mich.] 161 N. W. 936).

3621-3624. (p) Time of making demand

3623 (p). Under Rev. Laws Okl. 1910, § 967, the right to inspect and appraise given by a standard insurance policy must be demanded within a reasonable time, not exceeding 60 days, after receipt of proof of loss (Springfield Fire & Marine Ins. Co. v. Hays & Sons [Okl.] 156 Pac. 673, L. R. A. 1917A, 1078).

In Winchester v. North British & Mercantile Ins. Co. of London & Edinburgh, 160 Cal. 1, 116 Pac. 63, 35 L. R. A. (N. S.) 404, it was held that a fire policy requiring written notice for the appointment of appraisers by either party, and stipulating that the loss shall be payable 60 days after proof of damage and award by appraisers when required, requires insurer desiring the appointment of appraisers to serve on insured written notice within 60 days after proof of loss or the right to arbitration is waived, and insured need not thereafter submit to arbitration but may sue on the policy, and such notice must actually be received by insured within the specified time.

So under a fire policy requiring demand for appraisement to be made by the insurer within 90 days after submission of proof of

loss, a notice mailed within 90 days but received by the insured on the ninety-first day is too late (*Covey v. National Union Fire Ins. Co. of Pittsburgh*, 161 Pac. 35, 31 Cal. App. 579).

In *Langsner v. German Alliance Ins. Co.*, 123 N. Y. Supp. 144, 67 Misc. Rep. 411, it was held under substantially similar provisions in the policy that insurer has not an absolute right to wait until the last moment before the loss becomes payable, in the absence of an appraisal, and then demand an appraisal; but the demand must be made in a reasonable time, depending on the facts of the case.

3624-3625. (q) Property totally destroyed

3624 (q). Where the loss of a house by fire is total, an insurer has no right to demand arbitration of the amount of loss, though the policy provides for it.

Hinkle v. North River Ins. Co., 70 W. Va. 681, 75 S. E. 54 (statutory); *Stevens v. Norwich Union Fire Ins. Co.*, 96 S. W. 684, 120 Mo. App. 88 (statutory); *Teter v. Franklin Fire Ins. Co.*, 74 W. Va. 344, 82 S. E. 40 (statutory); *Springfield Fire & Marine Ins. Co. v. Homewood*, 32 Okl. 521, 122 Pac. 196 (statutory); *Prather v. Connecticut Fire Ins. Co.*, 188 Mo. App. 653, 176 S. W. 527 (statutory); *German-American Ins. Co. v. McBee*, 31 Ohio Cir. Ct. R. 469.

3625 (q). If an actual partial loss is greater than the insurance, a reference to arbitrators is not a condition precedent to recovery; but if the actual loss is less than the insurance, such reference is a condition precedent (*Oppenheim v. Fireman's Fund Ins. Co.*, 138 N. W. 777, 119 Minn. 417).

In *Hart v. Springfield Fire & Marine Ins. Co.*, 136 La. 114, 66 South. 558, it was said that the total destruction of movable property does not annul a provision for an appraisal stating separately the sound value and the damage and limiting the insurer's liability to the cash value of the property at the time the loss occurs.

3626-3627. (s) Rights of parties after failure of arbitration

3626 (s). Where a policy provides for arbitration of the amount of the loss, if any, as a condition precedent to insured's right of action on the policy, a mere attempt to have the loss determined by arbitration, which fails without the fault or misconduct of either party, does not constitute a compliance with the condition, and does not entitle assured, in the absence of a waiver thereof, to sue on

the policy without compliance with a further demand for new arbitration.

Baumgarth v. Firemen's Fund Ins. Co., 116 N. W. 449, 152 Mich. 479;
Riddell v. Rochester German Ins. Co. of New York, 36 R. I. 240,
 89 Atl. 833, rehearing denied 90 Atl. 170; *Grady v. Home Fire &*
Marine Ins. Co., 63 Atl. 173, 27 R. I. 435, 4 L. R. A. (N. S.) 288.

3627 (s). In many cases it has been held, however, that where the appraisers are unable to agree the insured may maintain an action at law on the policy notwithstanding the arbitration clause.

Coffin v. German Fire Ins. Co., 126 S. W. 253, 142 Mo. App. 295; *Lancashire Ins. Co. v. Lyon*, 124 Ill. App. 491; *Koch v. Home Ins. Co.*, New York, 185 Ill. App. 34; *Spring Garden Ins. Co. v. Amusement Syndicate Co.*, 178 Fed. 519, 102 C. C. A. 29; *Jerrils v. German-American Ins. Co. of New York*, 108 Pac. 114, 82 Kan. 320, 28 L. R. A. (N. S.) 104, 20 Ann. Cas. 251; *Sharp v. Niagara Fire Ins. Co.*, 147 S. W. 154, 164 Mo. App. 475; *Post v. American Central Ins. Co.*, 51 Pa. Super. Ct. 352; *Providence-Washington Ins. Co. v. Kennington*, 111 Miss. 244, 71 South. 378; *Bernhard v. Rochester German Ins. Co.*, 65 Atl. 134, 79 Conn. 388, 8 Ann. Cas. 298; *Slepski v. German Fire Ins. Co. of Peoria*, 141 Ill. App. 614; *Home Ins. Co. of New York v. M. Schiff's Sons*, 64 Atl. 63, 103 Md. 648; *Shawnee Fire Ins. Co. of Topeka, Kan., v. Pontfield*, 72 Atl. 835, 110 Md. 353, 132 Am. St. Rep. 449; *Jerrils v. German-American Ins. Co. of New York*, 108 Pac. 114, 82 Kan. 320, 28 L. R. A. (N. S.) 104, 20 Ann. Cas. 251; *Slepski v. German Fire Ins. Co. of Peoria*, 141 Ill. App. 614.

Where in the event of a disagreement as to the amount of a loss the policy provided for appraisers to determine the loss, and the appraisers were chosen and selected an umpire, if such appraisal is brought to a close before completion, or the final award is made invalid by default of one of the parties to the agreement, the other party is not bound to enter into a new appraisalment.

Fire Ass'n of Philadelphia v. Appel, 80 N. E. 952, 76 Ohio St. 1;
St. Paul Fire & Marine Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 164 S. W. 1186.

3627-3629. (t) Pleading and practice

3627 (t). Where a fire policy provides in case of loss for the appraisal before action brought, a complaint in an action on the policy is insufficient if it does not allege that the amount of loss has been determined by agreement or stipulation or that the provision has been waived.

Early v. Providence & Washington Ins. Co., 31 R. I. 225, 76 Atl. 553,
 140 Am. St. Rep. 750; *Same v. Royal Exch. Assur. Co. (R. I.)* 76

Atl. 756; *Leu v. Commercial Mut. Fire Ins. Co.*, 107 N. W. 59, 15 N. D. 360.

It has also been stated, however, that failure to allege performance of the condition can only be taken advantage of by a special plea.

Knapp v. Brotherhood of American Yeomen, 105 N. W. 63, 128 Iowa, 566; *Concordia Fire Ins. Co. v. Bowen*, 121 Ill. App. 35; *Concordia Fire Ins. Co. v. Bowen*, 121 Ill. App. 35; *Torpedo Top Co. v. Royal Ins. Co.*, 162 Ill. App. 338.

A plea setting up that an award by the appraisers was a condition precedent to an action by the mortgagee was demurrable, where the existence of all the conditions making the award essential were not set out (*Reed v. Newark Fire Ins. Co.*, 74 N. J. Law, 400, 65 Atl. 1053).

Where insured avers that there was no disagreement as to the amount of the loss and that he has performed all the conditions on his part, a provision in the policy imposing a duty on insured, in the event of disagreement as to the amount of loss, to procure an award of the loss by appraisers, is not put in issue by a general denial, but must be pleaded by the insurer, to make it an issue and place upon insured the burden of proving the waiver thereof (*Ohio Farmers' Ins. Co. v. Titus*, 82 Ohio St. 161, 92 N. E. 82).

3628 (t). A letter written by insured to the insurer, in which he insisted that disinterested appraisers be appointed to determine the amount of damages, is admissible, as showing that the insured was not refusing to submit the question of his loss to an appraisal (*Western Underwriters' Ass'n v. Hankins*, 77 N. E. 447, 221 Ill. 304, affirming 122 Ill. App. 600).

Whether parties to a fire policy endeavored to prevent an appraisal, so that the provision of the policy, making an appraisal a condition precedent to an action, ceases to have force, is a question for the jury (*Carp v. National Assur. Co.* [Mo. App.] 99 S. W. 523); but the substantial facts not being in dispute, the question whether an insurer demanded an appraisal in a reasonable time after filing of proof of loss is a question for the court (*Langsner v. German Alliance Ins. Co.*, 123 N. Y. Supp. 144, 67 Misc. Rep. 411).

The sufficiency of evidence was considered in *Slepski v. German Ins. Co. of Peoria*, 141 Ill. App. 614; *Kent & Purdy Paint Co. v. Aetna Ins. Co.*, 165 Mo. App. 30, 146 S. W. 78.

An instruction that if the adjuster did not in good faith try to agree with insured as to the amount of the loss, but took the posi-
(1504)

tion that the loss was the specified sum offered, there was no disagreement, and insurer waived its right to submit the matter to appraisers, was misleading as authorizing the jury to infer that insurer did not try to agree with insured as to the amount of loss from the fact that it made an offer of settlement (*James v. Insurance Co. of State of Illinois*, 115 S. W. 478, 135 Mo. App. 247).

3. VALIDITY AND EFFECT OF ARBITRATION

3629-3630. (a) Nature in general

3630 (a). Appraisers are required to act with impartiality, to fix the time for their meeting, and notify the parties, to proceed in a judicial manner, to hear evidence, and investigate the claims of insured, and arrive at a reasonable, just, and fair conclusion, after hearing evidence, as to the rights of the respective parties, and should act without regard to the manner of their appointment (*Mason v. Fire Ass'n of Philadelphia*, 23 S. D. 431, 122 N. W. 423).

A provision for appraisal, however, is not subject to the strict rules governing arbitration and awards.

American Steel Co. v. German-American Fire Ins. Co., 187 Fed. 730, 109 C. C. A. 478; *Mason v. Fire Ass'n of Philadelphia*, 23 S. D. 431, 122 N. W. 423.

3631-3633. (b) Effect of award in general—Form of award

3631 (b). Where the amount of loss, or any question touching the liability of the insurer, is submitted to arbitrators or appraisers under an agreement that the question shall be determined by their award, both parties will, in the absence of fraud or misconduct, be conclusively bound thereby, so that the matter cannot be again litigated in the courts.

Paris v. Hamburg-Bremen Fire Ins. Co. of Germany, 90 N. E. 420, 204 Mass. 90; *Bellinger v. German Ins. Co. of Freeport*, 82 N. E. 1124, 189 N. Y. 533, affirming 100 N. Y. Supp. 424, 113 App. Div. 917; *Billmyer v. Hamburg-Bremen Fire Ins. Co.*, 49 S. E. 901, 57 W. Va. 42; *Mayer v. Phoenix Assur. Co.*, 108 N. Y. Supp. 711, 124 App. Div. 241; *Solem v. Connecticut Fire Ins. Co.*, 41 Mont. 351, 109 Pac. 432; *Steinberg v. Boston Ins. Co.*, 144 App. Div. 110, 128 N. Y. Supp. 994; *Commercial Union Assur. Co. v. Dalzell*, 210 Fed. 605, 127 C. C. A. 241; *Eberhardt v. Federal Ins. Co.*, 14 Ga. App. 340, 80 S. E. 856; *Union Marine Ins. Co. v. Charlie's Transfer Co.*, 186 Ala. 443, 65 South. 78; *Doherty v. Phoenix Ins. Co.*, 112 N. E. 940, 224 Mass. 310; *Young v. Pennsylvania Fire Ins. Co.*, 269 Mo. 1, 187 S. W. 856; *Joyce v. St. Paul*

Fire & Marine Ins. Co. (Mo. App.) 194 S. W. 745; *Eaton v. Globe & Rutgers Fire Ins. Co.*, 227 Mass. 354, 116 N. E. 536; *Ætna Ins. Co. v. Pelham*, 115 Miss. 229, 76 South. 153; *Early v. Providence & Washington Ins. Co.*, 31 R. I. 225, 76 Atl. 753, 140 Am. St. Rep. 750; *Same v. Royal Exch. Assur. Co. (R. I.)* 76 Atl. 756.

An award of appraisers which was invalid, on the other hand, was properly excluded from evidence, in an action on a fire policy, whether offered to show performance of the condition requiring an award or to establish the amount of loss, or for both purposes (*Riddell v. Rochester German Ins. Co. of New York*, 36 R. I. 240, 89 Atl. 833, rehearing denied 90 Atl. 170).

So it has been held that appraisers selected to estimate the value of an insured building are not the agents or representatives of the persons who select them, and those persons are not estopped to complain of the appraisers' decision as the act of their agents (*Carlston v. St. Paul Fire & Marine Ins. Co.*, 37 Mont. 118, 94 Pac. 756, 127 Am. St. Rep. 715).

Where an insurance policy provided that no action could be maintained until the amount of loss had been determined by arbitrators, and the insurance company had rejected their determination, the insured cannot support an action without showing that the insurer was given notice of the award (*Weisman v. Firemen's Ins. Co.*, 95 N. E. 411, 208 Mass. 577).

3632 (b). Where plaintiff insured two buildings against loss by fire, and also insured the rents of all the buildings, and arbitrators awarded plaintiff three months' rent on all the buildings, and \$3,835.56 on the two buildings insured, but no date was set in the award from which the three months was to run, nor did the award specify the monthly rent which was to be allowed, such award was fatally defective for uncertainty as to the amount allowed for the rent, and, this being inseparable from the balance, the whole award was void (*Palatine Ins. Co., Limited, of Manchester, Eng., v. O'Brien*, 152 Fed. 922, 82 C. C. A. 70).

In *Siegele v. Des Moines Mut. Hail Ins. Ass'n*, 28 S. D. 142, 132 N. W. 697, loss having been suffered under a hail policy, two separate adjustment papers were made out; one, signed by the adjuster and left with the assured, adjusted the loss to the several fields of grain at a per cent. of total loss on each field; the other, signed by the assured and the adjuster, as to which assured claimed his signature had been secured by fraud, adjusted the total loss in

a lump sum. It was held that, in the absence of fraud on the part of the adjuster, the two papers executed at the same time should be construed together, and when so construed, it being apparent that the naming of the lump sum was at best a mistake, the amount of the loss as itemized, field by field, in the other should control.

3633. (c) Effect of valued policy law

3633 (c). Though the amount of a total loss is submitted, and an award made, it will not amount to a waiver of the valued policy law, but the insurer will still be liable for the full amount named in the policy.

Prather v. Connecticut Fire Ins. Co., 188 Mo. App. 653, 176 S. W. 527; *Joyce v. St. Paul Fire & Marine Ins. Co.* (Mo. App.) 194 S. W. 745.

This rule is not applicable, however, to an award fixing the amount of a partial loss (*Scottish Union & National Ins. Co. v. Skaggs*, 114 Miss. 618, 75 South. 437).

In *Harmon v. Stuyvesant Ins. Co.*, 156 S. W. 87, 170 Mo. App. 309, it was held that where an insurer repeatedly demanded an appraisal as provided by the policy, and such appraisal was had, it could not after refusing to pay the appraised loss and obliging the insured to sue, contend that as the loss was total there was no ground, in view of the valued policy statute, upon which to base an appraisal, and that it was therefore void.

3633-3636. (d) Binding effect of award as determined by matters submitted

3634 (d). An award under an insurance policy, the submission being limited to the amount of loss, does not prevent action on the policy (*Billmyer v. Hamburg-Bremen Fire Ins. Co.*, 49 S. E. 901, 57 W. Va. 42).

3635 (d). The award of appraisers, selected under a fire policy to determine the amount of loss, must conform in substance and form to the agreement for submission to appraisers.

Eberhardt v. Federal Ins. Co., 14 Ga. App. 340, 80 S. E. 856; *Riddell v. Rochester German Ins. Co. of New York*, 36 R. I. 240, 89 Atl. 883, rehearing denied 90 Atl. 170.

Thus where agreement provided for appraisal of loss, showing separately the sound value and loss, an award showing one lump sum as sound value, and another as loss, was valid, where insurers, though represented before the appraisers, did not suggest noncom-

pliance, and where they appeared to have fully understood the award (*Milwaukee Mechanics' Ins. Co. v. Frosch* [Tex. Civ. App.] 130 S. W. 600); but where, as in *Mason v. Fire Ass'n of Philadelphia*, 23 S. D. 431, 122 N. W. 423, appraisers were appointed, by the terms of the agreement for submission, to estimate "the sound value and loss," and in their award they stated that they had "determined the loss and damage" to be an amount specified, the award was not in accordance with the submission, as the "sound value" is "the cash value, making an allowance for depreciation due to use, etc., at and immediately preceding the time of the fire."

So where a policy provided that the company should be liable for only three-fourths of the actual value of the property destroyed, the findings of arbitrators were properly disregarded in an action on the policy where they did not find the actual value of the property destroyed, on the theory that such value was not of any importance if the total loss exceeded the total insurance (*Globe & Rutgers Ins. Co. v. Johnson* [Ky.] 127 S. W. 765).

Similarly, where an appraisal agreement was entered into which provided that two named persons, together with a third person to be appointed by them, and who should act as umpire on matters of difference only, should appraise the property and determine the loss and damage, the umpire had a right to act only in case of disagreement, so that an award made by one of the appraisers and the umpire only, and covering the matters as to which the appraisers did not differ, did not conform to the submission and was not binding.

Home Ins. Co. of New York v. Schiff's Sons, 64 Atl. 63, 103 Md. 648;
Selbert Bros. & Co. v. German Fire Ins. Co. of Freeport, Ill., 106 N. W. 507, 132 Iowa, 58.

3636-3637. (e) Manner of submission

3636 (e). The selection of a third referee by the insured and the company, under the provisions of the standard policy of fire insurance, need not be in writing (*Astell v. American Cent. Ins. Co.*, 114 Minn. 206, 130 N. W. 1002).

A submission by agreement between insurer and insured to appraisers to fix the amount of "sound value and damages" was in accordance with a provision of the policy authorizing submission of the "amount of loss" to appraisers (*Eberhardt v. Federal Ins. Co.*, 14 Ga. App. 340, 80 S. E. 856).

Where an insurance adjuster named an appraiser and afterwards appointed another appraiser, without notifying insured of the

change, even when informed of the appointment of an appraiser by insured, the party first appointed by the adjuster remained a duly qualified appraiser (*Harmon v. Stuyvesant Ins. Co.*, 156 S. W. 87, 170 Mo. App. 309).

3637-3638. (f) Same—Submission differing from policy stipulations

3637 (f). Unless the award is in accord with the submission, it is not binding, though in accord with the policy stipulations (*Home Ins. Co. of New York v. Schiff's Sons*, 64 Atl. 63, 103 Md. 648).

3638 (f). In *Western Assur. Co. v. Hall Bros.*, 38 South. 853, 143 Ala. 168, however, an agreement for submission, not in accordance with the provisions of the policy, was excluded from evidence in an action on the policy.

3639-3641. (h) Persons bound by appraisal

3639 (h). A mortgage clause attached to a fire policy, making the loss, if any, payable to the mortgagee as his interest may appear, is not an assignment of the policy to such mortgagee, and, in the absence of fraud, he is bound by the award of appraisers required by the policy on disagreement between insured and the company as to the amount of the loss, though he was not a party.

Erie Brewing Co. v. Ohio Farmers' Ins. Co., 89 N. E. 1065, 81 Ohio St. 1, 25 L. R. A. (N. S.) 740, 135 Am. St. Rep. 735, 18 Ann. Cas. 265, reversing 30 Ohio Cir. Ct. R. 390; *Collinsville Sav. Soc. v. Boston Ins. Co.*, 60 Atl. 647, 77 Conn. 676, 69 L. R. A. 924.

Substantially the contrary position was taken, however, on almost identical provisions in the policy in *Riddell v. Rochester German Ins. Co. of New York*, 36 R. I. 240, 89 Atl. 833, rehearing denied 90 Atl. 170.

3640 (h). In *Ætna Ins. Co. v. Pelham*, 115 Miss. 229, 76 South. 153, it was held that where loss of building and furniture occurred on policy containing mortgage clause covering building, mortgagee's refusal to abide by appraisal and his suit to recover insured value did not give insurer the right to enjoin the owner's action to recover for furniture loss, on theory of a right of set-off if mortgagee recovered more than amount fixed by appraisal.

3641 (h). Where an appraisal on behalf of several insurance companies is fraudulently made, one company innocent of the fraud is not protected by it, because the award is for the benefit of all, and vitiated by the fraud of one (*Mayer v. Phoenix Assur. Co.*, 108 N. Y. Supp. 711, 124 App. Div. 241).

3641-3643. (i) Appointment of incompetent or partial appraisers

3641 (i). An award may be disregarded if the arbitrators are guilty of bad faith, partiality, or misconduct substantially affecting the result.

Jones v. Orient Ins. Co., 184 Mo. App. 402, 171 S. W. 28; Fass v. Liverpool, London & Globe Fire Ins. Co., 105 S. C. 364, 89 S. E. 1040; Young v. Ætna Ins. Co., 64 Atl. 584, 101 Me. 294; J. E. Davis Mfg. Co. v. Firemen's Fund Ins. Co. (D. C.) 210 Fed. 653; Pierce v. Sun Ins. Office, 147 N. Y. Supp. 947, 86 Misc. Rep. 1; Western Underwriters' Ass'n v. Hankins, 77 N. E. 447, 221 Ill. 304, affirming 122 Ill. App. 600.

So under Rev. Laws Minn. 1905, § 1645, providing that referees appointed to adjust losses under the Minnesota standard insurance policy must be residents of the state, a failure to comply with the provision renders the award void (Schoenich v. American Ins. Co., 124 N. W. 5, 109 Minn. 388).

The defeated party cannot object to an award where, knowing of the existence of conditions which may influence the judgment of an arbitrator or referee or having notice of the partiality of one or more of the referees, sufficient to put him on inquiry, he remains silent.

Western Assur. Co. v. Hall Bros. Co., 38 South. 853, 143 Ala. 168; Doherty v. Phoenix Ins. Co., 112 N. E. 940, 224 Mass. 310.

Whether a person selected to appraise an insurance loss is "competent and disinterested," within the meaning of the appraisal clause of the policy, is a question for the jury.

National Fire Ins. Co. v. O'Bryan, 87 S. W. 129, 75 Ark. 198, 5 Ann. Cas. 334; Pierce v. Sun Ins. Office, 147 N. Y. Supp. 947, 86 Misc. Rep. 1; Cohen v. Atlas Assur. Co. of London, 148 N. Y. Supp. 563, 163 App. Div. 381.

3642 (i). In Whelen v. Goldman, 115 N. Y. Supp. 1006, 62 Misc. Rep. 108, it was held that it is not necessary that the appraisers should stand absolutely unbiased; but it is sufficient if they have no interest in the result of the arbitration. However, in Cohen v. Atlas Assur. Co. of London, 148 N. Y. Supp. 563, 163 App. Div. 381, it was stated that the requirement in a fire policy that appraisers shall be disinterested means that they shall be fair and unprejudiced; and in Young v. Ætna Ins. Co., 64 Atl. 584, 101 Me. 294, it was stated that they must be disinterested in the full sense of being competent, impartial, and substantially indifferent between the parties.

That an appraiser had served as appraiser for fire insurance companies on prior occasions does not of itself disqualify him or make the action of the companies in selecting him a fraud on insured.

Levin v. Northwestern Nat. Ins. Co. of Milwaukee (C. C.) 185 Fed. 981; Cohen v. Atlas Assur. Co. of London, 148 N. Y. Supp. 563, 163 App. Div. 381; Messler v. Williamsburg City Fire Ins. Co. of Brooklyn, N. Y. (R. I.) 95 Atl. 601, denying rehearing Same v. Williamsburgh City Fire Ins. Co. of Brooklyn, 94 Atl. 875.

The mere fact that an appraiser is not an expert in handling goods of the kind insured and damaged will not render him incompetent (American Cent. Ins. Co. v. District Court of Ramsey County, 147 N. W. 242, 125 Minn. 374, 52 L. R. A. [N. S.] 496); nor the mere fact that a person selected by insured to appraise the loss had previously made an estimate of the loss at the request of insured (National Fire Ins. Co. v. O'Bryan, 87 S. W. 129, 75 Ark. 198, 5 Ann. Cas. 334).

3643-3645. (j) Disagreement of appraisers—Award made without submission to all

3644 (j). Where agreement for submission under fire insurance policies provided for appointment of two appraisers to appoint an umpire, and that award signed by any two should be binding, one appraiser, by withdrawing, could not prevent the other two from completing the award.

Boutross v. Palatine Ins. Co., Limited, of London, England, 100 Kan. 574, 164 Pac. 1069; Garrebrant v. Continental Ins. Co., 75 N. J. Law, 577, 67 Atl. 90, 12 L. R. A. (N. S.) 443; German Ins. Co. v. Hazard Bank, 126 Ky. 730, 104 S. W. 725, 31 Ky. Law Rep. 1126; Union Marine Ins. Co. v. Charlie's Transfer Co., 186 Ala. 443, 65 South. 78.

But where contract of insurance provides that each party shall appoint an appraiser, and that the two so appointed shall appoint an umpire to whom they shall submit their differences, signature of umpire is without vitality unless and until the two appraisers have failed to agree (Collings Carriage Co. v. German-American Ins. Co., 86 N. J. Eq. 53, 97 Atl. 726).

It is the duty of appraisers to consult, and, if they do not agree, to call in the umpire; it being improper for one or two to consider evidence not submitted to the other or others (J. E. Davis Mfg. Co. v. Firemen's Fund Ins. Co. [D. C.] 210 Fed. 653).

(1511)

3645-3647. (k) Validity of award as affected by matters considered

3646 (k). Award of appraisers was not void for their failure to strictly comply with provision of agreement of submission that they should determine actual cash value of articles and place damages on each separately (*Boutross v. Palatine Ins. Co., Limited*, of London, England, 100 Kan. 574, 164 Pac. 1069).

3647 (k). In *Joyce v. St. Paul Fire & Marine Ins. Co.* (Mo. App.) 194 S. W. 745, it was held that, as value of property insured against fire fixed by parties at time of insurance is not conclusive as to value at time of fire, in that depreciation, if any, must be taken into consideration, it was within province of arbitrators between insured and insurer to determine value before fire of personalty insured.

3648-3651. (l) Giving of notice and taking of testimony

3648 (l). Insured has a right to introduce evidence before the appraisers as to the extent of his loss, and, where refused permission, the award is not binding on him.

Ætna Ins. Co. v. Jester, 37 Okl. 413, 132 Pac. 130, 47 L. R. A. (N. S.) 1191; *Harth Bros. Grain Co. v. Continental Ins. Co.*, 102 S. W. 242, 31 Ky. Law Rep. 180; *J. E. Davis Mfg. Co. v. Firemen's Fund Ins. Co.* (D. C.) 210 Fed. 653; *Security Ins. Co. v. Kelly* (Tex. Civ. App.) 196 S. W. 874; *Schoenich v. American Ins. Co.*, 124 N. W. 5, 109 Minn. 388.

Where the reference incorporated the Massachusetts statute as to arbitration (Rev. Laws, c. 194, §§ 1, 6, 7), the same result has been reached (*Second Society of Universalists in Town of Boston v. Royal Ins. Co., Limited*, 109 N. E. 384, 221 Mass. 518, Ann. Cas. 1917E, 491); but the provisions of the Massachusetts standard form of fire insurance policy, and the decisions of the courts thereunder, do not require the referees to receive evidence upon the amount of the loss (*Hanley v. Ætna Ins. Co.*, 102 N. E. 641, 215 Mass. 425, Ann. Cas. 1914D, 53).

A similar result has been reached under the Ohio standard policy (*Royal Ins. Co. v. Ries*, 88 N. E. 638, 80 Ohio St. 272).

However, the referees selected to adjust losses under the Minnesota standard policy have no authority to make an independent investigation, but must give interested parties an opportunity to present evidence, and a failure so to do may vitiate the award (*Schoenich v. American Ins. Co.*, 124 N. W. 5, 109 Minn. 388).

In *Carlston v. St. Paul Fire & Marine Ins. Co.*, 37 Mont. 118, (1512)

94 Pac. 756, 127 Am. St. Rep. 715, it was held that where experts are sent to estimate the value of an insured building before its destruction, or after it has been only partially destroyed and sufficient of it remains to disclose the size, general character of architecture, and quality of material used, a hearing and an opportunity to introduce evidence of value need not be granted; but where appraisers, unacquainted with the insured property, are selected to estimate a loss arising from the total destruction of the property, notice of the time and place of the appraisers' meeting and an opportunity to the parties to be heard is essential to the validity of the award.

Failure to give the insured notice of the meeting of the appraisers or an opportunity to present evidence did not invalidate the award; the agreement not providing for notice.

Security Ins. Co. v. Kelly (Tex. Civ. App.) 196 S. W. 874; *Eberhardt v. Federal Ins. Co.*, 14 Ga. App. 340, 80 S. E. 856; *Orient Ins. Co. of Hartford, Conn., v. Harmon* (Tex. Civ. App.) 177 S. W. 192; *Kent & Purdy Paint Co. v. Aetna Ins. Co.*, 165 Mo. App. 30, 146 S. W. 78; *Harmon v. Stuyvesant Ins. Co.*, 156 S. W. 87, 170 Mo. App. 309.

3649 (1). An umpire, selected by appraisers appointed to determine the loss under a fire policy, notified the appraisers that he would only act on condition that he could call in an expert builder to advise him as to the amount of the loss. He advised with a carpenter who viewed the premises at his request. It was held that the act of the umpire did not invalidate the award founded on his own judgment (*German Ins. Co. v. Hazard Bank*, 126 Ky. 730, 104 S. W. 725, 31 Ky. Law Rep. 1126).

3651 (1). A demand of two or more insurance companies for submission of their several liabilities in one appraisal or arbitration is not warranted (*Hartford Fire Ins. Co. v. Asher*, 100 S. W. 233, 30 Ky. Law Rep. 1053).

The provision in a fire policy that the loss is payable 60 days after the notice and proof of loss, and an award of appraisers, when an appraisal has been required, does not give the insurer, after it has agreed to an appraisal, and named its appraiser, an absolute right to 60 days in which to commence the appraisal, but it must proceed without unnecessary delay, and in a reasonable time, depending on the facts of the case (*Providence Washington Ins. Co. v. Wolf*, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395).

(1513)

3651-3652. (m) Inadequacy of award—Misconduct

3651 (m). An award cannot be vacated for mere inadequacy, not so gross as to constitute fraud.

Levin v. Northwestern Nat. Ins. Co. of Milwaukee (C. C.) 185 Fed. 981; Perry v. Greenwich Ins. Co., 49 S. E. 889, 137 N. C. 402; Baldinger v. Camden Fire Ins. Ass'n, 121 Minn. 160, 141 N. W. 104.

But inadequacy of the award is a circumstance which, taken in connection with other evidence, may show that the arbitration or appraisal was not fairly made.

Kirkham v. German American Ins. Co., 141 Pac. 1012, 92 Kan. 941; Mrs. A. K. Ross & Co. v. German Alliance Ins. Co. of New York, 119 Pac. 366, 86 Kan. 145, Ann. Cas. 1913B, 1045, rehearing denied 119 Pac. 1126, 86 Kan. 352.

So, under a policy, failure to select such umpire was an irregularity to be considered in determining whether award was fair (Security Ins. Co. v. Kelly [Tex. Civ. App.] 196 S. W. 874).

3652 (m). An award of arbitrators has been held sufficiently certain, though the arbitrators placed certain of the figures in the wrong column on the blank on which the award was written (Clark Millinery Co. v. National Union Fire Ins. Co., 160 N. C. 130, 75 S. E. 944, Ann. Cas. 1914C, 367). But where it gave the value and loss on the aggregate without itemization it was insufficient (Sauthof v. American Cent. Ins. Co., 34 R. I. 324, 83 Atl. 441).

Where appraisers and the umpire acted fairly, and insured was advised as to the manner in which the work was being done, it was proper to refuse to set aside the award because the appraisers and umpire acted jointly (Tyblewski v. Svea Fire & Life Assur. Co., 77 N. E. 196, 220 Ill. 436, affirming 121 Ill. App. 528); and it was held in the same case that, where appraisers had before them a statement as to the amount of property destroyed, saw the space which the property was claimed to have occupied, and had a schedule prepared by insured showing the property claimed to have been destroyed, it was proper to decline to set aside the award on the ground that the appraisers did not consider the insured's books.

Where one appraiser signed without giving consideration to or exercising his judgment on subject, the award was invalid (Collings Carriage Co. v. German-American Ins. Co., 86 N. J. Eq. 53, 97 Atl. 726).

Finding of arbitrators that value of library insured against fire was only \$600, when it was agreed in policy that \$1,000 was only three-fourths of its sound value, was inconsistent with finding that there had been no material depreciation up to time of fire, and so void and without force (*Joyce v. St. Paul Fire & Marine Ins. Co.* [Mo. App.] 194 S. W. 745).

3652-3653. (n) Necessity of substantial damage by misconduct or fraud

3653 (n). Where a witness for complainant estimated the cost of new buildings at \$2,890, while the appraisers fixed it at \$2,750, the difference was not sufficiently radical to show that plaintiff was injured by the award, or to justify the court in setting it aside because the complainant was not notified that the appraisers intended to meet and estimate the damages (*Sterling v. German-American Ins. Co.*, 60 Atl. 200, 69 N. J. Eq. 339).

In an action upon an award of referees, defended on the ground that evidence for the company was improperly excluded by the referees, the burden of proof is upon the insurance company to show that such evidence was material, and that its exclusion prejudiced the company (*Hanley v. Ætna Ins. Co.*, 102 N. E. 641, 215 Mass. 425, Ann. Cas. 1914D, 53).

3654-3657. (p) Actions to defeat award

3654 (p). Under the common-law system of procedure, an award of appraisers or arbitrators cannot be impeached or set aside, except in a separate equity action brought for that purpose.

Garrebrant v. Continental Ins. Co., 75 N. J. Eq. 577, 67 Atl. 90, 12 L. R. A. (N. S.) 443; *Levin v. Northwestern Nat. Ins. Co.* (C. C.) 146 Fed. 76; *Dixie Fire Ins. Co. v. American Confectionery Co.*, 124 Tenn. 247, 136 S. W. 915, 34 L. R. A. (N. S.) 897; *Hirsch v. Home Ins. Co.*, 38 R. I. 189, 94 Atl. 722.

But, under the Code system, the award, if pleaded as a defense, may be attacked by the reply.

Kent & Purdy Paint Co. v. Ætna Ins. Co., 165 Mo. App. 30, 146 S. W. 78; *Ross v. Phenix Ins. Co.*, 114 Pac. 1054, 84 Kan. 572; *Wilbisky v. German Alliance Ins. Co. of New York*, 90 Misc. Rep. 335, 152 N. Y. Supp. 1048; *Hudson v. Glens Falls Ins. Co.*, 112 N. E. 728, 218 N. Y. 133, L. R. A. 1917A, 482, reversing judgment 147 N. Y. Supp. 1117, 162 App. Div. 934.

And a similar position has been reached in Massachusetts (*Doherty v. Phoenix Ins. Co.*, 112 N. E. 940, 224 Mass. 310).

In *Eberhardt v. Federal Ins. Co.*, 14 Ga. App. 340, 80 S. E. 856, it was held that an award by appraisers selected under an insurance policy to determine the loss may be set aside, under Civ. Code 1910, §§ 5028, 5029, for fraud or by showing that unfair advantage has been given to one of the parties or for a palpable mistake of law.

3655 (p). Where an action is brought in equity to cancel an award made under insurance policies issued by the joint defendants for fraud in the amount awarded, the court, on decreeing cancellation, may give personal judgment against the defendants for the actual amount of the loss for which they are liable.

St. Paul Fire & Marine Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 164 S. W. 1186; *Mayer v. Phoenix Assur. Co.*, 108 N. Y. Supp. 711, 124 App. Div. 241.

The petition in an action to set aside a compromise of the claim on the ground of the fraud of insurer must allege that the beneficiary tendered to insurer the amount received under the compromise (*Western & Southern Life Ins. Co. v. Quinn*, 130 Ky. 397, 113 S. W. 456).

In an action on an award by appraisers appointed under a fire insurance policy, proof that the award was void for a reason not pleaded does not defeat recovery (*Orient Ins. Co. of Hartford, Conn., v. Harmon* [Tex. Civ. App.] 177 S. W. 192); and in an action upon an insurance policy the defense of an award must be pleaded (*Funk v. Fire Ass'n of Philadelphia*, 157 Ill. App. 602).

3656 (p). Where answer pleads that award was fraudulent, defendant has the burden of proof (*Boutross v. Palatine Ins. Co., Limited, of London, England*, 100 Kan. 574, 164 Pac. 1069).

Every reasonable presumption will be indulged to sustain an award.

Fire Ass'n of Philadelphia v. Taylor, 91 Pac. 1070, 76 Kan. 392; *American Cent. Ins. Co. v. District Court of Ramsey County*, 147 N. W. 242, 125 Minn. 374, 52 L. R. A. (N. S.) 496; *Niagara Fire Ins. Co. v. Boon*, 88 S. W. 915, 76 Ark. 153; *J. E. Davis Mfg. Co. v. Stuyvesant Ins. Co.*, 145 N. Y. Supp. 192, 160 App. Div. 74.

3657 (p). The testimony of an appraiser who has not signed the award is competent to impeach the same (*Novak v. Rochester German Ins. Co.*, 156 Ill. App. 352).

In an action after an adjustment, the adjustment is evidence of the value of the goods destroyed (*German Fire Ins. Co. of Free-*
(1516))

port, Ill., v. Gibbs, Wilson & Co., 92 S. W. 1068, 42 Tex. Civ. App. 407, rehearing denied 96 S. W. 760, 42 Tex. Civ. App. 407).

Where, in an action defendants claimed that by verbal agreement they were parties to a written submission to arbitration between plaintiff and another insurance company, and the award of the arbitrators was admitted in evidence, plaintiff could introduce any evidence tending to discredit the award as being an award between plaintiff and defendant to which defendant was in any way a party (*Levy v. Scottish Union & National Ins. Co.*, 52 S. E. 449, 58 W. Va. 546).

The sufficiency of evidence was considered in the following cases:

Western & Southern Life Ins. Co. v. Quinn, 130 Ky. 397, 113 S. W. 456; *Rolfe v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 72 Atl. 732, 105 Me. 58; *Security Ins. Co. v. Kelly* (Tex. Civ. App.) 196 S. W. 874; *Schoenich v. American Ins. Co.*, 124 N. W. 5, 109 Minn. 388; *Mason v. Fire Ass'n of Philadelphia*, 23 S. D. 431, 122 N. W. 423; *Second Society of Universalists in Town of Boston v. Royal Ins. Co.*, 109 N. E. 384, 221 Mass. 518, Ann. Cas. 1917E, 491; *Riddell v. Rochester German Ins. Co. of New York*, 36 R. I. 240, 89 Atl. 833, rehearing denied 90 Atl. 170; *Kent & Purdy Paint Co. v. Ætna Ins. Co.*, 165 Mo. App. 30, 146 S. W. 78; *Sterling v. German-American Ins. Co.*, 60 Atl. 200, 69 N. J. Eq. 339; *Jones v. Orient Ins. Co.*, 184 Mo. App. 402, 171 S. W. 28; *J. E. Davis Mfg. Co. v. Stuyvesant Ins. Co.*, 145 N. Y. Supp. 192, 160 App. Div. 74; *Harth Bros. Grain Co. v. Continental Ins. Co.*, 102 S. W. 242, 31 Ky. Law Rep. 180.

An instruction that it was the duty of the appraisers to give a just and fair award, whereas the law requires only that they exercise their best judgment, is not misleading, as it must be known that the honest judgment of appraisers is all that can be required or obtained (*Seibert Bros. & Co. v. Germania Fire Ins. Co. of New York City*, 106 N. W. 507, 132 Iowa, 58).

In an action on an award, a report by the superior court which states that, if the award was invalid judgment was to be rendered for the insurance company is not to be approved, where the time has expired within which, under the terms of the policy, the insured could institute another action (*Hanley v. Ætna Ins. Co.*, 102 N. E. 641, 215 Mass. 425, Ann. Cas. 1914D, 53).

3657-3658. (q) Remuneration and liability of appraisers

3657 (q). In action on policy, agents of the insurer, who attempted to make an adjustment and who were being paid a salary by the insurer without reference to such adjustment, were proper-

(1517)

ly disallowed their claim of \$10 per day as expenses of adjustment (Merchants' & Bankers' Fire Underwriters v. Brooks [Tex. Civ. App.] 188 S. W. 243).

4. WAIVER OF ARBITRATION OR APPRAISAL

3658-3660. (a) General rules—Parol waiver

3658 (a). The provisions of a fire policy requiring an appraisal of the loss in case of disagreement to be made for the benefit of the insurer may be waived by it.

Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395; Western Underwriters' Ass'n v. Hankins, 77 N. E. 447, 221 Ill. 304, affirming 122 Ill. App. 600.

But no waiver of the right to later raise the question of liability can arise from not doing so before the referees, on reference to determine the amount of damage; that question not being open before them (National Furniture Co. v. Prussian Nat. Ins. Co., 91 Atl. 785, 112 Me. 557).

It has also been held that a waiver, to be effective, must have occurred with full knowledge of all material facts, and must be distinctly made (North British & Mercantile Ins. Co. v. Robinett & Green, 112 Va. 754, 72 S. E. 668).

3659 (a). A stipulation that insurer will not waive any provision of the policy by any act relating to appraisal permits insurer, without waiving any right, to make investigation of the value of the property destroyed (Manheim v. Standard Fire Ins. Co. of Hartford, Conn., 84 Wash. 16, 145 Pac. 992); and where an accident policy required arbitration as a condition precedent to insured's right to recover on the policy, and the insured's right to the appointment of an arbitrator by a court or judge was conferred by statute on the insurer's refusal to concur in an arbitrator's selection, the insurer's refusal to arbitrate was not a waiver of insured's obligation to submit the claims to an arbitrator (Wilson v. Central Ins. Co., 119 N. Y. Supp. 955, 135 App. Div. 649).

3660-3661. (b) Refusal to arbitrate—What constitutes a refusal

3660 (b). Refusal on the part of the company to submit the matter is a waiver of arbitration.

O'Rourke v. German Ins. Co., 109 N. W. 401, 99 Minn. 293; Gage v. Connecticut Fire Ins. Co. of Hartford, Conn., 34 Okl. 744, 127 Pac. 407.

So where the appraisers and umpire of a fire loss, or one or more of them, were partial and interested, and insured, on ascertaining the facts demanded of the insurer the selection of disinterested and competent appraisers, which the insurer refused to do, insured was justified in breaking up the arbitration and suing on the policy (*Western Assur. Co. v. Hall Bros.*, 38 South. 853, 143 Ala. 168).

Failure to respond to insured's demand for arbitration has the same effect.

Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395; *Western Underwriters' Ass'n v. Hankins*, 77 N. E. 447, 221 Ill. 304, affirming 122 Ill. App. 600; *Gragg v. Northwestern Nat. Ins. Co.*, 126 S. W. 766, 140 Mo. App. 685.

So provision that no right of action should exist on a policy until after an appraisal is waived by the insurer's statement to the insured, when consulted regarding the loss, that it would do nothing (*Callahan v. London & Lancashire Fire Ins. Co.*, 98 Misc. Rep. 589, 163 N. Y. Supp. 322).

Under the standard fire policy provision (Rev. St. Me. c. 49, § 4, par. 7, as amended by Laws 1905, c. 158), arbitration was waived by insurer where one of its nominees declined to serve on being selected by insured, though insurer acted in good faith (*Mowry & Payson v. Hanover Fire Ins. Co.*, 106 Me. 308, 76 Atl. 875, 29 L. R. A. [N. S.] 498).

3661 (b). In *Vera v. Mercantile Fire & Marine Ins. Co.*, 103 N. E. 292, 216 Mass. 154, it was held that the failure of the insurer to appoint referees, after receiving the insured's letter stating that he was ready to proceed under the provisions of the policy did not show a waiver of the right to reference to arbitrators given by Rev. Laws Mass. c. 118, § 60.

An agent's admission of the insurer's liability for an amount less than demanded in the proof of loss is not a waiver of the company's right to an appraisal under the policy (*Hart v. Springfield Fire & Marine Ins. Co.*, 136 La. 114, 66 South. 558).

Where a refusal by insured to enter upon an appraisal by referees within the time limit, though required by the policy, does not defeat an action on the policy, the fact that the insurance company was prevented from applying for referees before the expiration of the time by a sale of a portion of the goods by insured is immaterial (*Levi v. Palatine Ins. Co.*, 78 Atl. 617, 75 N. H. 551).

It has, however, been held that refusal of insured to arbitrate pursuant to a clause, if unreasonably persisted in, forfeits the policy

(*St. Paul Fire & Marine Ins. Co. v. Kirkpatrick*, 129 Tenn. 55, 164 S. W. 1186).

3662-3664. (d) Denial of liability—What constitutes denial

3662 (d). The right to demand arbitration of the amount of a loss is waived by a denial of liability on the policy by the insurer.

Moore v. Sun Ins. Office, 111 N. W. 260, 100 Minn. 374; *Supreme Council Catholic Benev. Legion v. Grove*, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913; *Cullen v. Insurance Co. of North America*, 104 S. W. 117, 126 Mo. App. 412; *James v. Insurance Co. of State of Illinois*, 115 S. W. 478, 135 Mo. App. 247; *Cash v. Concordia Fire Ins. Co. of Milwaukee, Wis.*, 111 Minn. 162, 126 N. W. 524; *Same v. Des Moines Fire Ins. Co.*, 111 Minn. 538, 126 N. W. 526; *Higson v. North River Ins. Co.*, 67 S. E. 509, 152 N. C. 206; *Shook v. Retail Hardware Mut. Fire Ins. Co.*, 154 Mo. App. 394, 134 S. W. 589; *Home Ins. Co. of New York v. Ballard*, 32 Okl. 723, 124 Pac. 316; *Fidelity Phenix Fire Ins. Co. of New York v. Abilene Dry Goods Co. (Tex. Civ. App.)* 159 S. W. 172; *Harowitz v. Concordia Fire Ins. Co.*, 168 S. W. 163, 129 Tenn. 691; *City of Fall River v. Aetna Ins. Co.*, 219 Mass. 454, 107 N. E. 367; *Orient Ins. Co. v. Kaptur*, 176 Ind. 308, 95 N. E. 230; *Oakes v. Pine Tree State Mut. Fire Ins. Co.*, 90 Atl. 707, 112 Me. 52.

Under the standard fire policy provision (Rev. St. Me. c. 49, § 4, par. 7, as amended by Laws 1905, c. 158), arbitration was waived by insurer where one of its nominees declined to serve on being selected by insured, though insurer acted in good faith. *Mowry & Payson v. Hanover Fire Ins. Co.*, 106 Me. 308, 76 Atl. 875, 29 L. R. A. (N. S.) 498.

3666-3668. (g) Failure to demand arbitration or appraisal

3667 (g). Where a policy provided that in case the parties could not agree as to the amount of a loss it should be submitted to arbitration, it was the duty of the insurer to take the initiative step by appointing an arbitrator and requesting insured to do likewise, and hence insurer's failure so to do constituted a waiver of the provision.

Nerger v. Equitable Fire Ass'n, 107 N. W. 531, 20 S. D. 419; *McLean v. Tobin*, 109 N. Y. Supp. 926, 58 Misc. Rep. 528; *Sykes v. Royal Casualty Co.*, 111 Miss. 746, 72 South. 147, L. R. A. 1916F, 1043; *Great American Co-op. Fire Ass'n v. Jenkins*, 76 S. E. 159, 11 Ga. App. 784; *Bolte & Jansen v. Equitable Fire Ass'n*, 23 S. D. 240, 121 N. W. 773; *De Paola v. National Ins. Co.*, 38 R. I. 126, 94 Atl. 700.

The same result was reached under Laws S. D. 1897, p. 199, c. 70, § 7, authorizing the organization of mutual fire insurance com-

panies (*Norris v. Equitable Fire Ass'n*, 102 N. W. 306, 19 S. D. 114).

Where an insurer failed to give notice demanding appraisement in time and the insured then sued on the policy, the existence of which insurer recognized by again demanding appraisement, the insured was not estopped from claiming that the demand was not made in time (*Covey v. National Union Fire Ins. Co. of Pittsburgh*, 161 Pac. 35, 31 Cal. App. 579).

3668 (g). If adjuster makes up proof of loss from data furnished by insured, which includes itemized list of goods saved, with value of each item, and makes no demand for appraisement, he waives provision therefor (*Houseman v. Globe & Rutgers Fire Ins. Co.*, 78 W. Va. 586, 89 S. E. 269).

3670-3672. (j) Improper conduct during appraisement

3670 (j). Where a referee, nominated by the insurer to adjust a loss, refuses to co-operate with his associate, but the insurer does not authorize or approve the action of its referee, but, on being advised thereof, refuses to agree to the selection of other referees, it waives its right to an appraisal of the loss (*O'Rourke v. German Ins. Co. of Freeport*, 104 N. W. 900, 96 Minn. 154).

In *Fire Ass'n of Philadelphia v. Appel*, 80 N. E. 952, 76 Ohio St. 1, it was held that where an appraiser appointed to determine the amount of a loss under an insurance policy withdraws from the appraisement and refuses to proceed, it is the duty of the party who appointed him to choose another, and where the insurer who had appointed such appraiser refuses to proceed further with the appraisement, and insists on a new appraisement, it is a waiver of the condition in the policy for an appraisement.

3672-3673. (l) Waiver of second arbitration after failure of first

3673 (l). Where an insurance company asserts the validity of an award of appraisers, it waives its right to a second appraisement when the first award is set aside for invalidity.

Security Ins. Co. v. Kelly (Tex. Civ. App.) 196 S. W. 874; *Ætna Ins. Co. v. Jester*, 37 Okl. 413, 132 Pac. 130.

So the filing of proofs of loss by insured in accordance with an award of appraisers, where insured knew all the facts in relation to the appraisal and award, was a ratification of the award, and precluded insured from maintaining a suit to set it aside (*Tyblewski*

v. Svea Fire & Life Assur. Co., 77 N. E. 196, 220 Ill. 436, affirming 121 Ill. App. 528).

3673-3674. (m) Pleading and practice

3673 (m). Where the insurer failed to include in an arbitration as to extent of loss the mortgagee under a loss payable clause, it did not waive its right to an arbitration as to him (*Ætna Ins. Co. v. Cowan*, 111 Miss. 453, 71 South. 746).

3674 (m). The sufficiency of evidence of waiver of arbitration was considered in the following cases:

O'Rourke v. German Ins. Co. of Freeport, 104 N. W. 900, 96 Minn. 154; *Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co.*, 129 Minn. 292, 152 N. W. 650; *James v. Insurance Co. of State of Illinois*, 115 S. W. 478, 135 Mo. App. 247; *Hartford Fire Ins. Co. v. Asher*, 100 S. W. 233, 30 Ky. Law Rep. 1053; *Palin v. Insurance Co. of North America*, 140 Pac. 886, 92 Kan. 401; *Paris v. Hamburg-Bremen Fire Ins. Co.*, 90 N. E. 420, 204 Mass. 90.

The question whether defendant had waived a provision of the policy requiring an appraisal is for the jury (*Ball v. Royal Ins. Co.*, 107 S. W. 1097, 129 Mo. App. 34), where evidence is conflicting (*Rimmer v. Aachen & Munich Fire Ins. Co.* [R. I.] 82 Atl. 1060).

5. ARBITRATION IN LIFE AND ACCIDENT INSURANCE AND SUBMISSION TO TRIBUNALS OF FRATERNAL ORDERS

3675-3676. (a) Arbitration

3675 (a). A stipulation, in a benefit certificate providing for weekly benefits, that on disagreement "as to the amount payable on account of any valid claim" the amount should be determined by arbitration, requires the submission of the question of the amount of a valid claim in case of a disagreement, but not where the validity of the claim is disputed, and in such case a holder of a certificate may sue thereon without submitting the issues (*Robinson v. National Fraternal League*, 71 Atl. 1096, 81 Conn. 707).

3676-3679. (b) Recourse to tribunals of fraternal orders as condition precedent to action

3676 (b). Where the constitution and laws of a mutual benefit association provide for the determination of a claim by tribunals within the order, the procedure prescribed must be followed as a condition precedent to an appeal to the courts.

Supreme Council Catholic Benev. Legion v. Grove, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913; *King v. Wynema Council*, No.

10, *Daughters of Pocahontas*, 3 Boyce (Del.) 242, 82 Atl. 1076; *Union Fraternal League of Boston v. Johnston*, 53 S. E. 241, 124 Ga. 902; *Supreme Court of I. O. F. v. Herlinger*, 27 Ohio Cir. Ct. R. 151; *Monger v. New Era Ass'n*, 121 N. W. 823, 156 Mich. 645, 24 L. R. A. (N. S.) 1027; *Larkin v. Modern Woodmen of America*, 163 Mich. 670, 127 N. W. 786.

3677 (b). In several cases, however, it has been held that the provision that all cases must first be passed on by the tribunal of the society does not apply to claims against the society, as that would make it a judge of its own case.

Placa v. Polizzi Generosa Soc. of New York (Sup.) 138 N. Y. Supp. 822; *Great Hive Ladies of Modern Maccabees v. Hodge*, 130 Ill. App. 1; *Bond v. Grand Lodge Brotherhood of Railroad Trainmen*, 165 Ill. App. 490; *Edwards v. American Patriots*, 144 S. W. 1117, 162 Mo. App. 231.

In other cases the holding has been that, where the constitution and by-laws of a fraternal insurance association deny the right to resort to the civil courts until all the remedies within the order are exhausted, such provisions are valid and binding on the members, if reasonable.

Potievska v. Independent Western Star Order, 134 Mo. App. 471, 114 S. W. 572; *Carey v. Switchmen's Union of North America*, 107 N. W. 129, 98 Minn. 28; *Lindahl v. Supreme Court, I. O. F.*, 110 N. W. 358, 100 Minn. 87, 8 L. R. A. (N. S.) 916, 117 Am. St. Rep. 666; *Timmerhoff v. Supreme Tent of Knights of Maccabees of the World*, 155 Ill. App. 395; *American Home Circle v. Eggers*, 137 Ill. App. 595; *Markham v. Supreme Court I. O. F.*, 78 Neb. 295, 110 N. W. 638.

Under such holdings it has been declared that provisions making it possible to keep a claim pending in the association for two or more years before the claimant could resort to the courts were unreasonable and invalid.

Kane v. Supreme Tent, Knights of Maccabees of the World, 87 S. W. 547, 113 Mo. App. 104; *Lindahl v. Supreme Court I. O. F.*, 110 N. W. 358, 100 Minn. 87, 8 L. R. A. (N. S.) 916, 117 Am. St. Rep. 666; *Risinger v. Supreme Court, I. O. F.*, 158 Mo. App. 226, 138 S. W. 552.

3679 (b). Where a member of a mutual benefit company was suspended at his death, and his beneficiary had not appealed from the decision, so as to exhaust her remedy within the order before suing, as required by the by-laws, which ipso facto forfeited all benefits in such case, the beneficiary could not sue on the claim (*Conley v. Supreme Court, I. O. F.*, 122 N. W. 567, 158 Mich. 190).

The complaint is sufficient, though it does not allege a compliance with the constitution of the association as to appeals, when that objection was raised for the first time on appeal to the Supreme Court (*Carey v. Switchmen's Union of North America*, 107 N. W. 129, 98 Minn. 28).

3679-3684. (c) Conclusive effect of decisions by tribunals of the order

3679 (c). The provision of a benefit certificate that the decision of the Supreme Court of the order shall be final and conclusive is intended only to mark the distinction between the effect of the decision of the Supreme Court of the order and that of its other courts, and not to exclude the jurisdiction of legal tribunals (*Gilroy v. Supreme Court I. O. F.*, 75 N. J. Law, 584, 67 Atl. 1037, 14 L. R. A. [N. S.] 632).

3680 (c). In *Monger v. New Era Ass'n*, 137 N. W. 631, 171 Mich. 614, however, by-laws of benefit insurance society requiring claims to be submitted to a tribunal of the association were held to make its determination conclusive, in the absence of fraud, and not to merely require the submission of the claims as a preliminary to an action in the courts.

3684-3686. (d) Waiver

3684 (d). A fraternal beneficiary association, which denied liability on a certificate of membership, waived any further proceedings by the beneficiary under its by-laws providing for an appeal.

Knights of the Modern Maccabees v. Mayfield (Tex. Civ. App.) 147 S. W. 675; *Dague v. Grand Lodge, Brotherhood of Railroad Trainmen*, 73 Atl. 735, 111 Md. 95.

3685 (d). A provision in the laws of a mutual benefit insurance company, limiting the time within which an appeal must be taken from a decision on a claim under a benefit certificate, is waived by a failure to give notice of the decision, until after the time for appeal had expired.

Wells & McComas Council, No. 14, Junior Order United American Mechanics v. Littleton, 60 Atl. 22, 100 Md. 416; *Steiner v. Supreme Council I. O. F.*, 113 N. W. 15, 149 Mich. 567; *Ruterbusch v. Supreme Court I. O. F.*, 162 Mich. 213, 127 N. W. 288.

The board of directors of a fraternal insurance order may not arbitrarily and indefinitely postpone action on a claim, and thereby defeat a beneficiary's right of action, though the by-law requiring

the board to act on claims does not fix any time limit; but the board must act in good faith and within a reasonable time.

Larkin v. Modern Woodmen of America, 163 Mich. 670, 127 N. W. 786;
Winn v. Modern Woodmen of America, 119 S. W. 536, 138 Mo.
App. 701, motion to retax costs denied 146 Mo. App. 69, 123 S.
W. 59.

So, while the constitution and by-laws may require the beneficiaries to exhaust their remedy within the order, failure to do so will not bar them from suing in a court of law or equity, where the society deprives them of their opportunity to appeal within the order (*Ruterbusch v. Supreme Court, I. O. F.*, 162 Mich. 213, 127 N. W. 288).

In *Friedman v. Knights of Modern Maccabees*, 170 Ill. App. 33, it was stated that, in order that a failure by the beneficiary to exhaust remedies provided to be pursued under the constitution and by-laws of the society may be availed of, the society must show that it did all that was required of it in order to require the beneficiary to resort to such remedies.

(1525)

XXVII. RIGHT TO PROCEEDS

1. PERSONS ENTITLED TO PROCEEDS—INSURANCE OF PROPERTY

3689-3692. (b) Insurance of special interests—Husband and wife

3690 (b). A provision in a policy making loss payable to third party as its interest might appear is not dependent upon the existence of an insurable interest in such third party; it being a mere appointee (*Woods v. Insurance Co. of State of Pennsylvania*, 82 Wash. 563, 144 Pac. 650). But the person so named is only entitled to recover as insured's appointee, and, when the policy has become void as to the person effecting the insurance, it cannot be enforced by his appointee (*Brecht v. Law, Union & Crown Ins. Co.*, 160 Fed. 399, 87 C. C. A. 351, 18 L. R. A. [N. S.] 197, affirming [C. C.] 153 Fed. 452).

One to whom a fire insurance policy is made payable as his interest may appear cannot recover thereon, where the policy is made in the name of another and without the latter's knowledge or consent. *Cole v. Niagara Fire Ins. Co. of New York*, 103 S. W. 569, 126 Mo. App. 134.

Where a trustee, to whom insurance was payable as his interest might appear in action on the policy by the owner, answer, disclaiming interest, the owner's right to recover the full amount due under the policy was established. *Camden Fire Ins. Ass'n v. Baird* (Tex. Civ. App.) 187 S. W. 699.

A loss payment clause of a fire insurance policy for the benefit of a life tenant is not a new contract with the life tenant for his personal indemnity against loss, but a perpetuation of the policy in favor of the successors to the title of the property insured (*Millard v. Beaumont*, 194 Mo. App. 69, 185 S. W. 547).

If an executrix, to whom personalty is bequeathed, procures a fire policy thereon, and the property is destroyed by fire during administration, the insurance money takes the place of the personalty destroyed, and passes to her (*In re Robl's Estate*, 127 Pac. 55, 163 Cal. 801, Ann. Cas. 1914A, 319).

A contractor engaged in the building of a house destroyed by fire and earthquake cannot ordinarily share in the proceeds of insurance taken out by the owner (*Anderson v. Quick*, 126 Pac. 871,

163 Cal. 658). However, in *Anderson & Son v. Shattuck*, 76 N. H. 240, 81 Atl. 781, it appeared that the parties to a building contract incorporated therein a provision requiring the owner to keep the building insured, the policies to cover the work incorporated therein and materials for the same in and about the premises, and to be payable to the parties "as their interests may appear." The purpose of the provision was to protect the contractors against loss by fire to the building in which their only interest was that of lienor. It was held that the value of their insurable interest at the time of a fire wholly destroying the building must be determined by the contract price, so that they may recover out of the insurance moneys received only the amount due them under the contract, and not an amount equal to the cost of the work and materials incorporated in the building. Moreover, upon destruction of the building by fire before completion, the contractors were entitled to receive from the insurance moneys the fair value of lumber owned by them which had been brought upon the premises at the time of the fire to be used in the building, though it had not then been attached thereto.

3692 (b). Where a policy of fire insurance containing the usual clause as to "unconditional and sole ownership" is issued to a husband on property described in the application as his, but in fact the property of his wife, the latter, after the property has been destroyed by fire, cannot maintain an action on the policy against the insurance company (*Lehman v. Lancaster County Mut. Ins. Co.*, 45 Pa. Super. Ct. 375).

3692-3694. (c) Carriers—Warehousemen, etc.

3692 (c). Generally the interest of a third person in property described in a policy is not covered thereby in the absence of a provision that the policy shall inure to the "benefit of whom it may concern," or equivalent words (*Washburn-Crosby Co. v. Home Ins. Co.*, 85 N. E. 592, 199 Mass. 463). But, where a carrier receives the proceeds of a policy of insurance, for account of whom it may concern, he holds the money as trustee for those concerned, and he must, after paying himself, divide the remainder (*Symmers v. Carroll*, 101 N. E. 698, 207 N. Y. 632, 47 L. R. A. [N. S.] 196, Ann. Cas. 1914C, 685, affirming 134 N. Y. Supp. 170, 149 App. Div. 641). So, too, it has been held that where, by an arrangement of long standing between a consignee of goods and the carrier, the con-

signee was allowed to let the goods remain in the carrier's warehouse until they were sold and delivered to the purchasers on the written order of the consignee, the latter was entitled to recover for loss of the goods under insurance policy issued to the carrier "and other owners as interest may appear" and insuring against loss "merchandise and property of every description, loaded or unloaded in the custody of the transportation company as warehousemen, forwarders, carriers, or otherwise" and contained in the warehouse mentioned (*Kellner v. Fire Ass'n of Philadelphia*, 106 N. W. 1060, 128 Wis. 233, 116 Am. St. Rep. 45).

If a policy is procured by a bailee for the benefit of a bailor, there is direct insurance on the goods of the bailor, giving him an interest in the policy from the time of its issuance, subject of course, to any interest which the bailee may have under the policy. Thus, in *Robert Williams & Co. v. Auto Express Co.*, 78 N. J. Eq. 165, 78 Atl. 670, the express company procured insurance against loss by fire on merchandise in transit between certain points, for which they were liable as common carriers. While such policy was in force the express company received goods of a shipper which, while in the possession of the express company, were destroyed by fire, after which the express company assigned to the shipper its rights in the insurance money represented by the policy, to the extent of the value of the merchandise, and thereafter recovered the sum for which the policy had been adjusted, which was claimed by the shipper and by its own receiver, the express company claiming no interest in the policy. It was held that the money derived from the policy belonged to the shipper, the only interest of the carrier being in the freight money.

3694-3696. (d) Lessor and lessee

3695 (d). Where the lease would expire in eight years, and the tenant had built new buildings to make the premises tenantable and insured them, though the policy was payable to landlord, and on loss the landlord collected insurance after having refused to insure his own buildings, the value of plaintiff's buildings being greater than the amount of insurance, it was too late for the landlord to claim that the tenant had no legal or equitable right to recover the insurance money (*Plum Trees Lime Co. v. Keeler*, 92 Conn. 1, 101 Atl. 509).

3698-3699. (f) Purchase of insured property

3698 (f). A policy holder is not entitled to recover where he has transferred the property before the loss (*Davis v. Bremer County Farmers' Mut. Fire Ins. Ass'n*, 154 Iowa, 326, 134 N. W. 860). Though a vendor of land under a contract is entitled to the benefit of insurance taken by the purchaser in his own name for the benefit of the vendor, where such a purchaser obtains insurance for his own benefit without agreement to insure for the benefit of the vendor, the latter can claim no benefit therein (*Trumbull v. Bombard*, 157 N. Y. Supp. 794, 171 App. Div. 700). But the purchaser under a valid contract is entitled to the proceeds from policies of insurance on the property (*Millville Aerie No. 1836, Fraternal Order of Eagles v. Weatherby*, 82 N. J. Eq. 455, 88 Atl. 847). And one holding under mesne conveyances of land contract, entitling him to absolute conveyance on payment of \$1,200, he having paid accruing interest, and nothing having been done to forfeit or lessen his rights, is such a sole and unconditional owner as to entitle him to proceeds of insurance thereon (*Case v. Meany*, 165 Wis. 143, 161 N. W. 363). So, too, the purchaser of land subject to a vendor's lien, but who assumed no personal liability on the purchase-money notes, and who insured premises for his own benefit, is entitled to proceeds as against owner of the lien (*Gassaway v. Browning* [Tex. Civ. App.] 175 S. W. 481). It has, however, been held that where there is an agreement to transfer land on which there is a building, the owner being insured against loss thereof by fire, and a destruction of such building after such agreement, and a subsequent consummation of such agreement as to what remains, in the absence of any contract to the contrary, the right to recover for the loss is in the executory vendor (*Evans v. Crawford County Farmers' Mut. Fire Ins. Co.*, 109 N. W. 952, 130 Wis. 189, 9 L. R. A. [N. S.] 485, 118 Am. St. Rep. 1009).

In *Bartling v. German Mut. Ins. Co.* (Iowa) 123 N. W. 63, it appeared that plaintiff, who was the owner of land on which was an insured barn, agreed to exchange the property and assign the policy. In pursuance thereof, plaintiff executed a deed to a third person as security for loan of boot money advanced by the other party; it being agreed that the land should be conveyed to the other party when the loan was repaid. Possession of the land was given to the other party. It was discovered that the other party was not able to make proper title to the property to be exchanged by him, and negotiations were begun with other persons for the

perfection of the title; and, in the meantime, the barn was burned. Subsequently the other party was able to furnish a perfect title, and it was accepted by plaintiff. The policy contained no conditions of forfeiture. It was held that the other party to the exchange agreement, not being able at the time of the loan to furnish a good title so that the exchange was not completed, and plaintiff being necessarily damaged by the loss of the barn, plaintiff's rights were not lost by his subsequent pursuit of negotiations with the other party which resulted in the completed exchange.

Where an owner of land, having contracted for the sale thereof and received part payment of the price of vendee who went into possession, assigned to vendee a fire policy insuring buildings on the land, vendee on loss by fire was entitled to the insurance money, though he may have been then insolvent; the balance of the price not being then due (*Zenor v. Hayes*, 81 N. E. 1144, 228 Ill. 626, 13 L. R. A. [N. S.] 909).

3699-3703. (g) Mortgagees' and vendors' liens—"Loss payable to"

3699 (g). A mortgagee has no interest in a policy issued on the mortgaged property to the mortgagor unless created by covenant (*Johnson v. Northern Minnesota Land & Investment Co.*, 168 Iowa, 340, 150 N. W. 596).

Where it is not stipulated in a fire policy that the same shall be payable to a mortgagee, the mortgagee acquires no lien on such policy unless he files with the secretary of the insurance company a written notice describing his mortgage, the estate conveyed, and the sum remaining unpaid, as authorized by the express provisions of Rev. St. c. 49, § 54. *Knowlton v. Black*, 67 Atl. 563, 102 Me. 503. See, also, *Gilman v. Commonwealth Ins. Co. of New York*, 112 Me. 528, 92 Atl. 721, L. R. A. 1915C, 758.

3700 (g). An insurance policy making the loss payable to a mortgagee, as his interest appears, insures the owner's, and not the mortgagee's, interest (*Rawl v. American Cent. Ins. Co.*, 77 S. E. 1013, 94 S. C. 299, 45 L. R. A. [N. S.] 463, Ann. Cas. 1915A, 1231). But a rider attached to the policy stipulating for payment of loss to mortgagee protects the mortgagee to the amount of the face of the policy (*Laurenzi v. Atlas Ins. Co.*, 131 Tenn. 644, 176 S. W. 1022). The mortgagee's interest in the policy is greater than that of a naked appointee (*McDowell v. St. Paul Fire & Marine Ins. Co.*, 207 N. Y. 482, 101 N. E. 457, affirming 145 App. Div. 724, 130 N. Y. Supp. 294).

(1530)

A policy made payable to mortgagee "as his interest may appear" is an express promise by insurer to pay proceeds to mortgagee, who also has an interest in property insured to extent of his mortgage (*Northwestern Nat. Ins. Co. v. Southern States Phosphate & Fertilizer Co.*, 20 Ga. App. 506, 93 S. E. 157). The mortgagee's right to recover is dependent on and no greater than that of insured (*Fidelity-Phenix Fire Ins. Co. v. Cleveland [Okl.]* 156 Pac. 638). The loss payable clause does not create a new contract with the mortgagee independent of that with the assured, according to *Ætna Ins. Co. v. Cowan*, 111 Miss. 453, 71 South. 746. But it has been held that the standard mortgagee clause creates independent contract of insurance for mortgagees' separate benefit ingrafted upon main contract of insurance.

Fire Association of Philadelphia v. Evansville Brewing Ass'n (Fla.) 75 South. 196; *Stamey v. Royal Exch. Assur. Co.*, 150 Pac. 227, 93 Kan. 707.

The rights of a mortgagee of premises covered by a fire policy are fixed by stipulation in the policy that the loss shall be paid to the mortgagee as his interest may appear, and cannot be affected by any adjustment by insured with insurer made without its knowledge. *Leslie v. Firemen's Ins. Co. of Newark, N. J.*, 112 N. Y. Supp. 496, 60 Misc. Rep. 558.

Eighty per cent. average clause, contained in a policy of fire insurance, payable to mortgagee as her interest appeared, upon a loss of less than 80 per cent. of the cash value of the property, will reduce the mortgagee's recovery to the amount fixed thereby. *Hartwig v. American Ins. Co. of City of Newark, N. J.*, 154 N. Y. Supp. 801, 169 App. Div. 60.

Assured, whose building is totally destroyed by fire, cannot waive Act No. 135 of 1900, and Act No. 187 of 1908, abolishing a three-fourths value clause, to the prejudice of a mortgage creditor in whose favor the policy contains a rider. *Tilley v. Camden Fire Ins. Ass'n*, 72 South. 709, 139 La. 985.

Mortgagees of house covered by policy of fire insurance whose interest, though not in fact indorsed on the policy, regarded by equity as having been so indorsed, had an insurable interest and a cause of action against insurer after loss (*Continental Ins. Co. v. Bair [Ind. App.]* 114 N. E. 763).

A mortgagor has no interest in the proceeds of a policy insuring the mortgagee taken out by the mortgagee to protect his own interest, and in which the interest of the mortgagor has been forfeited, leaving that of the mortgagee still in force (*Gillespie v. Scottish Union & National Ins. Co.*, 61 W. Va. 169, 56 S. E. 213, 11

L. R. A. [N. S.] 143). If the policy was taken out by a mortgagor for the benefit of the mortgagee as its interest might appear, it is available to both, regardless of which had possession thereof (*Union Institution for Savings in City of Boston v. Phoenix Ins. Co.*, 196 Mass. 230, 81 N. E. 994, 14 L. R. A. [N. S.] 459, 13 Ann. Cas. 433). In *Beistle v. McConnell*, 141 Mich. 463, 104 N. W. 729, it appeared that a mortgagee procured a fire policy on the mortgaged premises, payable to him as his interest might appear after a loss, and pending an action on the policy, the mortgagee and the owner agreed to divide any judgment that might be recoverable. It was held that the agreement did not create simply the relation of creditor and debtor between the mortgagee and the owner, but impressed the judgment with an equitable trust in favor of the mortgagee.

Where the president of a bank loaned money of the bank, taking therefor in his own name a note and a mortgage securing it on a stock of goods, and deposited them in the bank, but did not make a formal transfer of them, and went into possession of the goods, he could insure the property in his own name, as mortgagee in possession, and, the bank not objecting, collect the insurance in case of loss. *Dalton v. Milwaukee Mechanics' Ins. Co.*, 102 N. W. 120, 126 Iowa, 377; *Same v. German Ins. Co., of Freeport, Ill.*, 102 N. W. 1131.

3701 (g). Where a loss was made payable to a mortgagee as his interest should appear, the policy was prima facie payable to the mortgagee to the extent of his mortgage debt as it appeared from the records, notwithstanding a renewal of the mortgage subsequent to the issuance of the policy (*Continental Ins. Co. v. Thomason*, 84 S. W. 546, 27 Ky. Law Rep. 158). And a mortgage stipulating that the premises shall be insured for the mortgagee's benefit, and that a loss shall be payable to him, is an appropriation in advance by the parties of the insurance money to the satisfaction of the notes secured by the mortgage, and, where insurance money is paid, neither party may without the consent of the other disregard the application, though one of the notes is not due (*Bonham v. Johnson*, 98 Ark. 459, 136 S. W. 191). Moreover, the amount accruing from the insurance is appropriated by clause making loss payable to mortgagee to payment of mortgage debt, so as to be not applicable to any other debt, without the consent of both parties (*Kissire v. Plunkett-Jarrell Grocer Co.*, 103 Ark. 473, 145 S. W. 567). But where buildings on property mortgaged, insured for the benefit of the mortgagee, were destroyed by fire, and the loss

paid to the latter at a time when no part of the mortgage debt was due, the mortgagee was not entitled to apply any part of the money so received on the debt without the consent of the mortgagor, but was bound to hold and apply it to the extinguishment of the debt as fast as it matured (*Thorp v. Croto*, 65 Atl. 562, 79 Vt. 390, 10 L. R. A. [N. S.] 1166, 118 Am. St. Rep. 961, 9 Ann. Cas. 58).

Where a mortgagee insures his own interest without any agreement with the mortgagor therefor, and a loss accrues, the mortgagor is not entitled to have the proceeds applied to the reduction or discharge of his mortgage debt, but the mortgagee may recover the whole proceeds.

Gould v. Marine Farmers' Mut. Fire Ins. Co., 114 Me. 416, 96 Atl. 732, L. R. A. 1917A, 604; *Stuyvesant Ins. Co. v. Reid*, 171 N. C. 513, 88 S. E. 779.

Where a mortgagee takes out insurance on the property at the expense and for the benefit of both mortgagor and mortgagee, the mortgagor in case of loss is entitled to have the avails of the policy applied toward the discharge of his indebtedness (*Leyden v. Lawrence*, 85 Atl. 1134, 80 N. J. Eq. 550, affirming decree 81 Atl. 121, 79 N. J. Eq. 113). If the policy made loss, if any, to be paid to the holder of a mortgage note, and there were two notes, the proceeds of the policy should be divided in proportion to the respective claims of the mortgagees (*Fidelity & Deposit Co. of Maryland v. Johnston*, 42 South. 357, 117 La. 880).

A chattel mortgagee, who insured his interest, is entitled to proceeds of policy after loss, notwithstanding mortgage was invalid as to creditors and subject to attack by mortgagor's trustee in bankruptcy (*In re Stucky Trucking & Rigging Co.* [D. C.] 240 Fed. 427). Where defendant purchased piano on installment plan, by terms of general policy of insurance carried by seller the relationship being, in effect, that of mortgagor and mortgagee, rights and liabilities of buyer with reference to insurance money must be determined by the principles applicable to that relationship (*Stuyvesant Ins. Co. v. Reid*, 171 N. C. 513, 88 S. E. 779).

3702 (g). Where a vendor of real estate retains title until the balance of the purchase money is paid, and the vendee takes out a policy of fire insurance, which, with the consent of the insurance company, he assigns to the vendor as collateral security, and a fire occurs after all of the purchase money has been paid, but before a deed has been delivered to the vendee, the vendor holds the policy as trustee for the vendee, and if the vendee does not object, the in-

insurance company cannot object (*Munson v. German Fire Ins. Co.*, 33 Pa. Super. Ct. 551). But parties who were not mortgagees, trustees, or lienors, though having a right to file a lien, are not entitled to recover under a policy providing that the loss should be payable to them "as mortgagees (or trustees) as interest may appear" (*Roper v. National Fire Ins. Co.*, 76 S. E. 869, 161 N. C. 151).

Where policies insuring severally under separate valuations certain factory buildings and their contents were indorsed, "Loss, if any, on buildings, payable" to a mortgagee as his interest might appear, the mortgagee was not entitled to any portion of the proceeds of insurance on the "contents" of the buildings (*Miller v. Gibbs*, 95 N. Y. Supp. 385, 108 App. Div. 103). So, where a policy was made payable to the vendor of the building insured thereby, "as his interest might appear," for the balance due on the price, a verdict in an action on the policy by such vendor for a sum in excess of the amount covering the building was excessive; it appearing that he had no interest in other property insured by the policy under separate items (*Herzog v. Palatine Ins. Co., Limited*, of Lincoln, England, 79 Pac. 287, 36 Wash. 611).

An agreement to sell personal property for a certain sum, any excess realized above such sum to be divided between the owner and seller, does not, of itself, entitle the seller to any part of the proceeds of insurance above such price, if the property is accidentally destroyed by fire before sale (*Waverley Sales Co. v. Ford* [Mo. App.] 194 S. W. 1085).

3703-3706. (h) Same—Covenant by mortgagor or vendee to insure

3703 (h). Where a mortgagor covenants to maintain insurance for the benefit of the mortgagee, insurance inures to the benefit of the mortgagee (*Johnson v. Northern Minnesota Land & Investment Co.*, 168 Iowa, 340, 150 N. W. 596). So, where a mortgage required the mortgagor to insure the property for the benefit of the mortgagee, the policy procured by the mortgagor, payable to the mortgagee as its interest might appear, was available to the latter, though it was not informed of the issuance of the policy, and had no knowledge thereof until after the fire (*Union Institution for Savings v. Phoenix Ins. Co.*, 196 Mass. 230, 81 N. E. 994, 14 L. R. A. [N. S.] 459, 13 Ann. Cas. 433). Moreover, in *Quackenbush v. Citizens' Ins. Co. of Missouri*, 150 Mich. 555, 114 N. W. 388, it was held that where a wife and her family are in possession of premises, which she holds under a land contract providing that the buildings shall be kept in-

sured by her for the benefit of the vendor, and a policy pursuant to such contract is taken out in the name of her husband, but payable to the vendor "as his contract interest may appear," and the insurer accepts and keeps the premium paid by the wife, and where the insurer's agent throughout the transaction has knowledge of the respective interests of the parties to the property, the insurer will be liable to the vendor for his loss by fire, even though the policy is in the name of the husband, between whom and the vendor no contract existed.

A contract by a mortgagor or purchaser under a conditional sale contract to provide insurance as additional security, although he has violated it by taking the insurance in his own name, will be given effect in equity through a lien against the proceeds of the insurance after a loss (*In re Zitron* [D. C.] 203 Fed. 79). A vendor's lien claimant has no claim, because of a stipulation in a trust deed for insurance for his benefit, to insurance on machinery acquired after the execution of such trust deed for the price of which a chattel mortgage was given containing a stipulation for insurance in favor of the mortgagee, who was the seller of the machinery (*Walter Connally & Co. v. Hopkins* [Tex. Civ. App.] 195 S. W. 656).

3706-3708. (i) Same—Foreclosure, payment, and restoration

3707 (i). Where a policy was payable to the trustee in a deed of trust on the building insured, and the deed was foreclosed and the property sold to the complainant in the foreclosure suit for an amount which left a deficiency, and subsequently the building burned, the insured, during the period of redemption, was entitled to the proceeds of the policy (*Rawson v. Bethesda Baptist Church*, 77 N. E. 560, 221 Ill. 216, 6 L. R. A. [N. S.] 448, affirming 123 Ill. App. 239). In *Uhlfelder v. Palatine Ins. Co.*, 111 App. Div. 57, 97 N. Y. Supp. 499, reversing 44 Misc. Rep. 153, 89 N. Y. Supp. 792, it appeared that plaintiff, a mortgagee of certain property, secured a policy thereon from defendant, insuring the mortgagor against loss or damage by fire to the mortgaged premises, loss payable to plaintiff as his interest might appear, and providing that the insurance should not be invalidated by any foreclosure or change of title or ownership of the property. After a foreclosure sale at which the plaintiff purchased the mortgaged premises, he assigned two-thirds of his interest to others, and subsequent to such assignment, but before the delivery of a deed by the referee, the property was damaged by fire. It was held that plaintiff's interest as mort-

gagee continued until the formal delivery of the deed by the referee under the foreclosure proceedings, and that plaintiff was therefore entitled to recover under the policy one-third of the total loss.

Where a mortgagee, when he took out insurance on the mortgaged property, had the authority to do so, the fact that the mortgage debt was subsequently paid did not affect the insurance contract. *New v. Germania Fire Ins. Co.* [Ind. App.] 82 N. E. 1005, reversing on rehearing 81 N. E. 217.

3708 (i). A release by the mortgagee of a mortgage held as collateral security does not affect the right to recover on a policy payable to him as his interest may appear, as under Rev. Laws Mass. c. 118, § 60, they are required only to assign to the insurer the mortgage and the note secured thereby (*Amory v. Reliance Ins. Co.*, 208 Mass. 378, 94 N. E. 677).

3708-3712. (j) Same—Action on policy

3710 (j). Where the interest of a mortgagee is the only valid liability under a fire policy, all that is due thereunder being due to him, "as his interest may appear," he can sue thereon, though his interest is less than the face of the policy (*Bacot v. Phenix Ins. Co. of Brooklyn*, 96 Miss. 223, 50 South. 729, 25 L. R. A. [N. S.] 1226, Ann. Cas. 1912B, 262). So, too, an action may be brought on a standard policy of fire insurance containing the mortgage subrogation clause, in the name of the mortgagee alone (*Ebensburg Building & Loan Ass'n v. Westchester Fire Ins. Co.*, 28 Pa. Super. Ct. 341). A mortgagee in possession after condition broken may sue on a policy issued to the mortgagor, stipulating that any loss shall be payable to the mortgagee as his interest may appear, and the mere fact that the mortgagor has executed a deed of the premises to the mortgagee, and that the deed has been deposited with a third person in escrow for delivery to the mortgagee on the performance of specified conditions, which have not been performed, does not defeat the right of the mortgagee to sue (*Walton v. Phoenix Ins. Co.*, 162 Mo. App. 316, 141 S. W. 1138).

Where a contract of insurance has been complied with by the insured, it is no defense, in an action by a mortgagee to whom a loss was made payable, that the secretary of the insurer exceeded his power by indorsing on the policy a clause making a loss payable to the mortgagee. *Adams v. Farmers' Mut. Fire Ins. Co.*, 90 S. W. 747, 115 Mo. App. 21.

Insured in a tornado policy making loss payable to a mortgagee as its interest may appear may sue for a loss (*Still v. Connecticut* (1536))

Fire Ins. Co. of Hartford, Conn., 185 Mo. App. 550, 172 S. W. 625). So, where a fire insurance policy in the name of the owner of the property contained the clause, "Loss payable" to a building association, "as its interest may appear," the owner may sue thereon (*Staats v. Georgia Home Ins. Co.*, 50 S. E. 815, 57 W. Va. 571, 4 Ann. Cas. 541). And where the mortgage debt was less than the amount due on the insurance policy, the insured could sue on the policy in her own name though a mortgage clause was attached to the policy (*Liverpool & London & Globe Ins. Co. v. Cargill*, 44 Okl. 735, 145 Pac. 1134).

Where a mortgagor insured the premises under a policy payable to the mortgagee as his interest might appear, the consent of the mortgagee, after an action on the policy commenced by the mortgagor had been tried in a municipal court, was sufficient to enable the mortgagor to maintain the action. *Green v. Star Fire Ins. Co.*, 77 N. E. 649, 190 Mass. 586.

3711 (j). In an action by a mortgagor to recover on a policy of insurance, a mortgagee to whom the loss is payable to the extent of his interest is a necessary party; and, where he refuses to join as plaintiff, he may be made defendant, under Code Civ. Proc. §§ 446, 448 (*Lewis v. Guardian Fire & Life Assur. Co.*, 74 N. E. 224, 181 N. Y. 392, 106 Am. St. Rep. 557, affirming 93 App. Div. 157, 87 N. Y. Supp. 525).

The existence under the Spanish law of a summary remedy to enforce a mortgage does not prevent the mortgage creditor from suing in the ordinary way for the avails of insurance subject to his mortgage. And the mortgage creditor in a mortgage governed by the civil law may sue for the avails of insurance subject to his mortgage without first exhausting his remedies against other property embraced by the mortgage (*Royal Ins. Co. v. Miller*, 26 Sup. Ct. 46, 199 U. S. 353, 50 L. Ed. 226, followed in *Amadeo v. Northern Assur. Co.*, 26 Sup. Ct. 507, 201 U. S. 194, 50 L. Ed. 722).

3712-3714. (k) Assignees and pledgees

3712 (k). Where an alleged bankrupt before insolvency arranged to borrow money to purchase goods, under an agreement that he would have the goods insured, and assign the policies to the lenders as collateral security, and loans were made to him, the agreement operated as a valid equitable assignment of the policies, though they were not delivered when issued, nor actually assigned until after loss, when the borrower was insolvent (*Wilder v. Watts*

[D. C.] 138 Fed. 426). In *Long v. Farmers' State Bank*, 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585, it appeared that a debtor agreed with his bank to carry \$7,000 insurance on his stock as a protection of the bank's claim against him; the contract providing that the debtor assigned thereby such amount of insurance to the bank as collateral security for his indebtedness to the bank. It was held that such instrument did not constitute an assignment of the policies in *præsenti*, but was at most an executory agreement to create a lien on the fund to arise in case of loss and collection from the insurance company. Where one of several judgment debtors in *solido* assigned a fire insurance policy subject to the rights of a judgment creditor, and afterwards assigned and delivered the policy to the creditor, and another judgment debtor paid the judgment, the judgment creditor had no title to the policy which he could convey to the debtor paying the judgment, and that the first assignee was entitled to the proceeds of the policy (*Michel v. Southern Ins. Co.*, 66 South. 302, 135 La. 933).

An indorsement of a policy, loss, if any, payable to another as his interest may appear, does not give the assignee a right to the loss absolutely, but to the extent of any interest he may have at the time of the loss. The words, "as their interest may appear," refer to an interest, not in the property insured, but in the payment of the loss (*Atlas Reduction Co. v. New Zealand Ins. Co.*, 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. [N. S.] 433, affirming [C. C.] 121 Fed. 929).

A creditor, holding a fire policy as collateral security for an indebtedness in excess of the face of the policy, may sue alone and recover the loss; neither the insured nor his legal representatives being necessary parties. *German Ins. Co. of Freeport, Ill., v. Gibbs, Wilson & Co.*, 92 S. W. 1068, 42 Tex. Civ. App. 407, rehearing denied 96 S. W. 760, 42 Tex. Civ. App. 407.

In *Amory v. Reliance Ins. Co.*, 208 Mass. 378, 94 N. E. 677, the policy was made payable to a mortgagee as his interest might appear. The mortgage was assigned to a third person as collateral for a debt secured by mortgage on other property. Subsequently the mortgagee indorsed on the policy an assignment of his interest in the policy to the third person, who subsequently discharged the assigned mortgage. It was held that the third person had no rights under the policy for the protection of his interests under the other mortgage. In the same case it appeared further that an indorsement on the policy by insured, assented to by an authorized agent

of insurer, directed that in case of loss the policy should be payable to a first mortgagee as his interest might appear under present or any future mortgages, and the balance to a second mortgagee as his interest might appear. The mortgages were executed on the same day, but the second mortgage was not delivered until a few days later. There was no fraud or concealment. It was held that the indorsement referred to the first and second mortgagees, and in case of a loss they were entitled to recover according to the indorsement.

3714-3715. (l) Other liens

3714 (l). The holder of a mechanic's lien has no claim on the proceeds of insurance policies taken out by the owner and payable to himself or to a mortgagee.

Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372; *Healey Ice Mach. Co. v. Green* (C. C.) 181 Fed. 890.

So, too, one holding a materialman's lien on an ice plant was not entitled to the proceeds of fire insurance collected by the owner, in the absence of an agreement to that effect (*Henry Vogt Mach. Co. v. Lingenfelter*, 99 S. W. 358, 30 Ky. Law Rep. 654).

A fire insurance agent, who made advances for an insured of premiums on policies which have expired, in the absence of a definite contract therefor, has no equitable lien for such advances on the proceeds of a subsequent policy on the property which was in force at the time of a loss (*In re Sejo Ice Cream Co.* [D. C.] 181 Fed. 627).

Where a mining company purchased mill and machinery of a company against which judgments had been rendered which were liens on fixtures, the fund derived by purchaser from insurance was not subject to lien of judgments, and did not stand in their stead (*Vogelstein v. Athletic Mining Co.* [Mo. App.] 192 S. W. 760).

In view of Acts 1908, c. 100, § 2, proceeds of a policy of insurance covering a stock of merchandise destroyed by fire must be distributed pro rata to all creditors of insured. *Citizens' Nat. Bank v. Yazoo Grocery Co.* (Miss.) 73 South. 877.

3715-3717. (m) Assignment after loss—Validity and sufficiency

3715 (m). The assignment of a fire insurance policy after loss is valid without the consent of the insurer, though the written transfer of the policy purports to be subject to the consent of the insurer.

G. Ober & Sons Co. v. Phillips Burttoff Mfg. Co., 40 South. 278, 145 Ala. 625; *Georgia Co-operative Fire Ass'n v. Borchardt & Co.*, 123

Ga. 181, 51 S. E. 429, 3 Ann. Cas. 472; *Bartling v. German Mut. Lightning & Tornado Ins. Co. of Farmers of Maxfield and Vicinity*, 154 Iowa, 335, 134 N. W. 864; *Warner v. Narragansett Mut. Fire Ins. Co.*, 90 Atl. 706, 111 Me. 590.

An adjusted claim for insurance is a chose in action, title to which passes by assignment. *Wasem v. Gray*, 43 Colo. 140, 95 Pac. 557.

Code Iowa, §§ 3044, 3046, relating to assignments of instruments for the payment of money, apply to the assignment of insurance policies after, but not before, the loss. *Davis v. Bremer County Farmers' Mut. Fire Ins. Ass'n*, 154 Iowa, 326, 134 N. W. 860.

Where the consideration for assignment of proceeds of insurance policy was then existing indebtedness of assignor to assignee, assignee is not entitled to protection as innocent purchaser of claim evidenced by policy. *Walter Connally & Co. v. Hopkins* (Tex. Civ. App.) 195 S. W. 656.

The assignment of the proceeds of a fire policy need not be accepted by the insurer's agent in order to become effective, if the company had notice of the assignment (*Prentice v. Security Ins. Co.* [Tex. Civ. App.] 153 S. W. 925). However, where the policy by its terms was payable to a third person, insured could not after the loss assign his claim, without the payee's consent, so as to defeat the rights of the payee under the terms of the policy (*German Ins. Co. of Freeport, Ill., v. Gibbs, Wilson & Co.*, 92 S. W. 1068, 42 Tex. Civ. App. 407, rehearing denied 96 S. W. 760, 42 Tex. Civ. App. 407).

3716 (m). In the absence of any provision in a fire policy requiring a transfer of a claim under the policy to be in writing, it may be by parol.

Cosmopolitan Fire Ins. Co. v. Gingold, 3 Ala. App. 537, 57 South. 266; *German Ins. Co. of Freeport, Ill., v. Gibbs, Wilson & Co.*, 92 S. W. 1068, 42 Tex. Civ. App. 407, rehearing denied 96 S. W. 760, 42 Tex. Civ. App. 407.

A written order signed by holder of policy after a loss, addressed to insurer's local agent, directing a payment to a third party, is competent evidence of an equitable assignment of the insured's claim under the policy (*Robertson v. Ridenour-Baker Grocery Co.*, 100 Kan. 133, 163 Pac. 655).

Where an assignment of a bond and mortgage does not in terms transfer a right of action on an insurance policy for a fire loss already sustained, nor the policy itself, neither party being aware of the loss, the assignment cannot be construed to pass such right of action (*Kupfersmith v. Delaware Ins. Co. of Philadelphia*, 81 N. J. Law, 664, 80 Atl. 561).

3717-3719. (n) Same—Effect

3718 (n). In *Craig v. Insurance Co. of State of Pennsylvania*, 162 Mich. 657, 127 N. W. 757, it appeared that complainant sold land to defendant, the price being secured as against loss by fire by a policy running to defendant, and providing for payment to complainant as his interest might appear, and defendant agreed to keep the premises insured and assign the policy to complainant, but a subsequent policy taken out by defendant omitted, without complainant's knowledge, the provision for his indemnity, and the buildings thereafter burned, and defendant's assignee of the policy, taking with knowledge of complainant's rights, recovered a judgment for the amount thereof. It was held that the assignment of the policy was a fraud upon complainant's rights, and the assignee held the money received under the policy in trust for complainant's protection, so that he was entitled to recover therefrom the amount due under the land contract.

In Maine an assignee of a fire loss could maintain an action in the insured's name (*Warner v. Narragansett Mut. Fire Ins. Co.*, 90 Atl. 706, 111 Me. 590). In Georgia the assignee under a written assignment may bring the action (*Georgia Co-operative Fire Ass'n v. Borchardt & Co.*, 51 S. E. 429, 123 Ga. 181, 3 Ann. Cas. 472). And in Illinois it is held that, where an insurance company sends money to its agents to adjust a loss, an assignee of the insured's interest in the money is the equitable and bona fide owner of it and may maintain an action for it in his own name under section 18, Practice Act, or in the name of his assignor for his use (*Rogers v. Rollins*, 185 Ill. App. 153).

3719. (o) Employer's liability insurance

3719 (o). An injured employé of insured or any other third party cannot maintain action on an indemnity insurance contract, since no privity exists between the parties (*United States Fidelity & Guaranty Co. v. Maryland Casualty Co.*, 182 Ill. App. 438). So a person injured by an auto company insured against liability for injuries, has no standing in equity to compel the insurance company to pay the judgment obtained by him against the auto company (*Goodman v. Georgia Life Ins. Co.*, 189 Ala. 130, 66 South. 649).

In *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981, an employer's indemnity policy was subject to the agreement that, if any suit be brought for damages, immediate notice should be given the insurer, so that it could defend or settle the same; that insured would

(1541)

not settle, or interfere with negotiations for settlement or in any legal proceeding, without the consent of the insurer; and that "no action shall lie against the insurer for any loss under the policy unless it be brought by the insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issues." It was held that merely obtaining a judgment against the insured for personal injuries, without payment thereof by insured, does not give the employé a cause of action against the insurer. In *Cayard v. Robertson & Hobbs*, 123 Tenn. 382, 131 S. W. 864, 30 L. R. A. (N. S.) 1224, Ann. Cas. 1912C, 152, it was held that an employé, obtaining a judgment against his employer for a personal injury, may not, on the insolvency of the employer, obtain a decree against an insurer in an indemnity policy, stipulating that it will indemnify the employer against loss for damages on account of bodily injuries, and that no action shall lie against insurer unless brought by the employer to reimburse him for loss actually sustained, though insurer, on the happening of the accident and notice thereof, assumed exclusive control of the negotiations for a settlement and of the defense of the action brought by the employé for his injuries, against the conditions of the policy. And in *White v. Maryland Casualty Co.*, 139 App. Div. 179, 123 N. Y. Supp. 840, it was said that, since an indemnity insurance contract is personal and cannot be assigned without the insurer's consent, a corporation which was not organized for more than a year after the expiration of the indemnity insurance policy issued to its predecessor firm covering personal injuries occurring in its yards, and which acquired no rights in the policy, was not a proper party plaintiff against the insurer to recover an amount paid in settlement of an action against it for personal injuries in its yards, though such corporation aided in defending the personal injury action and advanced some of the money paid in the settlement at the request of the insured firm, and even if the corporation was organized for the express purpose of taking over the business of the indemnified firm, so that the complaint was demurrable for misjoinder of parties plaintiff.

A provision of an employer's insurance policy, prohibiting its assignment by the assured unless with the consent of the insurer, has no application to an assignment of a cause of action which has already accrued thereon and after the policy has expired by its terms (*Maryland Casualty Co. v. Omaha Electric Light & Power Co.*, 157 Fed. 514, 85 C. C. A. 106).

2. RIGHT TO PROCEEDS IN LIFE AND ACCIDENT INSURANCE**3720-3725. (b) Right to proceeds in general**

3721 (b). The policy of a fraternal benefit insurer is the contract which measures the rights of the parties, and the beneficiaries take under the contract, and not by inheritance (*Mund v. Rehaume*, 51 Colo. 129, 117 Pac. 159, Ann. Cas. 1913A, 1243). The rights of a beneficiary in no wise depend upon the possession of the certificate by the beneficiary (*Supreme Lodge K. of P. v. Ferrell*, 112 Pac. 155, 83 Kan. 491, 33 L. R. A. [N. S.] 777). In order to be entitled to the proceeds of the policy or certificate, the person designated must come within the class of persons who may be made beneficiaries under the provisions of the statute or by-laws of the association.

Smith v. Supreme Tent Knights of Maccabees of the World, 102 N. W. 830, 127 Iowa, 115, 69 L. R. A. 174; *Modern Woodmen of America v. Comeaux*, 79 Kan. 493, 101 Pac. 1, 25 L. R. A. (N. S.) 814, 17 Ann. Cas. 865. And see *Clayton v. Supreme Conclave, Improved Order of Heptasophs*, 130 Md. 31, 99 Atl. 949, holding that where insured in a fraternal order had no nearer relatives than children named as beneficiaries, who were virtually, though not legally, adopted, and insurance must either go to them or lapse, they will take the proceeds.

A designation as beneficiary procured by fraud gives no right to proceeds. So where sisters of the insured fraudulently induce him to make them beneficiaries of an insurance policy, for the benefit of his children, the children may recover from them the proceeds of the policy collected by them from the insurer (*Munroe v. Beggs*, 139 Pac. 422, 91 Kan. 701).

3722 (b). The fact that a beneficiary named in a certificate is not eligible is not an objection such as the society alone can raise, as the rights of the parties are fixed by law, and are not affected by the action of the society in filing a bill of interpleader to determine conflicting claims (*Royal League v. Shields*, 159 Ill. App. 54).

If the right to proceeds depends on the relationship of the person claiming, such relationship is to be determined at the time of the member's death.

Murphy v. Nowak, 79 N. E. 112, 223 Ill. 301, 7 L. R. A. (N. S.) 393; *Farra v. Braman* (Ind. App.) 82 N. E. 926, rehearing denied 84 N. E. 155.

Thus in *Davin v. Davin*, 114 App. Div. 396, 99 N. Y. Supp. 1012, the benefit certificate provided that the society would pay to the beneficiary named, provided he was the lawful beneficiary of the member at the time of his death, a certain sum of money. The society's charter declared that its purpose was to render pecuniary aid to its members and beneficiaries in the following order: (a) To such person or persons of the immediate family of the member as by him designated; (b) to such person or persons, in default of such family, of the blood relatives of such member as by him designated; and (c) in default of any designation by the member, or out of the order named, to such family or relatives who are heirs at law, etc. At the time decedent became a member he was unmarried, and resided with his father, whom he named as his beneficiary, but prior to his death he married plaintiff, established a new family, and died without changing the beneficiary in his certificate. It was held that the relationship of the beneficiary to the member was to be determined at the time of the member's death, at which time his "immediate family," within section 1, subd. 1 (a) of the society's charter, consisted of his wife and his own household, so that she, and not the father named in the certificate, was entitled to the benefit.

And to substantially the same effect are *Knights of Columbus v. McInerney*, 153 Mich. 574, 117 N. W. 166, 126 Am. St. Rep. 541; *Spear v. Boston Police Relief Ass'n*, 195 Mass. 351, 81 N. E. 196; and *Larkin v. Knights of Columbus*, 73 N. E. 850, 188 Mass. 22.

For a death benefit payable to the family of the deceased, those persons whose relation to the deceased is legally connected with the word "family" are entitled to sue, and not his personal representative (*Jackson v. Brothers and Sisters of Promise*, 59 S. E. 11, 2 Ga. App. 761). There being no legal duty imposed by law on insured to support his mother, as is the case with his wife and minor children, she is not a "legal dependent" within the meaning of a policy payable to his "legal dependent" (*Vaughn v. National Council, Junior Order United American Mechanics*, 117 S. W. 115, 136 Mo. App. 362). So, too, a member who dies leaving no children or relatives other than brothers and sisters, nephews and nieces, not living with him, leaves no legal dependents within the meaning of a provision of the certificate of membership for payment of benefits to his legal dependents (*Little v. Colwell*, 74 S. E. 10, 158 N. C. 351, 39 L. R. A. [N. S.] 450).

Where the beneficiary has murdered the insured, the sole heir of the insured, who would take on death of an eligible beneficiary, may

recover. *Sharpless v. Grand Lodge A. O. U. W.*, 135 Minn. 35, 159 N. W. 1086, L. R. A. 1917B, 670.

A stipulation in a policy of life insurance, that payment of the amount of the policy to any relative of the insured belonging to a designated class will discharge the company from liability, does not make the person actually receiving the money thereunder the beneficiary of the policy, but is merely an appointment by the parties to the contract of a person who may collect the amount due for the benefit of the person ultimately entitled thereto (*Ogletree v. Hutchinson*, 55 S. E. 179, 126 Ga. 454). If the object or purpose of a benefit society in respect to deceased members is stated in the charter to be "to aid the families of deceased members," a provision in a by-law of such society to the effect that in a certain contingency the mortuary benefit might be paid to the heirs of the deceased, even though not members of the family of the deceased, is void, and such heirs are in no event entitled to the proceeds of the certificate (*Cerny v. Jednota Cesky Dam*, 146 Ill. App. 518; *Same v. Sesterska Podporujici Jednota*, Id. 590). If the certificate stipulated that the member was bound by the laws, rules, and regulations of the society, a provision of the society's constitution that no will should be permitted to control the appointment or distribution of, or the rights of any person to, any benefit payable by the order, became a part of the contract and controlled the distribution of the proceeds of the certificate (*Thomas v. Covert*, 105 N. W. 922, 126 Wis. 593, 3 L. R. A. [N. S.] 904, 5 Ann. Cas. 456).

Where the conflicting equities of two claimants to a sum due under a benefit certificate make it impossible to give all the fund to one without injustice to the other, the court may make an equitable division between them. *Hagar v. Grand Lodge, A. O. U. W. of Kansas*, 150 Pac. 528, 96 Kan. 221.

Where a wife under an arrangement with her husband paid the premiums on an insurance policy on the life of her husband for over twenty years, the payment being made from her savings in keeping a boarding house, the money payable on the maturity of the policy belonged to the wife, though the earnings from the boarding business were deposited in bank in the name of the husband and by him checked out (*Roberts v. W. H. Hughes Co.*, 86 Vt. 76, 83 Atl. 807). But a beneficiary, who has assisted in the keeping up of insurance under an agreement by which the proceeds thereof or a part of them are to be paid to her, loses such

rights where she abandons such agreement and fails to perform her undertakings (*Hill v. Hill*, 130 Ill. App. 278).

A member of a mutual benefit society holding a certificate of insurance has no interest in the fund, but simply possesses a power of appointment, and neither the certificate nor the proceeds become part of his estate.

Slaughter v. Grand Lodge, 192 Ala. 301, 68 South. 367; *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Pilcher v. Puckett*, 77 Kan. 284, 94 Pac. 132, 17 L. R. A. (N. S.) 1083; *Boice v. Shepard*, 78 Kan. 308, 96 Pac. 485.

A fraternal society sustains no relation of trust toward one who sues to enforce an alleged liability under a certificate of a member whom the society has undertaken to expel (*Marcus v. National Council of Knights and Ladies of Security*, 134 Minn. 338, 159 N. W. 835).

3723 (b). The right of persons to the death benefit, on the death of a member of a beneficial association, is not affected by a by-law of the association which did not go into effect till after his death (*Spear v. Boston Relief Ass'n*, 195 Mass. 351, 81 N. E. 196). In *Supreme Council Royal Arcanum v. McKnight*, 238 Ill. 349, 87 N. E. 299, reversing 140 Ill. App. 421, the association issued the certificate on condition that the member should comply with the laws then in force governing the council and fund or the laws that might subsequently be enacted. The by-laws in force at the time provided that the benefit might be made payable to the member's wife, nieces, and nephews. While such by-law was in force the member made the daughter of a sister of his deceased wife a beneficiary. Subsequently the society amended the by-laws so as to provide that the benefit might be payable to the member's wife and to the member's nieces and nephews, children of brothers and sisters of the whole and half blood. Thereafter the member died, leaving a wife. It was held that the daughter was not entitled to the benefit as against the wife. Where the charter provided for the payment of a certain sum to the family or heirs of deceased members, the fact that after the certificate was issued the law was changed, so that executors, administrators, or assigns of the deceased members could be made beneficiaries, did not affect the certificate, where the member never surrendered his original certificate and accepted a new one containing the names of substituted beneficiaries.

In *re Harton's Estate*, 62 Atl. 1058, 213 Pa. 499, 4 L. R. A. (N. S.) 939;

In *re Harton's Estate*, 62 Atl. 1059, 213 Pa. 505.

The power of a beneficiary to receive the proceeds of a benefit certificate, if such power existed at the time it was named as such, is not affected by acts of Congress and acts of the Illinois Legislature which do not by their express terms apply to such beneficiary. *Supreme Lodge K. P. v. Reyman*, 126 Ill. App. 482.

3724 (b). In *Burt v. Burt*, 218 Pa. 198, 67 Atl. 210, 11 Ann. Cas. 708, the policy was made payable to insured, his executors, administrators, and assigns. In the application it was written, under the head of beneficiary, "Self, if living; if not, equally divided among my two nephews and two nieces." It was held that on the death of the insured the proceeds of the property would be paid to the executor. Upon the death of a member of a mutual benefit society, no right to benefits passes to his estate (*Estes v. Local Union, No. 43, United Brotherhood of Carpenters and Joiners of America*, 97 Atl. 326, 90 Conn. 426). And the administratrix of member of fraternal beneficiary order has no claim to benefit fund by virtue of vested interest in insured at his death (*Order of Scottish Clans v. Reich*, 97 Atl. 863, 90 Conn. 511). But a fraternal society cannot waive vested rights of parties entitled to death benefit by paying fund to executors as stakeholders pending legal determination as to who is entitled thereto (*Grant v. Faires*, 97 Atl. 1060, 253 Pa. 232).

The administratrix of a beneficiary who died after insured, but before payment of benefits, is entitled to the benefits of a fraternal insurance policy, payable to trustee for the beneficiary with reversion to her sister (*Supreme Lodge, K. P. v. Rutzler*, 86 N. J. Eq. 327, 98 Atl. 836, decree modified 100 Atl. 189). Where no alternative beneficiary is designated in a life policy and the designated beneficiary is barred by wrongful act, a trust arises in favor of the estate of assured by virtue of which the representative of assured is entitled to the fund (*Equitable Life Assur. Soc. v. Weightman [Okl.]* 160 Pac. 629, L. R. A. 1917B, 1210). If the certificate provides that the amount, in the event of total or permanent disability, should be paid to insured, or at his death to plaintiff, if living, if the certificate matured in insured's lifetime because of total disability, plaintiff, on insured's death, was not entitled thereto, as the proceeds would then become the property of insured's estate (*Brotherhood of Railway Trainmen v. Dee*, 101 Tex. 597, 111 S. W. 396, reversing 108 S. W. 492).

Where the application for membership provides that the benefit "be paid to my wife Mary A. Riggs, subject to such future dis-

posals of the benefits among my dependents as I may hereafter direct, in compliance with the laws of the order," and the certificate issued therein directs the order "to pay to his wife, Mary A. Riggs, to be held in trust for his adopted daughter, Ruby Belle Riggs," such adopted daughter is entitled to receive the death benefits; it appearing that she was a dependent of the member (*Nowak v. Murray*, 127 Ill. App. 125). If the application designates a named person as the beneficiary, and the policy is issued which does not contain the name of any beneficiary, the person named in the application is to be treated as the beneficiary of the contract (*Ogletree v. Hutchinson*, 55 S. E. 179, 126 Ga. 454).

The language of a casualty insurance policy declaring that the indemnity for loss of life would be payable to the beneficiary named in the stub attached thereto, or, in the event of the beneficiary's prior death, or of a failure of beneficiary, to the legal representatives of the assured, should be construed as the language of the assured, and not of the insurance company and in the same manner as a testamentary provision (*Dunn v. New Amsterdam Casualty Co.*, 126 N. Y. Supp. 229, 141 App. Div. 478, reversing 121 N. Y. Supp. 686, 67 Misc. Rep. 109).

3725-3726. (c) What law governs

3725 (c). In an action on a foreign fraternal benefit certificate, the question whether the sole legatee or heirs at law were entitled to the benefits is determinable by the statute of Illinois and not by the law under which the society was incorporated (*Supreme Court of Independent Order of Foresters v. Fisher*, 172 Ill. App. 454).

3726-3731. (d) Policy payable to insured, his heirs or estate

3726 (d). A life policy payable to insured's executors, administrators, or assigns is payable to his estate (*Mitchell v. Allis*, 157 Ala. 304, 47 South. 715). But under the Florida statute (Laws 1872, c. 1864), as amended in 1897 (Laws 1897, c. 4555), where a life policy is payable to the executors, administrators, or assigns of a decedent, it is payable to the surviving widow and children of the decedent, and is not a part of decedent's estate for the purpose of paying debts or distribution (*Bradford v. Watson*, 65 Fla. 461, 62 South. 484). If the contract provides that a benefit fund shall be paid on a member's death to his "estate," it is payable to his exec-

utor or administrator (*Coghlan v. Supreme Conclave Improved Order Heptasophs*, 86 N. J. Law, 41, 91 Atl. 132).

Comp. Laws N. D. 1913, §. 8719, providing that proceeds of life insurance, payable to insured's representatives, heirs, or estate, shall be distributed to his heirs at law, is not unconstitutional. *Farmers' State Bank of Wild Rose v. Smith*, 36 N. D. 225, 162 N. W. 302.

A policy issued by a company organized under the act of June 22, 1893, entitled "An act to incorporate companies to do the business of life or accident insurance on the assessment plan," may be made payable to the estate of the insured and may be transferred by the insured by a will to a beneficiary having an insurable interest in the life of the insured. *McMahon v. Feldman*, 139 Ill. App. 624.

The executor of one insured by a policy payable to insured's executors, etc., cannot recover on the policy as against the defense of an existing valid assignment. *Harrison's Adm'r v. Northwestern Mut. Life Ins. Co.*, 63 Atl. 321, 78 Vt. 473, 112 Am. St. Rep. 932.

An accident insurance policy, making the loss payable to the estate of the insured, in trust for and to be paid over forthwith to his heirs, does not make the sum paid thereunder subject to the payment of debts and expenses of the administration of the estate and subject to an unrestricted disposition by will, but vests it in the personal representative solely in trust for the heirs, who are the real beneficiaries (*Lewis v. Brotherhood Accident Co.*, 194 Mass. 1, 79 N. E. 802, 17 L. R. A. [N. S.] 714). Ordinarily, policy of insurance on life of married man, where no person is therein named as beneficiary, is not payable to his wife, but to the executor or administrator of his estate (*Pate v. Insurance Co. of Virginia*, 19 Ga. App. 597, 91 S. E. 883).

3727 (d). In *Burns v. Burns*, 109 App. Div. 98, 95 N. Y. Supp. 797, affirmed in 190 N. Y. 211, 82 N. E. 1107, it was held that where the by-laws of an insurance company permit insurance in favor of one's heirs, and a policy provides for payment to the insured's heirs, the word "heirs" must be regarded as intended to describe those persons who would take in case of intestacy. And in the same case, where the policy payable to the insured's heirs was by its terms to be governed and construed according to the laws of Ohio, it was held that, though in New York "heirs," when applied to successors to personal estate, means next of kin, and "next of kin" does not include a widow, under the policy and laws of Ohio, the widow is entitled to personal property as next of kin, and should share in the insurance with the insured's children.

The Iowa statute (Code, § 3313), providing that the words "heirs"

or "legal heirs" in a policy of life insurance shall include the husband or wife of the insured, while prospective is applicable to a policy issued before its enactment where the insured did not die until after the act took effect (*Thompson v. Northwestern Mut. Life Ins. Co.*, 161 Iowa, 446, 143 N. W. 518).

Under the Alabama statute (Code 1896, § 28), providing that actions on contracts for the payment of money shall be prosecuted in the name of the party really interested, a complaint on an insurance policy, alleging that the policy is payable to the estate of a decedent and that the plaintiffs are heirs and next of kin of the deceased and are real beneficiaries, is demurrable, since under such a policy the personal representative, and not the heirs and next of kin, would be the real beneficiary. *Norwich Union Fire Ins. Co. v. Prude*, 40 South. 322, 145 Ala. 297, 8 Ann. Cas. 121.

3731-3732. (e) Policy payable to legal representatives

3731 (e). It has been held in some cases that the term "legal representatives," when used to designate the persons to whom the proceeds of a policy shall be paid, means executors and administrators.

Waters v. Kopp, 34 App. D. C. 575; *Mitchell v. Lambert*, Id. 583; *Hamilton v. Darley*, 266 Ill. 542, 107 N. E. 798. And see *Tucker v. Knights of Pythias of North and South America*, 135 Ga. 56, 68 S. E. 796.

The proceeds of a fraternal beneficiary association certificate payable to "legal representatives" go to the estate of deceased member. *Ordelheide v. Modern Brotherhood of America*, 268 Mo. 339, 187 S. W. 1193, affirming judgment 158 Mo. App. 677, 139 S. W. 269.

So, in *New York Life Ins. Co. v. Kansas City Bank*, 121 Mo. App. 479, 97 S. W. 195, where the insured, at the time the policy was issued, was unmarried, it was held that the words "legal representatives" meant the insured's executors or administrators, and not his next of kin.

On the other hand, it seems to be held in other jurisdictions that, though the words "legal representatives" in their strict technical sense mean executors or administrators, these words appearing in a life insurance policy may be shown, by the context and surrounding circumstances, to mean "heirs or next of kin."

In *re Viles*, 149 N. Y. Supp. 121, 86 Misc. Rep. 170; *Hague v. Hague's Ex'rs*, 30 Ohio Cir. Ct. R. 628; *Nashville Trust Co. v. First Nat. Bank*, 123 Tenn. 617, 134 S. W. 311.

In *Hall v. Ayers' Guardian* (Ky.) 105 S. W. 911, a policy of assessment life insurance provided that upon insured's death his wife
(1550)

(naming her) and his two daughters, if living, otherwise the insured's legal representatives, should be entitled to the insurance in equal parts. The wife and one of the daughters died, and insured remarried. No change was made in the beneficiaries, though allowable and the policy was not mentioned in insured's will. It was held that a child of a deceased daughter was entitled to one-half of the policy as legal representative, since the term "legal representatives" meant heirs and distributees, and it was not the insured's intention that the proceeds should go to his personal representatives.

Where the policy provided that insurance should be payable to deceased's representatives in the absence of other direction, failure to deceased to answer question as to beneficiary of certain portion of his insurance made such portion payable to his representatives. *Tennant v. Upton* (N. H.) 99 Atl. 652.

Where a policy was payable to insured's legal representatives, it was payable to his executors to be distributed by them to the legatee, to whom he bequeathed the proceeds (*Quick v. Quick*, 147 N. Y. Supp. 149, 161 App. Div. 878).

Where partners took out life policies on their several lives, payable to the firm or to the administrator in the event of a partner surviving the firm, the policy of a partner, dying subsequent to the dissolution of the firm by mutual consent, must be paid to his representative, as against the claim of the surviving partner that the policy was taken out for the benefit of creditors, none of whom complained. *Ruth v. Flynn*, 26 Colo. App. 171, 142 Pac. 194.

3732-3733. (f) Rights of persons designated as beneficiaries in general

3732 (f). The naming of a beneficiary in a life policy to whom payment is to be made is a gift of a benefit in the future and is contingent on the circumstances, and carries with it no obligation to the beneficiary that the donor will keep the policy alive, and the nature of the thing given would seem to imply that the beneficiary must survive the insured (*Smith v. Metropolitan Life Ins. Co.*, 71 Atl. 11, 222 Pa. 226, 20 L. R. A. [N. S.] 928, 128 Am. St. Rep. 799). While certain rights of the beneficiary attach immediately upon his designation (*Tyler v. Treasurer & Receiver General*, 226 Mass. 306, 115 N. E. 300, L. R. A. 1917D, 633), and the beneficiary takes only the rights conferred on her by the policy, subject to the limitations and provisions therein (*Eagle v. New York Life Ins. Co.*, 48 Ind App. 284, 91 N. E. 814), his rights to the proceeds of a mutual

(1551)

benefit certificate attach only upon the death of the insured (*Hodalski v. Hodalski*, 181 Ill. App. 158).

The beneficiary in a mutual benefit certificate is a mere volunteer, and is bound by what the member does (*Attorney General v. Supreme Council American Legion of Honor*, 206 Mass. 168, 92 N. E. 140). So, too, a beneficiary under a life policy has no right of action for damages resulting from the making by the insurance company of illegal assessments on insured, its failure to set apart a reserve fund, or to place insured in a particular class, etc.; the beneficiary being entitled only to what can be realized under the policy (*Price v. Mutual Reserve Life Ins. Co.*, 62 Atl. 1040, 102 Md. 683, 4 L. R. A. [N. S.] 870). Upon the death of one insured in a mutual benefit association, without having made any change in the beneficiary, the named beneficiary acquires a vested right to the benefit money (*Supreme Lodge of Fraternal Brotherhood v. Price*, 27 Cal. App. 607, 150 Pac. 803).

It is true that ordinarily the marriage of a member of a fraternal benefit society to whom a benefit certificate has been issued does not operate to affect in any way the certificate issued to him or the rights of the beneficiary designated in such certificate (*Stake v. Stake*, 131 Ill. App. 634, judgment affirmed 81 N. E. 1146, 228 Ill. 630). So, where the parents of insured were designated as her beneficiaries, they were entitled to the proceeds notwithstanding insured's marriage, the birth of her child, and the payment of dues by her husband, where insured had never designated any other beneficiary (*Ladies' Auxiliary of Ancient Order of Hibernians v. Flanagan*, 190 Mich. 675, 157 N. W. 355).

But the circumstances of the particular case may change the rule. In *Knights of Columbus v. McInerney*, 153 Mich. 574, 117 N. W. 166, 126 Am. St. Rep. 541, it appeared that, under the charter of a foreign insurance order and the laws of Connecticut, the state of its domicile, no benefits could be paid to a beneficiary not of the immediate family of a member at the time of his death. An unmarried man becoming a member of the order, accepted a benefit certificate payable to his mother, providing that she was at the time of his death his lawful beneficiary, under the charter and the laws of the order, and the laws of the state of Connecticut. On the member's death, he left a widow and children. It was held that the widow and children, by the force of the contract provision, were entitled to the insurance, and not the mother.

The designated beneficiary is entitled to the proceeds arising from a benefit certificate, and it is not within the power of one claiming such proceeds as the widow of a deceased member to raise the question of the ineligibility of such designated beneficiary; such question not being urged by the society (*Stake v. Stake*, 131 Ill. App. 634, judgment affirmed 81 N. E. 1146, 228 Ill. 630). But a designated beneficiary under a fraternal benefit certificate cannot object to intervention by the heirs of the insured who claimed that the beneficiary was not entitled under the law to be designated as such (*Bush v. Modern Woodmen of America* [Iowa] 152 N. W. 31).

In *Mund v. Rehaume*, 51 Colo. 129, 117 Pac. 159, Ann. Cas. 1913A, 1243, it appeared that the benefits under the certificate of a fraternal life insurance company, as designated in its constitution, were, in case the deceased left no widow or descendants, payable to his parents. The marriage of the insured's father to his own niece by the half blood was absolutely null and void without a divorce under the laws of Wisconsin, where the marriage was contracted; but by the laws of that state and of Minnesota, where the insured was born, the issue of such marriage was legitimate. It was held, in view of the statute providing that all words, unless intended to be used in their technical sense, should be understood and construed according to the approved and common usage of the language, that the word "parent" was a common word, and meant "he that begets," "she that bears young," "a father or a mother"; and hence that the father was entitled as the designated beneficiary.

A beneficiary under a benefit certificate, who has paid the assessments and dues on it till the beneficiary is changed, is entitled to be reimbursed out of the benefits. *Grand Lodge, A. O. U. W. of Missouri, v. O'Malley*, 89 S. W. 68, 114 Mo. App. 191.

Where life insurance policy describes beneficiary as business partner, but does not mention any indebtedness to him, he is entitled to entire proceeds of policy as against the executor of insured's estate, it being immaterial whether insured was indebted to beneficiary or whether proceeds exceed amount of debt (*Haberfeld v. Mayer*, 256 Pa. 151, 100 Atl. 587). And under an accident policy the principal sum and weekly indemnity during total disability are both payable to the beneficiary after the death of insured from the accident after a period of total disability (*North American Accident Ins. Co. v. Miller* [Tex. Civ. App.] 193 S. W. 750).

3733-3735. (g) Policy payable to wife or widow

3733 (g). The proceeds of a policy payable to insured's wife or widow belong to her and not to his estate.

Succession of Johnson, 38 South. 880, 115 La. 20; Woodmen of the World v. Torrence (Tex. Civ. App.) 103 S. W. 652.

Where a policy naming a wife as beneficiary was delivered to her, and premiums were paid by her, this was a settlement by the husband upon the wife, and created in her a separate estate. *Marquet v. Aetna Life Ins. Co.*, 128 Tenn. 213, 159 S. W. 733, L. R. A. 1915B, 749, Ann. Cas. 1915B, 677.

Where the certificate is payable to insured's wife "and heirs" the word "heirs" has reference to the heirs of the beneficiary (*Mutual Life Industrial Ass'n of Georgia v. Scott*, 170 Ala. 420, 54 South. 182).

3734 (g). Where insured was coerced into a marriage, and never thereafter cohabited with or visited his pretended wife, she was not his widow, within the terms of an insurance certificate, payable to insured's "widow or other heirs" (*Grand Lodge Colored K. P. of North and South America, Europe, Asia, Africa, Australia, and Oceania v. Smith*, 89 Miss. 718, 42 South. 89, 119 Am. St. Rep. 719).

If the certificate is payable to insured's wife and the first wife dies, the second wife of a deceased member is entitled to the benefit as against a child of the first marriage (*Cooper v. Order of Railway Conductors of America*, 156 Iowa, 481, 137 N. W. 472). But it has been held in New York that, where an industrial life policy designated insured's first wife as beneficiary and she died, a second wife is not entitled to the proceeds; the designation not having been changed (*In re Shanley*, 160 N. Y. Supp. 733, 95 Misc. Rep. 427). Where the first wife has for many years acquiesced in a separation from her husband, and in his remarriage, and has herself remarried, she is estopped to claim the benefits of insurance as his widow, as against his second wife (*Woodson v. Colored Grand Lodge of Knights of Honor of America*, 97 Miss. 210, 52 South. 457).

Where, by the terms of a life policy, the widow was to receive the "bonus additions," that the company in computing the amount due called this sum a "mortuary dividend," instead of "bonus additions," did not defeat the widow's right. *Tennant v. Upton* (N. H.) 99 Atl. 652.

3735 (g). It is generally held that one designated as the wife of the member may take the proceeds, though not legally married to him.

Slaughter v. Slaughter, 186 Ala. 302, 65 South. 348; *Prudential Ins. Co. of America v. Morris* (N. J. Ch.) 70 Atl. 924; *Mutual Benefit Life Ins. Co. v. Cummings*, 66 Or. 272, 133 Pac. 1169, 47 L. R. A. (N. S.) 252, Ann. Cas. 1915B, 535. And see *Starr v. Knights of Maccabees of the World*, 27 Ohio Cir. Ct. R. 475.

But a woman designated as beneficiary under the description of "wife" is not entitled to the proceeds of a benefit certificate where her alleged marriage to the assured was, at the time of her being named as beneficiary, to her knowledge void, and where she did not at the time of being so named come within the eligible class (*Miller v. Prella*, 122 Ill. App. 380). So, too, the proceeds of the policy of a benevolent order, payable to "the widow or other heir" of the member, may not be devised by him to one to whom he was in form married, while he still had a legal wife from whom he was never divorced and who survived him; this not being permitted by a by-law of the order that the money should go to the "widow, heirs, or other legal representatives" of the member, another by-law giving the form of the policy requiring payment to the "widow or heirs" (*Tutt v. Jackson*, 39 South. 420, 87 Miss. 207).

In *Baltimore & O. R. Co. v. Veltri*, 37 Pa. Super. Ct. 399, the regulations of the association provided that no one should be a beneficiary who is not a member's widow or related to him within certain degrees. The member designated in his application for membership a woman described as his wife. The woman named was not his wife, although she supposed herself to be so. After the death of the member, it was discovered that the member had a wife living at the time of marriage with the beneficiary named. It was held that a decree awarding the fund to the lawful wife was proper. It has been held in Maryland that under Code Pub. Gen. Laws 1904, art. 23, § 210, where proceeds of a certificate are claimed by the member's lawful wife, from whom he was separated, and by a woman with whom he lived illicitly, who was designated as his "wife" in the certificate, the proceeds are properly awarded to the lawful widow, in the absence of a by-law or rule to the contrary (*Meinhardt v. Meinhardt*, 83 Atl. 715, 117 Md. 426). In *Severa v. Beranak*, 138 Wis. 144, 119 N. W. 814, the by-laws of the society provided that if a member's designation of his beneficiaries should become void because of error, etc., the benefit should be paid one

half to the wife and the other half to the children; but, if there were no children, one-half should be paid to the wife and one-half to the member's parents, and, if there were no wife, children, or parents, the benefit should be paid to the member's legal heirs. A member left no children, and a person whom he designated as a beneficiary, naming her as his wife, was not legally married to him. It was held that his parents were entitled to the portion of the proceeds designated as her share, as his legal heirs.

If an affianced wife may be beneficiary, she is entitled to the proceeds, though designated in the policy as "wife" (*Tepper v. New York Life Ins. Co.*, 89 Misc. Rep. 224, 151 N. Y. Supp. 1049). So, too, an affianced wife, named in the certificate of the deceased member as "cousin," is entitled to the proceeds as against the heirs at law and next of kin, notwithstanding the rules of the order required the exact relationship of the beneficiary to be made known in writing before the issuance of the certificate; such an irregularity not being available to any one other than the society, and the society being unable to take advantage of it because the agent who took the application knew what was the relationship, and an affianced wife being a possible beneficiary (*Farrenkoph v. Holm*, 142 Ill. App. 336, affirmed in 237 Ill. 94, 86 N. E. 702).

3736. (h) Rights of divorced wife

3736 (h). In the absence of statute or regulation of the insurer to the contrary, a decree of divorce in itself in no way affects the rights of a divorced wife in a policy of insurance on her husband's life or her authority to demand and receive the amount payable in virtue of its terms.

Farra v. Braman, 86 N. E. 843, 171 Ind. 529; *Begley v. Miller*, 137 Ill. App. 278; *Schmidt v. Hauer*, 139 Iowa, 531, 111 N. W. 966; *Filley v. Illinois Life Ins. Co.*, 137 Pac. 793, 91 Kan. 220, L. R. A. 1915D, 130; *Filley v. Illinois Life Ins. Co.*, 93 Kan. 193, 144 Pac. 257, L. R. A. 1915D, 134; *Salvin v. Salvin*, 165 App. Div. 362, 366, 151 N. Y. Supp. 60, 63; *Snyder v. Supreme Ruler of Fraternal Mystic Circle*, 122 S. W. 981, 122 Tenn. 248, 45 L. R. A. (N. S.) 209.

Under the Wisconsin statute (St. 1915, § 2347), where a married woman has a vested interest as beneficiary in a life insurance policy, a change of status by divorce would not affect her interest, which can only be divested in the manner reserved in the policy (*Christman v. Christman*, 157 N. W. 1099, 163 Wis. 433). And it has been held in Oregon that where plaintiff was beneficiary in a policy of benefit insurance on the life of her husband, a divorce

did not deprive her of her right to recover full value of policy in event of death of husband prior to his withdrawal from order (*Somo v. Supreme Court I. O. F.*, 83 Or. 654, 164 Pac. 187).

On the other hand, it has been held in Michigan that a second wife of a member of a fraternal benefit society can question the right of the divorced wife to the proceeds of a certificate under the by-laws of the order, though the order admits its liability (*Knights of the Maccabees of the World v. Brown*, 186 Mich. 284, 152 N. W. 1085). Of course, if the designated beneficiary must under the statute or regulation of insurer sustain the relationship at the time of the death of insured, divorce terminates her rights (*Brotherhood of Railroad Trainmen v. Taylor*, 29 Ohio Cir. Ct. R. 171). So, under the Kentucky statute (Civ. Code Prac. § 425, and Ky. St. § 2121), providing for the restoration of property upon the granting of a divorce, a divorced wife cannot claim the proceeds of an insurance policy, paid up at the time of the divorce, in which she was named as beneficiary (*Sea v. Conrad*, 159 S. W. 622, 155 Ky. 51, 47 L. R. A. [N. S.] 1074, Ann. Cas. 1915C, 318).

And see *Green v. Green*, 144 S. W. 1073, 147 Ky. 608, 39 L. R. A. (N. S.) 370, Ann. Cas. 1913D, 683; *Green v. Knights and Ladies of Security*, 144 S. W. 1076, 147 Ky. 614; *Breedon v. Western & Southern Life Ins. Co.*, 146 S. W. 1104, 148 Ky. 488.

But it has also been held in Kentucky that where, after a divorce in Illinois by a wife, in which no reference was made to a policy on the husband's life in her favor, he kept up the policy without change of beneficiary until his death, the Illinois decree did not affect her right to the proceeds, in the absence of a showing that it was the duty of the Illinois court, under its laws, to restore property obtained by one spouse through the other during marriage, etc., though it would have been otherwise under Civ. Code Prac. § 425, had the divorce been obtained in Kentucky (*Guthrie's Ex'r v. Guthrie*, 159 S. W. 710, 155 Ky. 146).

In *Dohlin v. Knights of Modern Maccabees*, 151 Mich. 644, 115 N. W. 975, it appeared that the application was made subject to the association's constitution and laws then in force and that might thereafter be adopted. A subsequent by-law provided that in case a wife is designated as beneficiary, and subsequent thereto becomes divorced from the member, the divorce should annul the designation. Pub. Acts 1893, p. 186, No. 119, § 1, relative to such associations, provides that payment of benefits shall be made only to the widow, children, etc., of the member, provided that if the member

have no such relatives he may designate any other person or his estate as beneficiary. It was held that, where a member designated his wife as beneficiary, and was divorced from her at the time of his death, she was neither his wife nor his "widow," and therefore was not entitled to benefits under the certificate.

The Missouri statute (Rev. St. 1909, § 6944), authorizing husband, on divorcement of wife, to designate another beneficiary in policies for the benefit of the wife, is constitutional. *Orthwein v. Germania Life Ins. Co. of City of New York*, 261 Mo. 650, 170 S. W. 885.

3737-3738. (i) Policy payable to wife or children

3737 (i). In *Mutual Life Ins. Co. of New York v. Devine*, 180 Ill. App. 422, it was held that where insured has his policy issued payable to his wife "if living and if not, to their children or their guardian for their use" and, at the time, insured has only one child, the fact that the term "children" is used indicates that it is intended to designate a class. Consequently, if insured survives his wife and daughter and dies leaving a son, the son is entitled to the insurance as against the administrator of the daughter. So, too, it has been held that a policy for the benefit of insured's wife and children, binding insurer to pay the policy to the beneficiaries or their executors, and stipulating that on the death of a beneficiary the policy shall be paid to insured's heirs or assigns, designates the beneficiaries as a class, and there is no divesture, unless all die prior to insured (*Hartung v. Northwestern Mut. Life Ins. Co.*, 174 Mo. App. 289, 156 S. W. 980).

In *Lehman v. Lehman*, 29 Pa. Super. Ct. 60, it appeared that a widower with six children married a widow with one child and had by her two children. After the marriage he took out a policy of insurance payable to "his wife, in trust for herself and their children." There was nothing in the circumstances under which the policy was taken, or in the subsequent conduct of the insured, which tended to show that the insured intended to exclude his children by his first wife. It was held that the children by the first wife were entitled to share in the proceeds of the policy. On the other hand, it was held in Massachusetts that a policy payable to husband of insured or, in the event of his death before insured, to their children, excludes a child of the husband by a previous wife (*Hersam v. Aetna Life Ins. Co.*, 114 N. E. 711, 225 Mass. 425).

A life policy, payable to the wife of insured, if living, and, if not living, to the children of insured, or, if there be no such children surviving, then to the executors or assigns of insured, does not in-

clude in the word "children," grandchildren (Succession of Roder, 46 South. 697, 121 La. 692, 15 Ann. Cas. 526). And to the same effect is *Burnett v. Mutual Life Ins. Co. of New York* (Ind. App.) 114 N. E. 232.

Provision in a life policy that insured's children shall receive the proceeds, if he does not live until a certain date, if they survive him, and if he does not surrender the policy, is valid and enforceable, under St. 1894, c. 522, § 73 (St. 1907, c. 576, § 73), relating to life insurance. *Blinn v. Dame*, 93 N. E. 601, 207 Mass. 159, 20 Ann. Cas. 1184.

3738-3740. (j) Policy payable to trustee

3738 (j). In *Knights of Modern Maccabees v. Grice*, 148 Mich. 422, 111 N. W. 1054, the facts were these: Decedent, who was the owner of certain land and a certificate in a fraternal benefit society, payable to his sister, on being taken ill, went to live with and was cared for by his aunt, to whom he conveyed the land, the value of which greatly exceeded the value of the aunt's services, etc., rendered decedent prior to his death. Decedent also attempted to change the beneficiary in his certificate so as to make it payable to his aunt; but the society refused, and shortly thereafter, the sister becoming a nun, a trust agreement was executed, whereby decedent's minor half-brother, W., agreed to pay all of the proceeds of such certificate, if paid to him, except \$100 to the aunt, not knowing that decedent had already conveyed the real estate to her, whereupon the beneficiary in the certificate was changed to the brother. It was held that, the aunt having been fully paid for her services, decedent's brother was not estopped to claim the advantages of the benefit certificate, and at the same time to deny his obligation to hold the fund as trustee for the aunt.

3740-3742. (k) Policy payable to any relative or person equitably entitled to fund

3740 (k). The facility clause of an industrial life policy that on the death of insured prior to a specified date, the amount due may be paid to either the beneficiary named or to the executor or administrator, husband or wife or any blood relative of insured, and that the production of a receipt signed by either of them shall be conclusive evidence of payment is valid, and where insurer has paid the policy to one of the enumerated persons who owned the policy and surrendered it, another of the persons enumerated may not compel payment (*Renfro v. Metropolitan Life Ins. Co.*, 148 Mo.

(1559)

App. 258, 129 S. W. 444). So, too, a provision that the insurer "may make any payment provided for in this policy to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same, by reason of having incurred expense in any way on behalf of the insured, for his or her burial, or for any other purpose," is valid, but settlement made thereunder will be closely scrutinized by the courts (*Sheridan v. Prudential Ins. Co. of America*, 128 Ill. App. 519, affirmed 82 N. E. 426, 230 Ill. 33). Thus the payment to insured's aunt, his beneficiary, who cared for him in last sickness and buried him, is permissible under usual "facility of payment" clause in such a policy (*Metropolitan Life Ins. Co. v. Nelson*, 186 S. W. 520, 170 Ky. 674, L. R. A. 1916F, 457). Such a clause, though giving the company a right to pay to the person who had taken out the policy and paid the premiums, and who had cared for the insured in her home, does not require such payment, so that it can be compelled by the court (*Nolan v. Prudential Ins. Co. of America*, 139 App. Div. 166, 123 N. Y. Supp. 688). The insurer has the right to pay any one of the persons named in the clause up to the time of suit brought by the administrator, and such payment would be a complete defense; but, not having made such payment, the right of the administrator on suit brought was complete, and a plea by the insured of subsequent payment to one of the class mentioned would not operate to bar it (*Prudential Ins. Co. of America v. Godfrey*, 75 N. J. Eq. 484, 72 Atl. 456).

3741 (k). Payment under the clause may properly be made to a nonrelative, who has kept the insured for several years under an agreement to clothe and educate him and to receive his services until he became of age, and who had paid the premiums and insured's funeral expenses (*Thompson v. Prudential Ins. Co.*, 119 App. Div. 666, 104 N. Y. Supp. 257). So, where the policy provides for the payment of funeral benefits to the executors or administrators of the insured, but also provides that the company may make payment "to any relative by blood, or connection by marriage of the insured," or to any other person appearing to the company to be equitably entitled to the benefits by reason of having incurred expense for the burial of the insured, and it appears that the company paid the benefits in good faith and in the exercise of its discretion to the husband of the insured, such payment vests in the husband an absolute property in the proceeds, and he may deal with them as his own without any liability to account for them to his wife's

administrator (*Althouse v. Roth*, 35 Pa. Super. Ct. 400). And where the company has caused an undertaker to bury the deceased, on the faith of the provision, the proceeds of the policy, to the extent of the funeral expenses of the insured, should be paid to such undertaker (*Metropolitan Life Ins. Co. v. Johnson*, 121 Ill. App. 257). In *Kelly v. Prudential Ins. Co. of America*, 148 Mo. App. 249, 127 S. W. 649, a payment to a public administrator who had incurred expense for the funeral of the insured was held to be a good payment.

But see *Marzulli v. Metropolitan Life Ins. Co.*, 78 N. J. Law, 271, 75 Atl. 473, holding that one who had paid the premiums on the policy and the funeral expenses was not thereby entitled to sue on the policy. And see *Ferretti v. Prudential Ins. Co. of America*, 49 Misc. Rep. 489, 97 N. Y. Supp. 1007.

Where party furnishes money in emergency to one whose life is insured, and has no assignment of the life insurance policy, he cannot maintain an action against the insurer to recover the benefit under the policy. *Foryciarz v. Prudential Ins. Co. of America*, 158 N. Y. Supp. 834, 95 Misc. Rep. 306.

In *Cohen v. John Hancock Mut. Life Ins. Co.*, 135 App. Div. 776, 119 N. Y. Supp. 850, the facts were these: Defendant issued a policy on the life of plaintiff's father, by which it agreed to pay to executors or administrators, or to the beneficiary named, unless settlement shall be made as hereinafter provided, the amount named, subject to the conditions that the company may pay any claim to any relative by blood of the insured, or to any other person in the judgment of said company equitably entitled to the same by having incurred expense on behalf of the insured for his burial, or for any other purpose, and the receipt of such person shall be conclusive evidence that such sum has been properly paid; payment upon presentation of the policy and premium receipt book to be a discharge to the company. No beneficiary was named in the policy; but plaintiff was named as beneficiary in the application, which reserved the privilege to change the beneficiary. Insured subsequently married again, and, the premiums being in arrears, the policy and receipt book were turned over to the wife, who paid the arrears and premiums down to the time of the death of the insured, and upon his death she delivered the receipt book, policy, and proof of death to the company, and was paid by check, which she indorsed to the undertaker who buried deceased. It was held that payment was made in compliance with the contract.

3742 (k). A policy which names no specific beneficiary, but which provides that the company may pay any relative who is "equitably entitled," etc., to the proceeds, cannot be recovered upon by the husband. The right of action on such a policy resides in the personal representative of the deceased insured (*Heubner v. Metropolitan Life Ins. Co.*, 146 Ill. App. 282). Where an industrial life policy authorized the insurer to make payment to the executor, administrator, husband, wife, or blood relative of deceased, and the insurer paid the proceeds to insured's second wife, who was his administratrix, she cannot, not being entitled under the policy to the proceeds, claim them by reason of the payment (*In re Shanley*, 160 N. Y. Supp. 733, 95 Misc. Rep. 427).

A statement by an agent writing industrial insurance that the policy would be paid to whoever produced it, and that it was unnecessary for the insured to designate the beneficiary, is binding on the insurer. *Wallace v. Prudential Ins. Co. of America*, 174 Mo. App. 110, 157 S. W. 1028.

3742-3743. (l) Distribution among beneficiaries

3742 (l). Where a mutual benefit certificate was payable to the member's legal heirs, and he died leaving 10 heirs, consisting of his widow, brothers, sisters, nephews, and nieces, they were each entitled to one-tenth of the proceeds of the certificate (*Burke v. Modern Woodmen of America*, 84 Pac. 275, 2 Cal. App. 611).

Where an insurance policy provides that in case of the death of the insured the company will pay to the children of the assured named therein, not that it will pay to each of them, an aliquot part thereof, a joint cause of action thereon may be brought, either by such children or by their personal representatives. *Continental Casualty Co. v. Johnson*, 119 Ill. App. 93.

Rev. St. Ohio 1892, § 4176, providing that where an intestate leaves children or their legal representatives the widow or widower shall be entitled to one-half of the first \$400 and to one-third of the remainder of the property subject to distribution, fixes the extent of the widow's interest in an insurance fund payable to the heirs of her deceased husband, where such husband dies leaving the widow and children surviving him (*Burns v. Burns*, 95 N. Y. Supp. 797, 109 App. Div. 98, affirmed 82 N. E. 1107, 190 N. Y. 211).

3743-3748. (m) Rights of legatees

3744 (m). A person designated in a will as the beneficiary of an insurance policy made payable to executors or administrators is
(1562)

entitled to the proceeds as against the next of kin (*In re Milmine* [Sur.] 134 N. Y. Supp. 553). Where a member of a fraternal benefit association files with it a declaration designating defendant as the beneficiary, but directs him to distribute the fund according to his will, and by his will makes the fund a part of his residuary estate, the residuary legatee may enforce payment of the death benefit by the association without invoking the intervention of the designated beneficiary (*Katz v. Witt*, 134 N. Y. Supp. 675, 74 Misc. Rep. 582).

3748-3753. (n) Person entitled to proceeds when designation is invalid or there is no designation

3748 (n). Where there is a failure of beneficiary, either because no designation has been made or because the one made is invalid, the benefit goes to the one designated by the certificate or laws of the society to take in case of a failure of beneficiary or death of the beneficiary during the lifetime of the insured.

Journeyman Butchers' Protective & Benevolent Ass'n v. Bristol, 17 Cal. App. 576, 120 Pac. 787; *Supreme Lodge, New England Order of Protection, v. Hine*, 73 Atl. 791, 82 Conn. 315; *Royal League v. Kasey*, 144 Ill. App. 1; *Sanders v. Grand Lodge A. O. U. W. of Illinois*, 153 Ill. App. 7; *Murphy v. Nowak*, 79 N. E. 112, 223 Ill. 301, 7 L. R. A. (N. S.) 393; *Supreme Council of Royal Arcanum v. McKnight*, 87 N. E. 299, 238 Ill. 349, reversing 140 Ill. App. 421; *Grand Lodge A. O. U. W. v. Ehlman*, 246 Ill. 555, 92 N. E. 962; *Royal League v. Shields*, 96 N. E. 45, 251 Ill. 250, 36 L. R. A. (N. S.) 208; *Beresh v. Supreme Lodge Knights of Honor*, 99 N. E. 349, 255 Ill. 122, affirming 166 Ill. App. 511; *Duenser v. Supreme Council of Royal Arcanum*, 104 N. E. 801, 262 Ill. 475, 51 L. R. A. (N. S.) 726, reversing 178 Ill. App. 648; *Oliphant v. American Health & Accident Ass'n*, 147 Iowa, 656, 126 N. W. 806; *O'Brien v. Massachusetts Catholic Order of Foresters*, 220 Mass. 79, 107 N. E. 400; *Supreme Lodge, Order of Mut. Protection v. Dewey*, 106 N. W. 140, 142 Mich. 666, 3 L. R. A. (N. S.) 334, 113 Am. St. Rep. 596, 7 Ann. Cas. 681; *Switchmen's Union of North America v. Gillerman* (Mich.) 162 N. W. 1024, L. R. A. 1918A, 1117; *Logan v. Modern Woodmen of America*, 137 Minn. 221, 163 N. W. 292; *Western Commercial Travelers' Ass'n v. Tennent*, 106 S. W. 1073, 128 Mo. App. 541; *Passaconaway Council v. Dow* (N. H.) 97 Atl. 878; *In re Rock's Estate*, 99 N. Y. Supp. 157, 49 Misc. Rep. 286; *Weinstein v. Weinstein*, 104 N. Y. Supp. 1113, 120 App. Div. 496; *Mendelson v. Gausman*, 139 N. Y. Supp. 947, 78 Misc. Rep. 457, affirmed 141 N. Y. Supp. 1131, 156 App. Div. 914; *Carr v. Grand Lodge United Brothers of Friendship of Texas* (Tex. Civ. App.) 189 S. W. 510. But see *Alexander v. Page* (Sup.) 150 N. Y. Supp. 104.

The Kansas statute (Laws 1905, p. 421, c. 271), relating to insurance, and providing for the disposal of the insurance fund on the death of the insured, relates to insurance companies and ordinary insurance, and has no application to fraternal benefit societies or to the benefits resulting from membership in such societies. *Boice v. Shepard*, 78 Kan. 308, 96 Pac. 485.

Under the Tennessee statute (Acts 1913, c. 44, § 6), designation as beneficiary of one not relative of member of mutual benefit association is void, but does not avoid the policy, but a proper beneficiary could be named. *Sharp v. Sovereign Camp Woodmen of the World*, 137 Tenn. 77, 191 S. W. 529.

Where by-laws of fraternal insurance order provided that if beneficiary die during member's lifetime, his heirs shall take benefits, such heirs could contest right of illegal beneficiary designated after death of legal beneficiary. *Grand Lodge A. O. U. W. of Maine v. Conner (Me.)* 100 Atl. 1022.

3749 (n). In the absence of the designation of a beneficiary and of any proof as to the provisions of the constitution and by-laws of the society, the certificate is payable to the beneficiary or beneficiaries designated in the act providing for the organization of fraternal benefit societies (*Starcke v. Plattduetsche Grot Gilde*, 166 Ill. App. 146). If, on the surrender of the original certificate, the insured fails to designate a beneficiary who is eligible within the statute (Laws 1899, p. 195, c. 115, § 1) providing that death benefits shall be paid to insured's family, heirs, affianced wife, etc., the matter stood just as it would had insured failed in the first place to designate any eligible person and the benefit was payable to those entitled to it under the statute in the order of precedence named therein (*Grand Lodge Colored Knights of Pythias v. Mackey* [Tex. Civ. App.] 104 S. W. 907). A policy providing that the proceeds should be paid "to the widow, heirs, or such beneficiary as may be designated" by insured, requires the entire amount of the policy to be payable to the classes named therein in the order named in the absence of a designation otherwise, so that the widow would be entitled to the proceeds of the policy to the exclusion of insured's children and heirs (*Runyan v. Runyan*, 101 Ark. 353, 142 S. W. 519). The Illinois statutes (Laws 1893, p. 130) provide that the payment of death benefits by a fraternal beneficiary society shall be made only to the families, heirs, blood relations, affianced husband or wife of, or to persons dependent on, the member. The by-laws of a society made no provision for payment on a beneficiary's death prior to that of a member, where the member failed

to designate another beneficiary. In *Kaemmerer v. Kaemmerer*, 231 Ill. 154, 83 N. E. 133, the wife of a member, designated as beneficiary, died, leaving children of the marriage, and thereafter the member married another from whom he was divorced, subsequently marrying a third time, of which marriage there was a child. The beneficiary in the certificate was not changed, and at the member's death his family consisted of his third wife and the children of his first and third marriages. It was held that the statute governed, the family being first named, and that the third wife and all the children were entitled to the death benefit in equal portions.

The act of a member of a fraternal beneficiary society in naming a member not within the authorized classes specified in the articles of association and the act of the association in making its certificate payable to such beneficiary do not deprive the beneficiaries designated by the articles and the statute of their right to recover the amount due on the certificate. *National Union v. Keefe*, 105 N. E. 319, 263 Ill. 453, Ann. Cas. 1915C, 271, reversing 172 Ill. App. 101.

In *Hull v. Grand Lodge A. O. U. W.*, 105 S. W. 479, 32 Ky. Law Rep. 212, it appeared that the charter of the association provided that if all the beneficiaries designated by a member shall die during his lifetime, and he shall have made no new designation, the benefit shall be paid to the widow, if living, and, if no widow survive him, then to his children, share and share alike. It was held that where, after the death of his wife, who was the beneficiary in his benefit certificate, insured, while laboring under such unsoundness of mind as to be incapable of making a contract, attempts to designate new beneficiaries, such new designation is a nullity, and the benefit will be payable to his children according to the terms of the association's charter. The rules of a fraternal order providing for the payment of death benefits to the member's wife, children, or parents, or, if no wife, children, or parents, to such person as the member might designate, and that in case of no designation the money collected should be applied to the payment of the next occurring death, did not authorize the brothers and sisters of a deceased member, dying without leaving wife, children, or parents, and without having made any designation, to recover the death benefit (*Hepner v. United States Grand Lodge Order Brith Abraham*, 123 N. Y. Supp. 819, 68 Misc. Rep. 340).

Neither the estate of a member nor his next of kin has any in-

terest in the death benefit fund of a mutual benefit association, where the beneficiary is not entitled to take.

Supreme Colony United Order of Pilgrim Fathers v. Towne, 89 Atl. 264, 87 Conn. 644, Ann. Cas. 1916B, 181; Johnson v. Knights of Pythias, 14 Ga. App. 61, 80 S. E. 213; Smith's Adm'r v. Hatke, 115 Va. 230, 78 S. E. 584.

A rule of a benefit society providing the order in which relatives of the member shall take the fund if the designated beneficiary be not living at the death of the member has no application where the person named as beneficiary is totally incapacitated from taking the fund (Farra v. Bramán [Ind. App.] 82 N. E. 926, rehearing denied [Ind App.] 84 N. E. 155).

3750 (n). A fraternal beneficiary society cannot avoid liability on the certificate because the beneficiary named therein cannot recover because not within any of the classes designated by the law nor an heir or legatee of the member (Mullen v. Woodmen of the World, 144 Iowa, 228, 122 N. W. 903). So, too, though a fraternal beneficial certificate was ultra vires, in that it was payable to insured's personal representative, when the charter of the association required the beneficiary to be a relative or dependent, the association cannot, on that ground, defeat recovery under the certificate where the contract has been fully executed, but the personal representative may recover it, but only in trust for the charter beneficiaries (Gibbs v. Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11).

But see Cook v. Supreme Conclave Improved Order of Heptasophs, 202 Mass. 85, 88 N. E. 584, holding that where the only power a member of a fraternal benefit society has over the death fund is the power of appointment, and where by reason of a valid appointment, or where on his failure to make such an appointment, there is a provision in the certificate or in the by-laws of the association making a valid appointment, the fund will go to the appointee, and where there is a failure to make a valid appointment there is no one entitled to the fund.

A by-law is reasonable which provides that, in the event of the death of a member without designating a beneficiary, the fund shall be payable to the heirs at law of the deceased member (Royal League v. Kolin, 169 Ill. App. 646). Where a benefit certificate payable to the member's heirs unless his mother survived him was issued subject to power to change the by-laws, an amendment to the by-laws providing that, on the death of a named beneficiary and failure of the member to make a new designation, his wife

(1566)

should take in preference to his heirs controlled (*Hines v. Modern Woodmen of America*, 41 Okl. 135, 137 Pac. 675, L. R. A. 1915A, 264).

3752 (n). Where one of the beneficiaries named in a benefit certificate is not eligible, and no provision is made for apportionment, the eligible beneficiary takes the entire fund (*Cunat v. Supreme Tribe of Ben Hur*, 157 Ill. App. 138, affirmed in 249 Ill. 448, 94 N. E. 925, 34 L. R. A. [N. S.] 1192, Ann. Cas. 1912A, 213). So where, under the provisions of Civ. Code La. art. 1481, a beneficiary named could not acquire a vested right in the policy to the extent of nine-tenths, and the insured bound himself for 20 years to pay premiums annually, and his children had been left without support, the proceeds to the extent of nine-tenths fell to the insured's heirs (*New York Life Ins. Co. v. Neal*, 38 South. 485, 114 La. 652).

A fraternal benefit association denying liability on a certificate because of the nonexistence of any person to whom the benefit can be paid has the burden of proving that fact. *Supreme Tribe of Ben Hur v. Gailey*, 117 Ark. 145, 173 S. W. 838.

3753. (o) Funeral benefits

3753 (o). Where a by-law of defendant beneficial association provided for the payment of a funeral benefit to the member's next of kin, or the person having charge of the burial, a petition in an action on the certificate, alleging that plaintiffs were the next of kin to deceased, together with evidence showing that plaintiffs were decedent's children and that they did in fact have charge of her burial, showed a right to maintain the action (*Sleight v. Supreme Council of Mystic Tailors*, 107 N. W. 183, 133 Iowa, 379).

3753-3755. (p) Endowment policies

3754 (p). Where assured's wife is named as the sole beneficiary in an endowment policy, she is entitled to the proceeds at maturity, though her husband be still surviving (*Succession of Desforges*, 135 La. 49, 64 South. 978, 52 L. R. A. [N. S.] 689). And it was held in *Fuches v. Mutual Life Ins. Co.* (Sup.) 164 N. Y. Supp. 105, that the insured in an endowment policy, on maturity exercising option to take paid-up life policy, the insurer crediting policy with earned dividends, is not authorized to appropriate such surplus fund as against beneficiary, his wife. If the endowment policy provides that after 20 years it might be surrendered and the full reserve, with interest and surplus, would be paid to the insured, his executors, administrators, or assigns, the children of the insured have

no rights in the policy (*Eisenbach v. Mutual Life Ins. Co. of New York*, 147 N. Y. Supp. 962, 162 App. Div. 595, affirmed 212 N. Y. 593, 106 N. E. 1033).

Under a 20-year tontine policy, by the terms of which a certain sum was payable to the beneficiary upon due proof of the death of the insured "during the continuance of this policy," and providing further that the insured if living at a certain date should be entitled to receive, in cash, the value of the policy at that time, the interest of the beneficiary ceases upon the expiration of such period; the insured still surviving (*Cox v. Cox*, 192 Ill. App. 286). The insured is entitled to enforce a stipulation of the application made part of the policy that the reserve value of the policy at the end of 20 years should be paid to himself, even though the beneficiary refused to consent thereto (*Robison v. Union Cent. Life Ins. Co.*, 150 Pac. 564, 96 Kan. 237). Where a policy gave insured right to change beneficiary, and on maturity of policy to withdraw cash value, take an annuity, or continue policy as a paid-up participating policy, insured might take its cash surrender value without the consent of beneficiaries (*Cooper v. West*, 190 S. W. 1085, 173 Ky. 289).

Where, during the life of insured and his wife, an endowment policy payable to insured if he should survive the term of 21 years, and in case of his death to his wife, or if she should die before insured then to their children, was surrendered, and a paid-up policy taken payable to the wife, or in the event of her prior death to their children, their executors, administrators, or assigns, the terms of the paid-up policy governed the rights of the parties entitled to the proceeds thereof. *In re Peckham*, 29 R. I. 250, 69 Atl. 1002, 132 Am. St. Rep. 813.

3755-3759. (q) Vested interest of beneficiary

3755 (q). Under an ordinary policy of life insurance, in which there is no reservation of the right to cut off or modify the interest of the beneficiary, the latter has a vested interest in the policy, of which he cannot be divested without his consent.

Mutual Ben. Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298; *Johnson v. New York Life Ins. Co.*, 56 Colo. 178, 138 Pac. 414, L. R. A. 1916A, 868; *O'Donnell v. Metropolitan Life Ins. Co. (Del.)* 95 Atl. 289; *Perry v. Tweedy*, 57 S. E. 782, 128 Ga. 402, 119 Am. St. Rep. 393, 11 Ann. Cas. 46; *Arnold v. Empire Mut. Annuity & Life Ins. Co.*, 60 S. E. 470, 3 Ga. App. 685; *Mutual Life Ins. Co. v. Devine*, 180 Ill. App. 422; *American Central Life Ins. Co. v. Rosenstein (Ind. App.)* 88 N. E. 97; *Filley v. Illinois Life Ins. Co.*, 93 Kan. 193, 144 Pac. 257, L. R. A. 1915D, 134; *Succession of Desforges*, 135 La. 49, 64 South. 978, 52 L. R.

A. (N. S.) 689; *Breard v. New York Life Ins. Co.*, 70 South. 799, 138 La. 774; *Tuite v. Supreme Forest Woodmen Circle*, 187 S. W. 137, 193 Mo. App. 619; *Metropolitan Ins. Co. v. Clanton*, 76 N. J. Eq. 4, 73 Atl. 1052; *Jacobs v. Strumwasser*, 145 N. Y. Supp. 916, 84 Misc. Rep. 28; *Grems v. Traver*, 87 Misc. Rep. 644, 148 N. Y. Supp. 200, affirmed 164 App. Div. 968, 149 N. Y. Supp. 1085; *In re Gebert*, 160 N. Y. Supp. 782, 95 Misc. Rep. 477; *Lanier v. Eastern Life Ins. Co.*, 54 S. E. 786, 142 N. C. 14; *Mutual Benefit Life Ins. Co. of Newark, N. J., v. Cummings*, 66 Or. 272, 126 Pac. 982, 133 Pac. 1169, 47 L. R. A. (N. S.) 252, Ann. Cas. 1915B, 535; *John Hancock Mut. Life Ins. Co. v. Bedford*, 36 R. I. 116, 89 Atl. 154; *Deal v. Deal*, 87 S. C. 395, 69 S. E. 886, Ann. Cas. 1912B, 1142; *Jones v. North Carolina Mutual & Provident Ass'n*, 105 S. C. 427, 90 S. E. 30; *Marquet v. Aetna Life Ins. Co.*, 128 Tenn. 213, 159 S. W. 733, L. R. A. 1915B, 749, Ann. Cas. 1915B, 677.

A "vested interest" is not one creating a mere expectancy, but one where "there is an immediate fixed right of present or future enjoyment." *McManus v. Peerless Casualty Co.*, 95 Atl. 510, 114 Me. 98.

One having an undivided interest in a paid-up policy of another has a vested interest during the life of the insured. *In re Ulric's Estate*, 145 Mo. App. 463, 122 S. W. 761.

An insurer cannot by contract with the insured change the vested rights of the beneficiary. *Missouri State Life Ins. Co. v. Crabtree*, 124 Ark. 214, 187 S. W. 173.

So, too, a beneficiary, to whom an endowment policy is payable upon insured's death within the endowment period, has a vested right of which she cannot be deprived without her consent (*In re Dreuil & Co.* [D. C.] 221 Fed. 796). In *Wallace v. Mutual Ben. Life Ins. Co.*, 97 Minn. 27, 106 N. W. 84, 3 L. R. A. (N. S.) 478, a husband effected a 20 year endowment policy of insurance on his life, payable on his death within 20 years to his wife, but, if he lived, to himself at the end of that time. If the wife died before the death of the husband within the 20 years, the policy was payable to the personal representatives of the husband. Pending divorce proceedings the parties agreed that, if a divorce was granted the wife, the court might award her certain specified property as alimony, and the wife agreed to relinquish to the husband any claim to any of his property arising out of the relation of husband and wife. It was held that the wife acquired a vested interest in the policy, not divested by the decree of divorce.

Rev. St. Mo. 1899, § 7895, providing that, on the divorcement of a wife, the husband may designate another beneficiary in a life policy, has no application to an old line life policy, issued prior to

the statute, as such a construction would render the statute violative of Const. art. 2, § 15, forbidding any law retrospective in its operation or impairing the obligation of contracts. *Blum v. New York Life Ins. Co.*, 95 S. W. 317, 197 Mo. 513, 8 L. R. A. (N. S.) 923, 7 Ann. Cas. 1021.

Delivery of the policy to the insured is essential to vest the interest of the beneficiary, and where insured requested a change of beneficiaries before the policy became effective by delivery to her, the former beneficiaries had no vested interest therein, and the change became effective, even though not indorsed on the policy, as required by a clause thereof, prior to insured's death (*Pierce v. New York Life Ins. Co.*, 174 Mo. App. 383, 160 S. W. 40).

The interest of the beneficiary may be contingent by the terms of the designation. Thus a life policy, payable to the wife of insured, if living, and, if not living, to the children of insured, or, if there be no such children surviving, then to the executors or assigns of insured, vests no interest in the wife or children unless living at the death of insured (*Succession of Roder*, 46 South. 697, 121 La. 692, 15 Ann. Cas. 526). So where the wife of an insured, whose right to the proceeds was contingent on her surviving her husband, and who predeceased insured, had no vested transmissible interest, a child of the wife, whose right to share in the proceeds was contingent on her surviving her mother, had no vested interest (*Davis v. New York Life Ins. Co.*, 212 Mass. 310, 98 N. E. 1043, 41 L. R. A. [N. S.] 250). And where insured has his policy issued payable to his wife "if living and if not, to their children or their guardian for their use," a daughter who died ten years before her father, the insured, was not a beneficiary and never had a vested interest in the fund (*Mutual Life Ins. Co. v. Devine*, 180 Ill. App. 422). But under the Kentucky statute (St. § 654), where a policy of insurance for benefit of wife and their children taken by a husband showed on its face that premiums were to be paid by wife, it was not in nature of a testamentary disposition and at death of wife a child took a vested interest which he could will to his widow (*Mutual Life Ins. Co. of New York v. Spohn*, 186 S. W. 633, 170 Ky. 721, opinion modified 188 S. W. 1078, 172 Ky. 90).

Where decedent obtained insurance upon her husband's life, payable to herself, or to his children, should she die before him, her interest in the policy was contingent upon her surviving her husband (*Morgan v. Mutual Ben. Life Ins. Co.*, 82 N. E. 438, 189 N. Y. 447, affirming 119 App. Div. 645, 104 N. Y. Supp. 185). The in-

terest of the children of insured in a life policy payable to them, or if they die before him then to his legal representatives, with no reservation in the policy of the right to change the beneficiary, but merely a reservation to insured of the right to surrender the policy at the end of the first 10 years; or at the end of any subsequent 5 years, and to receive in cash its then cash value, such right continuing for only 30 days immediately succeeding any such term of years, is a vested interest, subject to be defeated only if they die before insured, or if he, at the time and in the manner expressed in the policy exercise his power to surrender it for its then cash value (*Townsend's Assignee v. Townsend*, 127 Ky. 230, 105 S. W. 937, 32 Ky. Law Rep. 240, 263, 16 L. R. A. [N. S.] 316). In *Bradshaw v. Mutual Life Ins. Co.*, 187 N. Y. 347, 80 N. E. 203, 10 Ann. Cas. 266, reversing 109 App. Div. 375, 95 N. Y. Supp. 780, the court construed the New York Statute (Laws 1840, p. 59, c. 80, as amended by Laws 1858, p. 306, c. 187, Laws 1862, p. 214, c. 70, Laws 1866, p. 1413, c. 656, Laws 1870, p. 612, c. 277, and Laws 1873, p. 1234, c. 821), providing that any married woman might cause the life of her husband to be insured for her sole use, and that, in case of her surviving him, the insurance should be payable to her, for her own use, free from the claims of her husband's representatives or creditors, and that, in case of her death before the husband, the insurance might be made payable after her death to her children, and that a married woman might, in case she had no child or children, dispose of the policy by will. It was held that where a policy was payable to insured's wife, "if living in conformity with the statute, and, if not living, to their children," and insured paid the premiums on the policy, where the wife died childless before the death of her husband, she had no interest that could pass by her will, as the statutes refer to an insurance contract made by a woman on the life of her husband.

A provision, that should the insured reach the age of 64 and so desire he could surrender the policy and receive back his payments with interest, is a condition subsequent not impairing the beneficiary's vested interest unless the insured should reach such age and choose to surrender. *Filley v. Illinois Life Ins. Co.*, 93 Kan. 193, 144 Pac. 257, L. R. A. 1915D, 134.

It has been held in Missouri that the beneficiary under an accident insurance policy which provided for an indemnity in case of death has no rights under the contract until the insured has died

(1571)

(*Crotty v. Continental Casualty Co.*, 146 S. W. 833, 163 Mo. App. 628). But in *Dunn v. Amsterdam Casualty Co.*, 121 N. Y. Supp. 686, 67 Misc. Rep. 109, it seems to be conceded that the beneficiary under an insurance policy issued by a casualty company doing business under Insurance Law (Consol. Laws, c. 28) art. 2, which does not provide for a change of beneficiaries without the beneficiary's consent, has a vested interest in the policy, and not a mere inchoate right. The judgment in that case was however reversed by the Appellate Division (141 App. Div. 478, 126 N. Y. Supp. 229), apparently on the ground that the provisions of the policy were inconsistent with the theory that the beneficiary took a vested interest. The policy provided that the indemnity should be paid to the beneficiary named in the stub attached thereto, or, in the event of her "prior death," or in the event that no beneficiary was named in the stub, then to the legal representatives of the assured. The court held that the beneficiary under such provision should not be regarded as taking a vested interest in the policy; the burden being on the beneficiary's representatives to show that she survived the assured; and hence, where both the beneficiary and assured died in a common disaster and there was no proof of survivorship, the proceeds of the policy passed to the representatives of the assured.

If, however, the policy reserves to the insured the right to change the beneficiary with the assent of the insurer, the beneficiary first designated does not take a vested interest.

Mutual Ben. Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298; *Malone v. Cohn*, 236 Fed. 882, 150 C. C. A. 144; *Waring v. Wilcox*, 8 Cal. App. 317, 96 Pac. 910; *New York Life Ins. Co. v. Daley*, 25 Cal. App. 376, 143 Pac. 1033; *Equitable Life Assur. Soc. of United States v. Stough*, 45 Ind. App. 411, 89 N. E. 612; *Indiana Nat. Life Ins. Co. v. McGinnis* (Ind. App.) 99 N. E. 751, reversed 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192; *Id.* (Ind. App.) 99 N. E. 756, reversed, 180 Ind. 701, 101 N. E. 295; *Burnett v. Mutual Life Ins. Co. of New York* (Ind. App.) 114 N. E. 232; *Townsend v. Fidelity & Casualty Co. of New York*, 163 Iowa, 713, 144 N. W. 574, L. R. A. 1915A, 109; *McKinney v. Fidelity Mut. Life Ins. Co.*, 270 Mo. 305, 193 S. W. 564; *Rosman v. Travelers' Ins. Co.*, 96 Atl. 875, 127 Md. 689; *Clarkston v. Metropolitan Life Ins. Co.*, 190 Mo. App. 624, 176 S. W. 437; *Lauterbach v. New York Inv. Co.*, 117 N. Y. Supp. 152, 62 Misc. Rep. 561, judgment affirmed *Minrath v. New York Inv. & Imp. Co.*, 122 N. Y. Supp. 1137, 137 App. Div. 919; *Cavagnaro v. Thompson*, 138 N. Y. Supp. 819, 78 Misc. Rep. 687; *Barbour v. Equitable Life Assur. Society of United States*, 161 N. Y. Supp.

469, 174 App. Div. 759; *Eltonhead v. Travelers' Ins. Co.*, 177 App. Div. 170, 163 N. Y. Supp. 838.

So where the custom of the company permitted a change of beneficiary it was held that a beneficiary acquired no vested interest. *Metropolitan Life Ins. Co. v. Hooppel*, 76 N. J. Eq. 94, 74 Atl. 467.

The New York statute authorizing a married woman in her own name to cause the life of her husband to be insured, etc., contemplates a contract made by an insurer directly with a wife, either in person or through an agent, and a policy so obtained is the property of the wife and her children, but a policy issued on the life of a husband which designates the husband as the "insured," and which expressly authorizes him to change the beneficiary, is not within the statute, so that the wife named as beneficiary has no vested right in the policy. *Eagle v. New York Life Ins. Co.*, 48 Ind. App. 284, 91 N. E. 814.

In action by assured to recover present possession of life insurance policies from beneficiary, his wife, as Rev. Laws, c. 118, § 73, is not applicable, defendant's request for ruling that under such statute defendant has a vested interest in policies is rightly refused. *Carpenter v. Carpenter*, 227 Mass. 288, 116 N. E. 494.

If, however, no change is made during the life of the insured, the interest of the beneficiary designated became vested on insured's death (*Langdeau v. John Hancock Mut. Life Ins. Co.*, 194 Mass. 56, 80 N. E. 452, 18 L. R. A. [N. S.] 1190); and to the same effect is *Weil v. Marquis*, 256 Pa. 608, 101 Atl. 70. In *American Cent. Life Ins. Co. v. Rosenstein*, 46 Ind. App. 537, 92 N. E. 380, affirming on rehearing (Ind. App.) 88 N. E. 97, construing the Indiana statute (*Burns' Ann. St.* 1908, § 4703), declaring that an insured at any time with the consent of the corporation may change the beneficiary without the beneficiary's consent, provided the policy has not been assigned as security for a debt or other legal consideration, it was held that, while a beneficiary under a contract of insurance has no vested interest therein prior to the death of the insured, yet, on insured's death, the beneficiary's interest became vested and a suit on the policy constituted an election by her to accept the contract, which was enforceable only by her or her representatives.

3756 (q). The beneficiary in the certificate issued by a mutual benefit association, in which the member is given full power to direct the disposal of the benefit and to change the beneficiary has no vested right in the contract of insurance evidenced by such certificate.

Slaughter v. Grand Lodge, 192 Ala. 301, 68 South. 367; *Ross v. Rogers*, 96 Ark. 154, 131 S. W. 336; *Longer v. Carter*, 102 Ark. 72, 143 S.

W. 575; *Supreme Lodge of Fraternal Brotherhood v. Price*, 27 Cal. App. 607, 150 Pac. 803; *Vawter v. Purdy*, 157 Pac. 556, 29 Cal. App. 623; *Order of Scottish Clans v. Reich*, 97 Atl. 863, 90 Conn. 511; *Ptacek v. Pisa*, 134 Ill. App. 155, judgment affirmed 83 N. E. 221, 231 Ill. 522, 14 L. R. A. (N. S.) 537; *Fraternal Tribunes v. Teutsch*, 170 Ill. App. 47; *National Union v. Keefe*, 172 Ill. App. 101; *Supreme Council Royal Arcanum v. McKnight*, 238 Ill. 349, 87 N. E. 299, reversing 140 Ill. App. 421; *Farra v. Braman* (Ind. App.) 82 N. E. 926, rehearing denied (Ind. App.) 84 N. E. 155; *Wandell v. Mystic Toilers*, 105 N. W. 448, 130 Iowa, 639; *Cooper v. Order of Railway Conductors of America*, 156 Iowa, 481, 137 N. W. 472; *Bush v. Modern Woodmen of America* (Iowa) 162 N. W. 59; *Sykes v. Armstrong*, 111 Miss. 44, 71 South. 262; *Dennis v. Modern Brotherhood of America*, 95 S. W. 967, 119 Mo. App. 210; *Grand Lodge A. O. U. W. v. McFadden*, 111 S. W. 1172, 213 Mo. 269; *Ables v. Ackley*, 113 S. W. 698, 133 Mo. App. 594; *Londry v. Sovereign Camp Woodmen of the World*, 140 Mo. App. 45, 124 S. W. 530; *Jackson v. Brotherhood of American Yeomen*, 167 Mo. App. 19, 150 S. W. 871; *Alexander v. Sovereign Camp of Woodmen of the World*, 186 S. W. 2, 193 Mo. App. 411; *Tuite v. Supreme Forest Woodmen Circle*, 187 S. W. 137, 193 Mo. App. 619; *Ogden v. Sovereign Camp Woodmen of the World*, 78 Neb. 804, 111 N. W. 797, affirmed on rehearing, 78 Neb. 806, 113 N. W. 524; *McCloskey v. Supreme Council American Legion of Honor*, 96 N. Y. Supp. 347, 109 App. Div. 309; *In re Gebert*, 160 N. Y. Supp. 782, 95 Misc. Rep. 477; *Pollock v. Household of Ruth*, 63 S. E. 940, 150 N. C. 211; *Christenson v. El Riad Temple, Ancient Arabic Order Nobles of Mystic Shrine of Sioux Falls*, 37 S. D. 68, 156 N. W. 581; *Alfsen v. Crouch*, 89 S. W. 329, 115 Tenn. 352; *Littleton v. Sain*, 126 Tenn. 461, 150 S. W. 423, 41 L. R. A. (N. S.) 1118; *Coleman v. Anderson*, 86 S. W. 730, 98 Tex. 570, affirming (Tex. Civ. App.) 82 S. W. 1057; *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893, L. R. A. 1915A, 580; *Malancy v. Malancy*, 165 Wis. 642, 163 N. W. 186.

Where the power of designating a beneficiary was not reserved to insured under the certificate, the beneficiary first designated acquires a vested interest upon delivery of the certificate; but where there is such reservation of power he takes a mere expectancy (*Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122).

3757 (q). Where a policy provided that it should be paid to the beneficiary of insured last designated on the back of the policy, if living, one so designated, under the Wisconsin law, took a vested interest in the policy, subject only to the possibility that she might assign or surrender the policy and destroy such interest (*In re Hogan* [D. C.] 186 Fed. 537).

Right of insured under benefit certificate issued in 1890 to change named beneficiary without her consent was a valuable vested

property interest protected by constitutional safeguards, not affected by St. Wis. § 2347, as amended by Laws 1891, c. 376, nor by section 1957, subd. 5, originating in Laws 1895, c. 175, § 3, relating to beneficiaries' rights. *Suelflow v. Supreme Lodge, Knights and Ladies of Honor*, 165 Wis. 291, 162 N. W. 346. As to the doctrine of the Wisconsin courts, see, also, *National Life Ins. Co. v. Brautigam*, 163 Wis. 270, 154 N. W. 839, reversed on rehearing, 163 Wis. 270, 157 N. W. 782.

3758 (q). The interest of a beneficiary in the certificate issued on the life of a member of a mutual benefit association is a mere expectancy, which becomes vested only on the death of the insured.

Slaughter v. Grand Lodge, 192 Ala. 301, 68 South. 367; *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Farra v. Braman* (Ind. App.) 82 N. E. 926, rehearing denied (Ind. App.) 84 N. E. 155; *Holden v. Modern Brotherhood of America*, 151 Iowa, 673, 132 N. W. 329; *Attorney General v. Supreme Council, A. L. H.*, 92 N. E. 136, 206 Mass. 158; *Hughes v. Modern Woodmen of America*, 145 N. W. 387, 124 Minn. 458; *Tierney v. Same*, 145 N. W. 390, 124 Minn. 540; *Hines v. Modern Woodmen of America*, 41 Okl. 135, 137 Pac. 675, L. R. A. 1915A, 264; *Noble v. Police Beneficiary Ass'n*, 73 Atl. 336, 224 Pa. 298, 132 Am. St. Rep. 783; *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893, L. R. A. 1915A, 580.

That the beneficiary in a mutual benefit certificate has something more than mere expectancy seems to be recognized in some cases. Thus it has been held in Indiana that, though the beneficiary in a certificate has no vested right till death of assured, she has an interest, subject only to the right of substitution of another in the mode prescribed by the contract (*Farra v. Braman*, 86 N. E. 843, 171 Ind. 529). So in Illinois it is said that while, as a general proposition, the beneficiary has no vested interest in a fraternal benefit certificate, an equitable interest will be recognized and enforced in a court of equity (*Conner v. Conner*, 163 Ill. App. 436). And it was also held in Illinois that the principle that vested rights may be acquired in mutual benefit insurance which courts of equity will enforce applies likewise to life insurance policies (*Order of Columbian Knights v. Matzel*, 184 Ill. App. 15). In Tennessee it is said that, while beneficiary does not have a vested interest, it does have a contingent right subject to be defeated by an exercise of power of substitution substantially in manner provided by laws of the order (*Davis v. Davis*, 190 S. W. 459, 136 Tenn. 520). And in Georgia it has been held that the beneficiary, while not having such an interest as to prevent the member from changing the designation, where permitted to do so, has such an interest that, if a third person

fraudulently induces the beneficiary to change, she may at the death of the member maintain an action for damages (*Mitchell v. Langley*, 85 S. E. 1050, 143 Ga. 827, L. R. A. 1916C, 1134, Ann. Cas. 1917A, 469). In *Supreme Lodge K. of P. v. Ferrell*, 83 Kan. 491, 112 Pac. 155, 33 L. R. A. (N. S.) 777, it was held that where, in performance of an antenuptial contract, a husband procures a change in a certificate of insurance in which his children were the sole beneficiaries so as to make his wife an equal beneficiary with the children, and she has fully executed the antenuptial contract on her part, she obtains an equitable interest in the certificate, and he cannot thereafter, without her consent, surrender it and have issued a new one in which a third person is named as sole beneficiary. It has been held in Illinois, too, that where the insured has designated an eligible beneficiary, and the latter has paid dues upon the faith of the certificate, the beneficiary so named acquires a beneficial interest in the certificate (*Women's Catholic Order of Foresters v. Hill*, 191 Ill. App. 629). But a mere promise to pay assessments and dues upon a policy of benefit insurance if made beneficiary is not sufficient to create in the promisor a vested interest, or limit right to change beneficiary (*Modern Brotherhood of America v. Hudson*, 194 Mich. 124, 160 N. W. 406).

During the life of an insured, his beneficiary has no vested right in the insurance; but he has a property right conferred by his certificate which cannot be destroyed or abridged without his consent clearly and unequivocally expressed. *Small v. Court of Honor*, 117 S. W. 116, 136 Mo. App. 434; *Umbarger v. Supreme Council of the Royal League* (Mo. App.) 118 S. W. 1199.

3759-3767. (r) Right to change beneficiary

3759 (r). In view of the rule as to vested interest it follows that under a policy of ordinary life insurance, containing a reservation of the right to change beneficiaries, the consent of the beneficiary first designated is necessary to render valid a substitution of beneficiaries.

Begley v. Miller, 137 Ill. App. 278; *O'Bryan v. England*, 189 S. W. 1126, 173 Ky. 12; *Breard v. New York Life Ins. Co.*, 70 South. 799, 138 La. 774; *Wachtel v. Harrison*, 145 N. Y. Supp. 982, 84 Misc. Rep. 76; *Tepper v. New York Life Ins. Co.*, 89 Misc. Rep. 224, 151 N. Y. Supp. 1049; *Smith v. Metropolitan Life Ins. Co.*, 34 Pa. Super. Ct. 72; *Jones v. North Carolina Mutual & Provident Ass'n*, 105 S. C. 427, 90 S. E. 30.

The right of the original beneficiary is not affected by a clause in an industrial policy that a production by the company of the policy
(1576)

and a receipt for the sum assured signed by an executor, or lawful beneficiary of the deceased, shall be conclusive evidence of payment to the person lawfully entitled to it (*Wachtel v. Harrison*, 145 N. Y. Supp. 982, 84 Misc. Rep. 76).

By the Wisconsin rule, heretofore adverted to in the original text, by virtue of which a beneficiary has a subsisting interest subject however to be revoked, the insured could change his beneficiary without consent of the original beneficiary. So far as policies in favor of the wife are concerned, the rule is now changed by Laws 1891, c. 376, amending Rev. St. 1878, § 2347 (*Boehmer v. Kalk*, 155 Wis. 156, 144 N. W. 182). And the statute now in force (St. 1915, § 2347), preventing divesting of rights of married woman beneficiary in life insurance policy without her consent, nevertheless permits insured, where right to change beneficiary is reserved, to do so, though beneficiary is a married woman, in conformity with terms of reservation (*National Life Ins. Co. of United States v. Brautigam*, 157 N. W. 782, 163 Wis. 270, reversing judgment on rehearing 154 N. W. 839, 163 Wis. 270).

It has been held in Kentucky that, where a policy is payable to insured or his legal representatives, he may change the beneficiary but the proceeds of the policy are subject to the rights of the wife in her husband's estate (*Gaines v. Gaines* [Ky.] 99 S. W. 600).

A Missouri statute (Rev. St. 1899, § 7895; Ann. St. 1906, p. 3749; Rev. St. 1909, § 6944) provides that insurance policies for the benefit of insured's wife shall inure to her separate benefit, etc., provided that in the event of the death or divorcement of the wife before the husband's death he shall have a right to designate another beneficiary by written notice to the insurer. The term "divorcement," as so used, means a dissolution of the marriage tie; a legal dissolution of the marriage contract by a court or other body having competent authority, without reference to whether the fault authorizing the divorce was that of the husband or of the wife.

Haven v. Home Ins. Co., 149 Mo. App. 291, 130 S. W. 73; *Orthwein v. Germania Life Ins. Co.*, 261 Mo. 650, 170 S. W. 885. The statute has no application to a policy payable to the wife, if living, and, if not, to the children of the beneficiary. *Blum v. New York Life Ins. Co.*, 95 S. W. 317, 197 Mo. 513, 8 L. R. A. (N. S.) 923, 7 Ann. Cas. 1021.

Under the Missouri statute (Rev. St. 1909, §§ 6946-6949) insured under life policy for \$30,000, with right reserved to change beneficiary, at any time and on surrender, had power, without consent of

beneficiaries, to surrender original policy for paid-up policy for \$2,760, payable at his death to same beneficiaries. *McKinney v. Fidelity Mut. Life Ins. Co.*, 270 Mo. App. 305, 193 S. W. 564.

In *Crowell v. Northwestern Nat. Life Ins. Co.*, 140 Iowa, 258, 118 N. W. 412, it appeared that deceased took a life policy in an Iowa company, which afterwards transferred its business to a Minnesota company, which undertook to reinsure, assume, and guarantee all the first company's insurance contracts. It was held that, even if deceased could thereafter treat his insurance as an Iowa contract, and so could substitute a beneficiary without the consent of the original beneficiary, he was not bound to do so; and he having construed the contract as one for substitution of a beneficiary, with the consent of the original beneficiary, and such beneficiary and the person to be substituted having acquiesced in such construction and undertaken to conform to it, such construction will be adopted by the court.

3761 (r). Where a life policy provides that the beneficiary may only be changed by the consent of the company indorsed on the policy, a change of beneficiary cannot be made until such conditions are complied with (*O'Donnell v. Metropolitan Life Ins. Co.* [Del.] 95 Atl. 289). Under the Nebraska statute (*Cobbey's Ann. St.* 1903, § 6638) relative to mutual accident insurance companies, providing that any member shall have the right, with the consent of such corporation, to designate a different beneficiary, requires the consent of such corporation, though the by-laws provide that a beneficiary may be changed on the written application of the member to the secretary (*Urlick v. Western Travelers' Acc. Ass'n*, 81 Neb. 327, 116 N. W. 48). It has been held in Illinois that a New York statute (*Laws* 1892, p. 2015, c. 690, § 211), requiring the consent of the insurance company to a change of beneficiary by insured, becomes a part of a New York policy issued while such statute is in force, and is controlling on the subject covered thereby, although the policy is silent concerning the same (*Freund v. Freund*, 75 N. E. 925, 218 Ill. 189, 109 Am. St. Rep. 283, reversing 117 Ill. App. 565).

Under Code Iowa, § 1789, authorizing change of beneficiary at the pleasure of insured, by-law requiring consent of association to change of beneficiary is invalid. *Garrett v. Garrett*, 159 Pac. 1050, 81 Cal. App. 173.

3762 (r). Under a reservation of the right to change the beneficiary, in whatever form it exists, whether in the contract or laws
(1578)

of the insurer, the insured may, irrespective of the consent of the original beneficiary, and subject only to the rules of the association, change his beneficiary at will.

Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144; *Slaughter v. Grand Lodge*, 192 Ala. 301, 68 South. 367; *Beasely v. Mutual Aid Ass'n*, 94 Ark. 499, 127 S. W. 974; *Wilkes v. Hicks*, 124 Ark. 192, 186 S. W. 830; *Vawter v. Purdy*, 157 Pac. 556, 29 Cal. App. 623; *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Supreme Colony United Order of Pilgrim Fathers v. Towne*, 89 Atl. 264, 87 Conn. 644, Ann. Cas. 1916B, 181; *Estes v. Local Union, No. 43, United Brotherhood of Carpenters and Joiners of America*, 97 Atl. 326, 90 Conn. 426; *Smith v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n*, 76 S. E. 44, 138 Ga. 717; *Chance v. Simpkins*, 146 Ga. 519, 91 S. E. 773; *Begley v. Miller*, 137 Ill. App. 278; *Supreme Council of Royal Arcanum v. McKnight*, 87 N. E. 299, 238 Ill. 349, reversing 140 Ill. App. 421; *Modern Brotherhood of America v. Matkovitch*, 56 Ind. App. 8, 104 N. E. 795; *Carpenter v. Carpenter*, 227 Mass. 288, 116 N. E. 494; *New Era Ass'n v. Kuyat*, 191 Mich. 646, 158 N. W. 119; *Wherry v. Latimer*, 103 Miss. 524, 60 South. 563, suggestion of error overruled 103 Miss. 524, 60 South. 642; *Grand Lodge, A. O. U. W. of Missouri, v. O'Malley*, 89 S. W. 68, 114 Mo. App. 191; *Grand Lodge A. O. U. W. v. McFadden*, 111 S. W. 1172, 213 Mo. 269; *Londry v. Sovereign Camp Woodmen of the World*, 140 Mo. App. 45, 124 S. W. 530; *Eves v. Sovereign Camp W. O. W.*, 153 Mo. App. 247, 133 S. W. 657; *Robinson v. New York Life Ins. Co.*, 153 S. W. 534, 168 Mo. App. 259; *Gibbs v. Knights of Pythias of Missouri*, 173 Mo. App. 34, 156 S. W. 11; *Clarkston v. Metropolitan Life Ins. Co.*, 190 Mo. App. 624, 176 S. W. 437; *Knights of Maccabees of the World v. Sackett*, 86 Pac. 423, 34 Mont. 357, 115 Am. St. Rep. 532; *Baker v. Hardy*, 148 N. W. 80, 96 Neb. 377; *Sinclair v. Fitzpatrick*, 138 N. Y. Supp. 272, 78 Misc. Rep. 60; *Pollock v. Household of Ruth*, 150 N. C. 211, 63 S. E. 940; *Lentz v. Fritter*, 110 N. E. 637, 92 Ohio St. 186; *Modern Woodmen of America v. Terry* (Okl.) 153 Pac. 1124; *Janeway v. Norton* (Okl.) 160 Pac. 908; *John Hancock Mut. Life Ins. Co. v. Bedford*, 36 R. I. 116, 89 Atl. 154; *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893, L. R. A. 1915A, 580; *Bernheim v. Martin*, 45 Wash. 120, 88 Pac. 106; *Suelflow v. Supreme Lodge, Knights and Ladies of Honor*, 165 Wis. 291, 162 N. W. 346.

Rev. St. 1899, § 1417 (Ann. St. 1906, p. 1116), expressly authorizes the holder of a certificate to designate a new beneficiary. *Supreme Tent, Knights of the Maccabees of the World, v. Altmann*, 134 Mo. App. 363, 114 S. W. 1107.

Where a fraternal beneficial association, for a valuable consideration, has issued a benefit certificate payable to a stated beneficiary, the Legislature by statute, cannot without the member's consent, deprive him of his right to designate the beneficiary. *Coghlan v.*

Supreme Conclave Improved Order Heptasophs, 86 N. J. Law, 41, 91 Atl. 132.

Under the Wisconsin statute (St. 1898, § 1955c) the member of a fraternal benefit society, whose certificate named wife as beneficiary, after divorce could change certificate to make his second wife beneficiary, entitling her to benefit on his death. *Ormond v. McKinley*, 157 N. W. 786, 163 Wis. 205.

Where there is no authority in the by-laws or constitution of a fraternal society, nor a clause in the certificate, providing for a change of beneficiary, there can be no change (*Knights of Pythias of North America v. Long*, 117 Ark. 136, 174 S. W. 1197). But if the rules of a mutual benefit association do not forbid a change in beneficiaries, the obligation being to pay the beneficiary of the deceased member, and there is no policy, but only a receipt for dues which designates the beneficiary, the insured can change beneficiaries without the consent of the one first appointed, for the beneficiary has only an expectancy, and is not the obligee of a contract (*Carruth v. Clawson*, 97 Ark. 50, 133 S. W. 178). In *Noble v. Police Beneficiary Ass'n*, 224 Pa. 298, 73 Atl. 336, 132 Am. St. Rep. 783, a member of a benefit association named his sister as beneficiary. On marrying he surrendered the certificate, and obtained a new certificate, wherein the wife was named as beneficiary. It was held that, on the member's death, his wife had sole interest in the proceeds of the certificate, though a by-law of the association provided that the certificate should be transferred only on the consent of the beneficiary, and the sister did not in fact consent; the insured having retained the certificate in his possession during his lifetime.

3765 (r). Where the original beneficiary is so designated for a valuable consideration which she fully performs, the member cannot destroy her rights by changing the beneficiary (*Stronge v. Supreme Lodge K. P.*, 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. [N. S.] 1206, 121 Am. St. Rep. 902, 12 Ann. Cas. 941). So, where insured changed the beneficiary in consideration of the new beneficiary's promise to marry him, and the marriage took place, she acquired a right to the benefit of the certificate, which could not be taken away without her consent (*Supreme Lodge, Knights & Ladies of Honor, v. Ulanowsky*, 246 Pa. 591, 92 Atl. 711).

Similarly, by the weight of authority, a beneficiary acquires a vested right in insurance which equity will protect if such beneficiary assists in paying the assessments or premiums under an

agreement by which the proceeds of the insurance or a part of them are to be paid to such beneficiary.

Hill v. Hill, 130 Ill. App. 278; Order of Columbian Knights v. Matzel, 184 Ill. App. 15; McKeon v. Ehringer, 48 Ind. App. 226, 95 N. E. 604; Savage v. Modern Woodmen of America, 84 Kan. 63, 113 Pac. 802, 33 L. R. A. (N. S.) 773; Callahan v. Supreme Tent of Knights of Maccabees of the World (Sup.) 121 N. Y. Supp. 354; King v. Supreme Council Catholic Mut. Ben. Ass'n, 65 Atl. 1108, 216 Pa. 553.

On the other hand, it is held in Missouri that, in view of the statute (Rev. St. 1899, § 1417), an agreement between the member and the beneficiary that the beneficiary shall pay the assessments and dues gives the beneficiary no paying no vested right.

Londry v. Sovereign Camp Woodmen of the World, 140 Mo. App. 45, 124 S. W. 530; Supreme Tent, Knights of the Maccabees of the World, v. Altmann, 134 Mo. App. 363, 114 S. W. 1107. It seems that such is the view of the Missouri courts independent of statute. See Supreme Council Royal Arcanum v. Heitzman, 140 Mo. App. 105, 120 S. W. 628. But see Sovereign Camp, Woodmen of the World, v. Broadwell, 89 S. W. 891, 114 Mo. App. 471.

The same rule seems to prevail in Kentucky and Michigan independent of statute.

Grand Lodge, Ancient Order of United Workmen of Kentucky v. Denzer, 129 Ky. 202, 110 S. W. 882, 33 Ky. Law Rep. 643; Schiller-Bund v. Knack, 184 Mich. 95, 150 N. W. 337.

Of course, if the beneficiary fails to comply with the agreement the members may change the beneficiary under the general rule (Eatman v. Eatman [Tex. Civ. App.] 135 S. W. 165). And in Grand Lodge A. O. U. W. v. Jones, 47 Tex. Civ. App. 533, 106 S. W. 184, it was held that where the by-laws of the association provide that a member may change his beneficiary upon delivering his certificate, etc., and a certificate is issued subject to and is to be construed by the laws of the order, and the insured complies with the provisions for making a change of beneficiary, the association cannot be enjoined from issuing a new certificate to the new beneficiary, though plaintiff, to whom the certificate was formerly payable as trustee, had paid out money to keep the insurance alive, under an agreement with the insured and his beneficiary by which plaintiff was to receive the money so paid by him out of the proceeds of the certificate. Under the Wisconsin statute (St. 1915, § 1957—5), providing that fraternal benefit member may change

(1581)

beneficiary without beneficiary's consent and society's by-laws declaring void agreements not to change beneficiary, the beneficiary may be changed although insured had received financial aid upon condition that he name former beneficiary (*Malancy v. Malancy*, 165 Wis. 642, 163 N. W. 186).

The mere voluntary payment of assessments by the beneficiary does not give her such an equity as will estop the member from changing the beneficiary.

Supreme Lodge, New England Order of Protection, v. Hine, 73 Atl. 791, 82 Conn. 315; Grand Lodge, A. O. U. W. of Missouri, v. O'Malley, 89 S. W. 68, 114 Mo. App. 191; Grand Lodge A. O. U. W. v. McFadden, 111 S. W. 1172, 213 Mo. 269; Pollock v. Household of Ruth, 63 S. E. 940, 150 N. C. 211.

3766 (r). Under the general power to change his beneficiary, a member may not substitute as beneficiary one not within the class of persons who by the laws of the association may be designated as beneficiary.

Miller v. Prelle, 122 Ill. App. 380; *Royal League v. Shields*, 96 N. E. 45, 251 Ill. 250, 36 L. R. A. (N. S.) 208; *Brinen v. Supreme Council of Catholic Mut. Ben. Ass'n*, 103 N. W. 603, 140 Mich. 220; *Foss v. Petterson*, 104 N. W. 915, 20 S. D. 93.

The statute of Illinois limiting those who may be designated as beneficiaries under a certificate in a fraternal benefit society prevents an insured under an existing certificate of an Illinois society from changing the beneficiary to one not in the permitted class. *Bush v. Modern Woodmen of America* (Iowa) 152 N. W. 31.

Where, after amendment of Mass. St. 1876-77, p. 586, c. 204, by St. 1882, p. 149, c. 195, § 2, which amendment authorized the designation of a relative as beneficiary, a member of a mutual benefit society surrendered his certificate, and requested another to issue in its place to his grandniece and grandnephew, and the society, in accordance with such request, issued such certificate, it will be deemed to have assented to the designation of such niece and nephew as beneficiaries, though it did not formally adopt the statute of 1882 (*Mathewson v. Supreme Council Royal Arcanum*, 110 N. W. 69, 146 Mich. 671).

Where a fraternal beneficiary association issued a benefit certificate making the wife of the member beneficiary, and then permitted the member to change the beneficiary by making his brother and sisters beneficiaries, the only party who could contest the validity of the change was the association itself, and, where it recognized its validity, the wife could not complain though the association did

not have power to designate brothers and sisters of a member beneficiaries. *Grand Lodge, A. O. U. W. of Michigan, v. Brown*, 125 N. W. 400, 160 Mich. 437.

3767-3775. (s) Mode of changing beneficiary

3767 (s). Where the insurer has made reasonable regulations defining the method by which the insured may change the beneficiary, the regulations are part of the contract and the right to change can be exercised in no other way.

Sovereign Camp, Woodmen of the World, v. Israel, 117 Ark. 121, 173 S. W. 855; *Wilkes v. Hicks*, 124 Ark. 192, 186 S. W. 830; *Supreme Lodge of Fraternal Brotherhood v. Price*, 27 Cal. App. 607, 150 Pac. 803; *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Johnson v. New York Life Ins. Co.*, 56 Colo. 178, 138 Pac. 414, L. R. A. 1916A, 868; *Knights of Columbus v. Curran*, 91 Conn. 115, 99 Atl. 485; *Smith v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n*, 76 S. E. 44, 138 Ga. 717; *Freund v. Freund*, 75 N. E. 925, 218 Ill. 189, 109 Am. St. Rep. 283, reversing 117 Ill. App. 565; *Hodalski v. Hodalski*, 181 Ill. App. 158; *Indiana Nat. Life Ins. Co. v. McGinnis*, 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192, reversing (Ind. App.) 99 N. E. 751; *Id.*, 180 Ind. 701, 101 N. E. 295, reversing (Ind. App.) 99 N. E. 756; *Holden v. Modern Brotherhood of America*, 151 Iowa, 673, 132 N. W. 329; *Townsend v. Fidelity & Casualty Co. of New York*, 163 Iowa, 713, 144 N. W. 574, L. R. A. 1915A, 109; *Pilcher v. Puckett*, 77 Kan. 284, 94 Pac. 132, 17 L. R. A. (N. S.) 1083; *Vanasek v. Western Bohemian Fraternal Ass'n*, 142 N. W. 333, 122 Minn. 273, 49 L. R. A. (N. S.) 141, Ann. Cas. 1914D, 1123; *Londry v. Sovereign Camp, Woodmen of the World*, 140 Mo. App. 45, 124 S. W. 530; *Knights of Maccabees of the World v. Sackett*, 86 Pac. 423, 34 Mont. 357, 115 Am. St. Rep. 532; *Metropolitan Ins. Co. v. Clanton*, 76 N. J. Eq. 4, 73 Atl. 1052; *Sullivan v. Maroney*, 77 N. J. Eq. 565, 78 Atl. 150, affirming 76 N. J. Eq. 104, 73 Atl. 842; *Hoff v. Supreme Lodge K. of P.*, 161 N. Y. Supp. 1012, 98 Misc. Rep. 61, judgment affirmed *Same v. Hoff*, 161 N. Y. Supp. 520, 175 App. Div. 40; *Stemler v. Stemler*, 31 S. D. 595, 141 N. W. 780; *Flowers v. Sovereign Camp, Woodmen of the World*, 90 S. W. 526, 40 Tex. Civ. App. 593; *Gray v. Sovereign Camp, Woodmen of the World*, 47 Tex. Civ. App. 609, 106 S. W. 176; *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893, L. R. A. 1915A, 580; *Dean v. Dean*, 162 Wis. 303, 156 N. W. 135; *Suelflow v. Supreme Lodge, Knights and Ladies of Honor*, 165 Wis. 291, 162 N. W. 346.

Where insurer, at insured's request, they being the only parties in interest, altered a policy so as to make it payable \$4,000 to the insured's second wife and \$1,000 to his son, there is a sufficient transfer of the policy, though unknown to the transferees until after insured's death. *York v. Flaherty*, 96 N. E. 53, 210 Mass. 35.

The fund from death benefit certificate is not subject to disposal of holder, testamentary or otherwise, except as to designation of beneficiary pursuant to rules of order. *Grant v. Faires*, 97 Atl. 1060, 253 Pa. 232.

So, where a policy provided that insured, while the policy was in force and not assigned, might have the beneficiary changed by returning the policy to the company with his written request for the appropriate indorsement on the policy, to effect a change of beneficiary it was necessary for insured to return the policy to the company with the requisite written request, and he could not effect such change by a written assignment or by delivery of the policy, with the intent of making such change (*Deal v. Deal*, 69 S. E. 886, 87 S. C. 395, Ann. Cas. 1912B, 1142). In *Abbott v. Supreme Colony, United Order of Pilgrim Fathers*, 190 Mass. 67, 76 N. E. 234, the constitution and by-laws of a mutual benefit association authorized a change of beneficiary by a written declaration signed and witnessed by two witnesses and acknowledged before a justice of the peace, etc. The certificate provided that a change of beneficiary in any other manner would not be legal or binding on the order. It was held that an attempted change of beneficiary by a member, which was witnessed only by the justice before whom the declaration was acknowledged, because of a rule of the hospital in which the member lay at the time and in which he died, allowing but one visitor a day to a patient, was not a compliance with rules of the society and was ineffectual.

Where policy allowed insured to change beneficiary in writing, valid only if indorsed on the policy by the insurer at the home office, and attached to the policy, a simple assignment as collateral to a loan, not sent to the insurer, did not affect the beneficiary's right. *Muller v. Penn Mut. Life Ins. Co. of Philadelphia (Colo.)* 161 Pac. 148.

Where a reorganization of an insurance association under laws relating to fraternal societies is effected, a change of beneficiary may be effected by election of the policy holder and association to treat the policy as controlled by the statute and constitution and by-laws of the reorganized association, including a limitation of beneficiaries to a specified class. *Lentz v. Fritter*, 110 N. E. 637, 92 Ohio St. 186.

A mere parol declaration of his wish to change, though made to an officer of the lodge, is of course insufficient (*Slaughter v. Slaughter*, 186 Ala. 302, 65 South. 348). So, too, writing to the proper
(1584)

officer, expressing a desire to change the beneficiary, or even designating a new beneficiary, is insufficient.

Urick v. Western Travelers' Acc. Ass'n, 81 Neb. 327, 116 N. W. 48; Grand Lodge A. O. U. W. of Maine v. Edwards, 89 Atl. 147, 111 Me. 359.

No new contract to insure the life of B. for the benefit of his estate, or estoppel of the insurance company to deny liability to his estate on a policy which had issued on his life to his wife, arose from his writing the company after her death that he wished the policy made payable to his estate, and furnished a requested affidavit of her death, leaving no children, but a will, and the company's agent writing him that such affidavit was all that was necessary, and that the company's records would show that the policy had been made payable to his estate, and the company continuing thereafter to receive premiums from him thereon. Bradshaw v. Mutual Life Ins. Co. of New York, 98 N. E. 851, 205 N. Y. 467, modifying judgment 125 N. Y. Supp. 1114, 140 App. Div. 917.

An expression of intent to change the beneficiary, not followed by a substantial carrying out of the intent, is insufficient. Farra v. Braman, 86 N. E. 843, 171 Ind. 529; Franken v. Supreme Court I. O. F., 116 N. W. 188, 152 Mich. 502; Davis v. Davis, 190 S. W. 459, 136 Tenn. 520; Wooden v. Wooden (Tex. Civ. App.) 116 S. W. 627.

If, however, no formalities or specific directions are required by the constitution, by-laws, or certificate for directing the payment of the fund in case the legal beneficiary named is dead, any clear definite direction or designation of the beneficiary by the insured to whom he desires the fund to be paid will suffice, provided such designated beneficiary is one of a class who can legally receive the fund (Fraternal Tribunes v. Teutsch, 170 Ill. App. 47).

If the insured sends his application for a change of beneficiary by mail to the association, he constitutes the mail his agent, and assumes the risk of failure to deliver the application, or that the delivery would not be made until a date so late as to be of no effect; and hence where, at the time of the death of insured, his application for a change of beneficiary had not been received by the association through the mail, the fact that the application was actually delivered on the day of insured's death and within about six hours thereafter did not affect the interest of the beneficiary, which attached instantly on insured's death (Knights of Maccabees of the World v. Sackett, 86 Pac. 423, 34 Mont. 357, 115 Am. St. Rep. 532).

Making of false affidavit that beneficiary was dead, to obtain loan from company, does not revoke designation of beneficiary as to proceeds

of policy, less the loan. *Crosby v. Mutual Benefit Life Ins. Co.*, 109 N. E. 365, 221 Mass. 461.

Where a member seeks to make a change of beneficiaries, undertaking to designate a number of beneficiaries to participate in the fund, some of whom are not legally entitled to be named as beneficiaries under the by-laws of the order issuing the certificate, a change will not be deemed to have been effected in favor of any of the persons sought to be substituted as beneficiaries, and the original beneficiary will be awarded the fund. *Flannery v. Gleason*, 133 Ill. App. 398.

3769 (s). If the insured has done substantially all that is required of him to effect a change of beneficiary, and all that remains to be done are the ministerial acts of the officers of the association, the change will take effect though the formal details were not completed before the death of insured.

Carruth v. Clawson, 97 Ark. 50, 133 S. W. 178; *Garrett v. Garrett*, 159 Pac. 1050, 31 Cal. App. 173; *Mutual Life Ins. Co. of New York v. Lowther*, 126 Pac. 882, 22 Colo. App. 622; *Smith v. Locomotive Engineers Mut. Life & Acc. Ins. Ass'n*, 138 Ga. 717, 76 S. E. 44; *O'Connell v. Supreme Tent of Knights of Maccabees of the World*, 153 Ill. App. 232; *Supreme Council of Royal Arcanum v. Huckins*, 166 Ill. App. 555; *Flannery v. Gleason*, 133 Ill. App. 398; *Wandell v. Mystic Toilers*, 105 N. W. 448, 130 Iowa, 639; *Wood v. Brotherhood of American Yeomen*, 148 Iowa, 400, 126 N. W. 949; *Brown v. Modern Woodmen of America*, 156 Pac. 767, 97 Kan. 665, L. R. A. 1916E, 588; *Vaughan's Adm'r v. Modern Brotherhood of America*, 149 S. W. 937, 149 Ky. 587; *Daugherty v. Daugherty*, 154 S. W. 9, 152 Ky. 732; *Supreme Court I. O. F. v. Frise*, 183 Mich. 186, 150 N. W. 110; *Hughes v. Modern Woodmen of America*, 145 N. W. 387, 124 Minn. 458; *Tierney v. Same*, 145 N. W. 390, 124 Minn. 540; *Henderson v. Modern Woodmen of America*, 163 Mo. App. 186, 146 S. W. 102; *Jackson v. Brotherhood of American Yeomen*, 167 Mo. App. 19, 150 S. W. 871; *Supreme Tent, Knights of the Maccabees of the World, v. Altmann*, 134 Mo. App. 363, 114 S. W. 1107; *Jane-way v. Norton (Okla.)* 160 Pac. 908; *Stemler v. Stemler*, 31 S. D. 595, 141 N. W. 780.

The stipulation in the by-laws of the association that a certificate shall not take effect until after delivery while the insured is in good health does not apply to the delivery of a new certificate for the purpose of changing the beneficiary. *Eatman v. Eatman (Tex. Civ. App.)* 135 S. W. 165. But where a by-law provided that no change of beneficiary should be effective until the old certificate was surrendered and a new one delivered during the life time of the member, a new certificate changing the beneficiary did not become effective if not delivered until after the death of the member. *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893, L. R. A. 1915A, 580. But see *McIntyre v. Modern Woodmen of America*,

200 Fed. 1, 121 C. C. A. 1, holding that the fact that a reissued certificate, changing the beneficiary had not been actually delivered at the time of the member's death, was no defense thereto.

In *Tidd v. McIntyre*, 116 App. Div. 602, 101 N. Y. Supp. 867, the by-laws of the association provided that a member, desiring to change his beneficiary, might do so by surrendering his certificate, with a written request on a form provided on the certificate, and delivering the same to the record keeper of his local lodge, with a certain fee, and whereupon the supreme record keeper should issue a new certificate. A certificate named the member's deceased wife as his beneficiary, and he agreed orally with plaintiff, his niece, that she should provide a home and care for him during his life and receive the amount payable under the certificate on his death, and plaintiff fully performed the agreement on her part. After the making of the agreement the member mailed his certificate to his local recorder, with a letter requesting that the beneficiary be changed according to the agreement; but the recorder, under the mistaken impression that the plaintiff was his only niece, advised him that she would receive the benefit without any change. It was held that, the association having paid the money into court, as between plaintiff and other nieces of the member equity required that plaintiff should be regarded as the sole beneficiary.

While equity will aid an attempted, but incomplete, change of beneficiary, it does so only when the insured in good faith has attempted to comply with the prescribed mode of change. Equity will consider that done which ought to have been done, and will not require impossibilities. So it has been held that, where the insured was prevented from following the prescribed mode of change by the wrongful withholding of the certificate by the original beneficiary, but insured had done all she could to effect the change under the circumstances equity would regard the change as made (*Modern Brotherhood of America v. Matkovitch*, 56 Ind. App. 8, 104 N. E. 795). And where the member made a bona fide attempt to change the beneficiary, but death intervened before he could conform to all the rules equity regarded the change as made (*Walsh v. St. Louis Union Trust Co.*, 148 Mo. App. 179, 127 S. W. 645). On the other hand, where the insured did nothing in accordance with the rules prescribed, his will, giving the fund to another, did not, in equity, constitute a change (*Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122). So, too, where the rules of the insurer require consent of the insurer to be indorsed on the policy, the act required

to be done by the insurer is not a mere ministerial act (*Sheppard v. Crowley*, 61 Fla. 735, 55 South. 841), and equity will not supply the indorsement.

Rumsey v. New York Life Ins. Co., 59 Colo. 71, 147 Pac. 337; *Freund v. Freund*, 75 N. E. 925, 218 Ill. 189, 109 Am. St. Rep. 283, reversing judgment 117 Ill. App. 565; *New York Life Ins. Co. v. Murtagh*, 69 South. 165, 137 La. 760.

That notice of deceased's change of designation of beneficiary is not given to the society until after his death, where no payment of benefit has been made, does not affect the validity of the designation. *Estes v. Local Union, No. 43, United Brotherhood of Carpenters and Joiners of America*, 97 Atl. 326, 90 Conn. 426.

In *Grand Lodge A. O. U. W. v. McFadden*, 213 Mo. 269, 111 S. W. 1172, the laws of the order provided that, when a certificate was not under the control of a member, he might have a duplicate on making an affidavit to the facts and by executing a release of rights under the original, and in accordance therewith a duplicate was issued to a member, changing the name of the beneficiary as authorized in writing by him, though the by-laws provided that a member desiring such change might do so by authorizing it in writing on the back of the certificate; the old certificate, if possible, to be filed, and a new certificate issued thereon. It was held that the member, not having the original certificate on which to indorse authority for the change, did all that was in his power under the circumstances to effect it in strict compliance with requirements, and that he and the association, being the only persons having a vested interest in the certificate, could waive the formality of indorsing authority on the back of the duplicate and having a new certificate issued, and the duplicate certificate was a binding contract.

In *French v. Provident Savings Life Assur. Soc. of New York*, 205 Mass. 424, 91 N. E. 577, it appeared that in endeavoring to change the beneficiary in a life policy in a New York company, so as to make it payable to her mother instead of her husband, insured signed and acknowledged the usual form for such change, but, being unable to find the policy, was told by defendant's agent that it must be surrendered to the company to complete the change, or a lost certificate be filed, and she said, when she found the policy, she would send it to the agent. A few days later a blank certificate for a lost policy was mailed to her. The agent took with him and

kept in Boston the request for a change of beneficiary, but did not send it to the company till after her death, and the company never received any certificate for lost policy, nor was the policy itself surrendered for completion of the change, as was required by it. The policy expressly provided that a change would take effect on the indorsement by the company of a written request therefor; but, so far as appeared, the only knowledge it had of the intended change was that it had at some time copies of its agent's letter to her, to the effect that it would be necessary to have the policy, or the certificate for lost copy, and of the letter from its Boston cashier to the agent, stating that, if nothing further had been done, she would like to return the application. It was held that this was merely an incomplete attempt to designate a new beneficiary, which was of no effect, and her husband was entitled to the insurance.

In *Murphy v. Nowak*, 223 Ill. 301, 79 N. E. 112, 7 L. R. A. (N. S.) 393, the application directed that all benefits payable on the death of the applicant should be paid to his wife, subject to such future disposal among his dependents as he might direct. On the back was an unsigned direction to pay to his wife, "to be held in trust by her" for his adopted daughter named. The certificate issued to him was made payable according to such unsigned direction, and was accepted by him in writing "on the conditions named," and was held by him for many years and until his death with full knowledge of its conditions. It was held that the fact that the direction followed in making the certificate was unsigned was immaterial in view of its having been knowingly accepted, and that the adopted daughter was the equitable beneficiary. In *Wandell v. Mystic Toilers*, 130 Iowa, 639, 105 N. W. 448, the by-laws of the society authorized the change of beneficiaries by members on payment of a certain fee and surrendering the old certificate, where the surrender clause was duly executed in the presence of, and attested by, the secretary of the member's subordinate council, except that, where it could not be so attested, the member's signature might be attested by the jurat of an officer authorized to administer oaths. It was held that where a member in extremis, desiring to change her beneficiary, signed the indorsement on her certificate in the absence of the secretary of the local council, but he voluntarily thereafter affixed his attestation to the signature, accepted the same as properly verified, and forwarded the certificate to the general office of the association before the member's death, the associa-

tion was estopped to deny that the indorsement was properly executed.

Where deceased personally signed his name at bottom of a new certificate of insurance in plaintiff benefit association, he agreed to its terms and ratified a change of beneficiary. *New Era Ass'n v. Kuyat*, 191 Mich. 646, 158 N. W. 119.

In *Bernheim v. Martin*, 45 Wash. 120, 88 Pac. 106, the by-laws of the association provided that a member might change his beneficiary by surrendering his certificate to the secretary with a written request on a form provided on the certificate, and that the supreme secretary should, on receipt of the same, issue a new certificate. A man and woman who were engaged to be married were each members of a beneficial association, and they agreed to have the beneficiaries in their certificates changed so that each should be the beneficiary of the other. After the marriage, the husband changed his beneficiary, and the wife took her certificate to the secretary of her local lodge, and filled out the application for a change, signing her maiden name, but the supreme secretary returned it, with directions that she sign the application by both her maiden name, and her name after marriage. There was no rule or by-law requiring it to be done, though it was the custom of the supreme secretary's office, and when the certificate was returned, the wife was ill and in regard to the matter stated that she was "not going to sign any more papers." It was held that a change of beneficiary had been effected.

3770 (s). Where the contract of insurance provided for a change of beneficiary by surrender of the old certificate, an attempt to make a change without following such provisions is not excused by failure of the member to understand his contract (*Sterling v. Head Camp*, Pacific Jurisdiction, 80 Pac. 375, 28 Utah, 505, rehearing denied 80 Pac. 1110, 28 Utah, 526).

A member has a right to change a beneficiary named in a certificate without the surrender of the old certificate, and this without regard to the fact that the old beneficiary was a creditor. *Ptacek v. Pisa*, 134 Ill. App. 155, judgment affirmed 83 N. E. 221, 231 Ill. 522, 14 L. R. A. (N. S.) 537.

If the rules of the association so provide the original certificate must be surrendered to effectuate the change (*Ables v. Ackley*, 133 Mo. App. 594, 113 S. W. 698). But it has been held in Delaware that the failure of an insured to deliver the policy while attempting to change the beneficiary will not prevent the new beneficiary from

recovering as equitable assignee (*O'Donnell v. Metropolitan Life Ins. Co.* [Del. Ch.] 95 Atl. 289). The original beneficiary in whose possession the certificate is cannot defeat the change by refusing to surrender the certificate.

Modern Brotherhood of America v. Matkovitch, 56 Ind. App. 8, 104 N. E. 795; *Holden v. Modern Brotherhood of America*, 151 Iowa, 673, 132 N. W. 329; *Modern Brotherhood of America v. Hudson*, 194 Mich. 124, 160 N. W. 406; *Polish National Alliance of United States of North America v. Nagrabski*, 71 N. J. Eq. 621, 64 Atl. 471; *John Hancock Mut. Life Ins. Co. v. Bedford*, 36 R. I. 116, 89 Atl. 154.

Where the laws of the society as to a change of beneficiary did not require approval by the supreme body or its recorder to validate the change, a member having complied with the rules as far as he was able, the change was complete, though no new certificate was issued, because the old certificate was lost in the mail (*Wintergerst v. Court of Honor*, 185 Mo. App. 373, 170 S. W. 346). And generally, if the rules of the association have been otherwise complied with, the fact that the new certificate was not issued before the member's death will not render the change ineffectual.

Robinson v. Robinson, 121 Ark. 276, 181 S. W. 300; *Hayden v. Modern Brotherhood of America*, 173 Iowa, 395, 155 N. W. 830; *Tolson v. National Provident Union*, 113 N. Y. Supp. 534, 60 Misc. Rep. 460, affirmed in 130 App. Div. 884, 114 N. Y. Supp. 1149; *Modern Woodmen of America v. Terry* (Okla.) 153 Pac. 1124.

But the rule of the order may require proof of the loss of the original certificate to be made and approved by the clerk of the supreme body (*Sovereign Camp, Woodmen of the World, v. Israel*, 117 Ark. 121, 173 S. W. 855). And where the rules so require the mere application for a change of beneficiary cannot affect the rights of the original beneficiary (*Flowers v. Sovereign Camp Woodmen of the World*, 40 Tex. Civ. App. 593, 90 S. W. 526).

In *Grand Lodge A. O. U. W. of Missouri v. O'Malley*, 114 Mo. App. 191, 89 S. W. 68, a by-law of the association provided that when a certificate shall not be under the control of the member, he may have a duplicate issued, on making affidavit of the fact, and executing a release of all rights and benefits under the original certificate. Another of its laws provided that a member holding a certificate, desiring to make a new direction as to its payment, may do so by authorizing such change in writing on the back of his certificate; the change of direction not to be effectual till it is reported

to an officer of the association, the old certificate, if practicable, filed with him, and a new certificate issued thereon. It was held that where one complied with the provisions for obtaining a duplicate, and at the same time directed in writing a change of beneficiary, on which the association issued a new certificate payable to the new beneficiary, there was a substantial compliance with the association's laws, effectuating a change of beneficiary.

3772 (s). In so far as the requirements as to the mode of changing beneficiary are for the benefit of the insurer it may waive them.

Supreme Lodge of Fraternal Brotherhood v. Price, 27 Cal. App. 607, 150 Pac. 803; Casey v. Ladies Catholic Benev. Ass'n, 195 Ill. App. 2; Grand Lodge A. O. U. W. v. McFadden, 111 S. W. 1172, 213 Mo. 269; Ables v. Ackley, 113 S. W. 698, 133 Mo. App. 594; Noble v. Police Beneficiary Ass'n, 224 Pa. 298, 73 Atl. 336, 132 Am. St. Rep. 783. And see Anderson v. Royal League, 153 N. W. 853, 130 Minn. 416, L. R. A. 1916B, 901, Ann. Cas. 1917C, 691.

So, where an insured, desiring to substitute his daughter as beneficiary for his wife, who had died, applied to the agent of the insurance company, and was furnished with a printed blank called "change of designation," which he executed, and this change of designation was delivered to the company and accepted by it, and for more than seven years it received premiums on the basis of such change, the company is estopped to deny the validity of the change, whether strictly in accordance with the requirements of the by-laws of the company or not (Smith v. Metropolitan Life Ins. Co., 71 Atl. 11, 222 Pa. 226, 20 L. R. A. [N. S.] 928, 128 Am. St. Rep. 799). But in order that a waiver of requirements may affect the rights of the original beneficiary such waiver must occur during the lifetime of the insured as the rights of the beneficiary vest on the death of the member.

Freund v. Freund, 75 N. E. 925, 218 Ill. 189, 109 Am. St. Rep. 283, reversing judgment 117 Ill. App. 565; Ancient Order of Gleaners v. Bury, 165 Mich. 1, 130 N. W. 191, 34 L. R. A. (N. S.) 277; Londry v. Sovereign Camp, Woodmen of the World, 140 Mo. App. 45, 124 S. W. 530; Knights of Maccabees of the World v. Sackett, 86 Pac. 423, 34 Mont. 357, 115 Am. St. Rep. 532.

Noncompliance with the by-laws as to change of beneficiary is not waived by the association interpleading claimants of the benefit after the member's death (Knights of Columbus v. Curran, 99 Atl. 485, 91 Conn. 115).

(1592)

3773 (s). Though the association admits its liability and pays into court the amount due on the certificate, this does not affect the rights of the original beneficiary.

Finnell v. Franklin, 55 Colo. 156, 134 Pac. 122; *Freund v. Freund*, 75 N. E. 925, 218 Ill. 189, 109 Am. St. Rep. 283, reversing judgment 117 Ill. App. 565; *Knights of Maccabees of the World v. Sackett*, 86 Pac. 423, 34 Mont. 357, 115 Am. St. Rep. 532; *Pennsylvania R. Co. v. Warren*, 60 Atl. 1122, 69 N. J. Eq. 706; *Barner v. Lyter*, 31 Pa. Super. Ct. 435; *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893, L. R. A. 1915A, 580; *Faubel v. Eckhart*, 151 Wis. 155, 138 N. W. 615. And see *Strong v. Supreme Lodge K. P.*, 82 N. E. 433, 189 N. Y. 346, 12 L. R. A. (N. S.) 1206, 121 Am. St. Rep. 902, 12 Ann. Cas. 941, reversing 111 App. Div. 87, 97 N. Y. Supp. 661.

3774 (s). The beneficiary of a mutual benefit certificate, not being a party to the contract, cannot object to a change of beneficiary which has been actually consummated, nor to the failure of the member to comply with formalities required by the contract, provided the application for the change has been in fact made and acted on by the association during the lifetime of the member.

Ross v. Rogers, 96 Ark. 154, 131 S. W. 336; *Almy v. Commercial Travelers' Ass'n of Indiana*, 59 Ind. App. 249, 106 N. E. 893; *Wandell v. Mystic Toilers*, 130 Iowa, 639, 105 N. W. 448; *Ladies of Modern Maccabees v. Daley*, 166 Mich. 542, 131 N. W. 1127; *White v. White*, 111 Miss. 219, 71 South. 322; *Coleman v. Grand Lodge Colored Knights of Pythias* (Tex. Civ. App.) 104 S. W. 909.

Failure of a member to comply strictly with the laws of a fraternal benefit association in making change in the beneficiary of his certificate can be asserted only by the association. *Jones v. Holmes* (Tex. Civ. App.) 195 S. W. 306.

If the insurer has prescribed the mode of changing the beneficiary an attempt by the member to dispose of the fund by will is generally ineffectual.

Arnold v. Equitable Life Assur. Soc. of United States (D. C.) 228 Fed. 157; *Burke v. Modern Woodmen of America*, 84 Pac. 275, 2 Cal. App. 611; *German-American Trust Co. v. Ten Winkel* (Colo.) 160 Pac. 188; *Pilcher v. Puckett*, 77 Kan. 284, 94 Pac. 132, 17 L. R. A. (N. S.) 1083; *Mineola Tribe No. 114, v. Lizer*, 83 Atl. 149, 117 Md. 136, 42 L. R. A. (N. S.) 1170; *Christman v. Christman*, 157 N. W. 1099, 163 Wis. 433.

But in *Brooklyn Trust Co. v. Seventh Regiment Veteran & Active League*, 113 App. Div. 717, 99 N. Y. Supp. 248, it appeared that the by-laws of the association provided that benefits should be payable at the death of a member to his designated beneficiary, and

that no change of beneficiary should be made except by a return of the certificate, accompanied by the member's written request designating the alteration desired which should be recorded and indorsed on the certificate, and that payment should be made to the person or persons whose name or names were so recorded on the books of the association. It was held that where a member after the death of his wife who had been his designated beneficiary returned his certificate with a request that the beneficiary should be altered so as to provide for payment to a beneficiary to be named in the member's will, and such alteration was made, both on the certificate and the association's books, it constituted a valid change of beneficiary. And it has been held that where a mutual benefit society had prescribed no mode for changing beneficiaries in a certificate, where the beneficiary named had died before insured's death, a provision in his will directing payment of the proceeds of the certificate to intervener was valid as changing the beneficiary to a "legatee" (*Brinsmaid v. Iowa State Traveling Men's Ass'n*, 152 Iowa, 134, 132 N. W. 34). And to the same effect is *Armstrong v. Blanchard*, 150 Wis. 31, 136 N. W. 145.

Where insured made one the beneficiary in his will, and insurer with notice thereof did not object, and in action by beneficiary and administrator pays money into court, there was a sufficient change in favor of last-named beneficiary. *Koenigstein v. Finke* (Neb.) 163 N. W. 758, L. R. A. 1917F, 398.

3775-3776. (t) Validity and effect of change

3775 (t). A change of beneficiary to be effective must have been made understandingly. Hence, if it appears that there was fraud or undue influence, or lack of mental capacity, the attempted change will be inoperative.

Goyt v. National Council Knights and Ladies of Security, 178 Ill. App. 377; *Supreme Council of Royal Arcanum v. McKnight*, 87 N. E. 299, 238 Ill. 349, reversing 140 Ill. App. 421; *Sluder v. National Americans* (Kan.) 166 Pac. 482; *Sovereign Camp, Woodmen of the World, v. Broadwell*, 89 S. W. 891, 114 Mo. App. 471; *Turner v. Turner* (Tex. Civ. App.) 195 S. W. 326.

Where a policy in favor of the mother of insured reserved the right to him to change the beneficiary, the fact that he falsely represented to the insurer and to his mother that he had married one with whom he was living in illicit relations and desired to make her the beneficiary, as she was his wife, and that the mother believed him, is of no consequence in determining the rights of the sub-

stituted beneficiary (*Waring v. Wilcox*, 8 Cal. App. 317, 96 Pac. 910).

A certificate of insurance in a fraternal order is not "property" in the sense that a change in the beneficiary by the husband from the wife to some one else will of itself constitute a fraud on her marital rights. *Hahn v. Supreme Lodge of the Pathfinder*, 136 Ky. 823, 125 S. W. 259.

For the purpose of raising the question of fraud or mental incapacity, the original beneficiary in a mutual benefit certificate has a sufficient interest.

Goyt v. National Council, Knights & Ladies of Security, 178 Ill. App. 377; *Sluder v. National Americans (Kan.)* 166 Pac. 482; *Knights of the Modern Maccabees v. Sharp*, 163 Mich. 449, 128 N. W. 786, 33 L. R. A. (N. S.) 780; *Wherry v. Latimer*, 103 Miss. 524, 60 South. 563, suggestion of error overruled 103 Miss. 524, 60 South. 642.

Where the original beneficiary in a policy which authorizes the change of beneficiaries is the wife of the assured, and the assured thereafter assigns the policy to the person whom he substitutes for the wife, the question of the validity of the change is one not concerning the minor children, issue of the marriage between the assured and his wife. *Alba v. Provident Sav. Life Assur. Soc. of New York*, 43 South. 663, 118 La. 1021.

Fraud or undue influence in making a change of beneficiaries must be such as to practically deprive insured of her free agency, and be particularly directed toward securing the desired and accomplished result. The proof should be reasonably clear and convincing (*New York Life Ins. Co. v. Andrews*, 167 Ill. App. 182). An insured has mental capacity to change the beneficiary, where he has sufficient mental capacity to understand the business and the extent of his property and how he wishes to dispose of it and who are dependent on him (*Grand Lodge A. O. U. W. v. Brown*, 125 N. W. 400, 160 Mich. 437).

One charging mental incapacity and undue influence has the burden of proof. *Wherry v. Latimer*, 103 Miss. 524, 60 South. 642, overruling suggestion of error 103 Miss. 524, 60 South. 563. Sufficiency of evidence to show fraud. *Drake v. Elliot*, 199 Mass. 327, 85 N. E. 85.

In *Raschke v. Haderer*, 138 Wis. 129, 119 N. W. 812, it appeared that, after a husband took out a benefit certificate in favor of his wife, differences arose between them, and she commenced divorce proceedings, and without his knowledge secreted the certificate. The husband then made affidavit that the certificate was lost and

that he wished to change the certificate so as to substitute his children beneficiaries, all of which was done in accordance with the by-laws of the association. It was held that the children were entitled to the proceeds as against the wife, as it was immaterial that he was acting under a mistake of fact as to the loss of the certificate.

On a valid change of beneficiary, the new beneficiary becomes entitled to the fund.

Haller v. Haller, 45 Pa. Super. Ct. 409; *Sargent v. Hancock Mut. Life Ins. Co.*, 49 Pa. Super. Ct. 239; *Alfsen v. Crouch*, 89 S. W. 329, 115 Tenn. 352.

It has, however, been held that a certificate issued to one who may be lawfully named as beneficiary will be enforced in equity in favor of such beneficiary notwithstanding an attempted change by the member, if it appears that such beneficiary has made a loan to such member on the faith of such certificate (*Kiolbassa v. Polish Roman Catholic Union of America*, 141 Ill. App. 297). So, too, when a wife with her own means kept alive for 12 or 13 years benefit insurance on her husband's life by paying the assessments while she was the beneficiary, she is entitled to so much of the fund on his death as will make her whole, notwithstanding he made a subsequent valid change in favor of another beneficiary, who is entitled to the fund (*Grand Lodge A. O. U. W. v. McFadden*, 111 S. W. 1172, 213 Mo. 269).

A beneficiary's rights are defeated by change of beneficiary, though she was designated as beneficiary pursuant to antenuptial agreement with insured (*Liles v. Eubanks*, 114 Miss. 587, 75 South. 447). Under the Massachusetts statute (St. 1911, c. 628, § 6), the right of a wife, under antenuptial agreement with husband, to payment of death benefit certificate, is determined by the vesting of like equitable interest of husband's sister, not a volunteer, under a subsequently issued certificate, upon death of the husband and payment to her, without notice of wife's right (*Ryan v. Boston Letter Carriers' Mut. Ben. Ass'n of Boston*, 110 N. E. 281, 222 Mass. 237, L. R. A. 1916C, 1130).

Where a fraternal order, having issued one policy, issued a second policy on insured's affidavit that the first had been lost or mislaid, if order did not object, the second policy canceled all rights under original, though second beneficiary was ineligible (*White v. White*, 111 Miss. 219, 71 South. 322). Where the designation of an eligible beneficiary was canceled, designation of an ineligible in

new benefit certificate did not reinstate such canceled designation, where by-laws in such case made certificate payable to insured's widow and children (*Logan v. Modern Woodmen of America*, 137 Minn. 221, 163 N. W. 292).

3776 (t). If the attempted change is invalid or ineffective for any reason, the rights of the original beneficiary are not affected.

Page v. Bell, 146 Ga. 680, 92 S. E. 54; *Freund v. Freund*, 75 N. E. 925, 218 Ill. 189, 109 Am. St. Rep. 283, reversing judgment 117 Ill. App. 565; *Miller v. Prella*, 122 Ill. App. 380; *Royal League v. Shields*, 159 Ill. App. 54; *Sturges v. Sturges*, 126 Ky. 80, 102 S. W. 884, 31 Ky. Law Rep. 537, 12 L. R. A. (N. S.) 1014; *Pettus v. Hendricks* (Va.) 74 S. E. 191.

But in *Grand Lodge Colored Knights of Pythias v. Mackey* (Tex. Civ. App.) 104 S. W. 907, it was held that the surrender of an original certificate to and acceptance thereof by the grand lodge of an order, and the issuance of another certificate naming another beneficiary, revoked the original certificate and destroyed the rights of the beneficiary named therein, though the designation of beneficiary in the second certificate was illegal.

Where a policy provided that insured might, with the consent of the company, assign it, or, before assignment, change the beneficiary, a trust document executed by insured, appointing a trustee to administer the fund to be derived from the policy, amounted to a change of beneficiary and not to an assignment, and hence it was valid, though not consented to by the insurer (*Howe v. Fidelity Trust Co.*, 89 S. W. 521, 28 Ky. Law Rep. 485). Where insured in a policy payable to his daughter inserted the name of his minor son as a co-beneficiary, the daughter was entitled to show the mutilation and recover on the contract as it was before being mutilated, though the policy provided for a change of beneficiary with the consent of the insurer (*Provident Sav. Life Assur. Soc. v. Dees*, 86 S. W. 522, 120 Ky. 285, 27 Ky. Law Rep. 670).

3776-3786. (u) Death of original beneficiary

3776 (u). Where a wife took out a policy on her husband's life payable to her if she outlived him, otherwise to his heirs at law, and she having died first he married another, the latter was entitled to take as her husband's heir the same proportion of the proceeds that she would be entitled to receive in her husband's personal property had he died intestate (*Thompson v. Northwestern Mut. Life Ins. Co.*, 161 Iowa, 446, 143 N. W. 518).

Where a certificate designates the member's wife as beneficiary, and she dies before the member, who marries again and dies without changing the designation, the second wife is entitled to the fund.

Grand Lodge A. O. U. W. of Maine v. Edwards, 89 Atl. 147, 111 Me. 359; Speegle v. Sovereign Camp of Woodmen of the World, 58 S. E. 435, 77 S. C. 517; Harris v. Harris, 44 Tex. Civ. App. 152, 97 S. W. 504.

Where a life policy was payable to insured's wife, if living, or his legal representatives, and the wife predeceased insured, leaving a daughter, his only heir and next of kin, the proceeds went to the daughter (In re Viles, 155 N. Y. Supp. 401, 170 App. Div. 59, affirming decree 149 N. Y. Supp. 121, 86 Misc. Rep. 170). If the beneficiary under mutual benefit insurance policy died, insured's failure to name another beneficiary will not cause amount of policy to revert to the order where insured left children surviving him (International Brotherhood of Maintenance of Way Employés v. Duncan [Tex. Civ. App.] 194 S. W. 956). If the constitution and by-laws provide that on member's death without legally designated beneficiary his widow, if any, shall be beneficiary, administrator of estate of widow dying before collection may collect on certificate. (Beeson v. Brotherhood of Locomotive Firemen and Enginemen [Kan.] 166 Pac. 466). Where surviving wife died intestate before she actually had possession of her share of insurance fund arising from her deceased husband's policies, her administrator had the right to sue for and collect it (German-American Trust Co. v. Ten Winkel [Colo.] 160 Pac. 188). Sums paid to the administrator of the insured after the death of the last beneficiary of a trust in the proceeds of a life policy are assets of the insured's estate, under a contract providing that on death of such beneficiary the policy should be paid to the "executors, administrators, or assigns," of insured (Sherman v. Howes, 38 R. I. 174, 94 Atl. 490).

In Wharton v. Drewry, 135 Ga. 587, 69 S. E. 1117, the policy provided that the life was insured "for the benefit of M., his wife, and his children." The insurer promised to pay the amount of the policy "to the said beneficiaries, or their executors, administrators, or assigns." In case of the death of the beneficiary before the death of the assured, the insurance at maturity shall be payable to the heirs or assigns of assured. When the policy was issued, the wife and two children of assured were living, and the wife and one child

survived him; the other child having died intestate without assigning his interest in the policy. It was held that the wife and child, as the only heirs at law of the deceased child, were entitled to one-third of the amount of the policy. Where the by-laws of a mutual benefit association provided that death benefits should go to the member's widow, or, in case of her death before the member, to the children, and the widow received the death benefits on the presumption of her husband's death after his absence for seven years, giving bond to repay such benefits if he should return alive, and the member returns after the wife's death and dies shortly afterwards, the wife's right to the benefits ceased upon her death and vested in the children (*Ancient Order of United Workmen v. Mooney*, 79 Atl. 233, 230 Pa. 16).

3778 (u). It has been held in Massachusetts that where the policy was payable to the wife of insured, and in case of her death before the death of insured to her children for their use, children of the wife's deceased daughter took no interest under the policy on the death of the wife before the death of insured (*Davis v. New York Life Ins. Co.*, 212 Mass. 310, 98 N. E. 1043, 41 L. R. A. [N. S.] 250). On the other hand, in *Michigan Mut. Life Ins. Co. v. Basler*, 140 Mich. 233, 103 N. W. 596, the policy provided for the payment of its proceeds to the insured's wife, if living, and, if not living, to the children of insured and his wife. Prior to the death of insured, his wife and one of his two children died. It was held that the proceeds of the policy were payable to the surviving child and the surviving issue of the deceased child. It was said in *Diehm v. Northwestern Mut. Life Ins. Co.*, 129 Mo. App. 256, 108 S. W. 139, that, though the interest of a beneficiary in the proceeds of a life policy is ordinarily transmissible as well as vested, the policy may be worded so as to make it a vested, but not a transmissible, interest, where insured so desires, but it is presumed that it is his intention that the interest shall descend, unless the contrary appears on the face of the policy, because such is the general course of property. In that case the policy insured the life of assured for the benefit of his wife and children, and the insurer promised to pay the policy "to the said beneficiaries or their executors, administrators, or assigns," within a specified time after proof of the death of assured. Assured died, leaving a wife and four children and grandchildren of a deceased child, who was living at the time the policy was issued, but who died before assured. It was held

that the interest of the deceased child in the proceeds of the policy passed to the grandchildren.

The Illinois Statute of Descent (Hurd's Rev. St. 1911, c. 39) § 11, which provides that the issue of a devisee or legatee who has predeceased the testator shall be entitled to the estate of such devisee or legatee, but that, in case there are no issue, the estate which would have passed shall be considered intestate property, cannot be invoked to determine whether children of a child of an insured who was a beneficiary under the policy and who predeceased the insured need be made parties in an action on the policy. *Martin v. Modern Woodmen of America*, 163 Ill. App. 548, affirmed 97 N. E. 693, 253 Ill. 400, Ann. Cas. 1913A, 299.

Under a Kentucky statute (Ky. St. § 2064), where insured takes out a policy on his life for benefit of his wife, and upon her death for benefit of his children, and after death of the wife one of the children dies without issue before insured, his part goes to the surviving beneficiaries. *Mutual Life Ins. Co. of New York v. Spohn*, 186 S. W. 633, 170 Ky. 721, opinion modified 188 S. W. 1078, 172 Ky. 90.

Under a Massachusetts statute (Rev. Laws, c. 119, § 6), and under the by-laws of a fraternal beneficiary order, a stepdaughter paying assessments on a certificate is not entitled to recover the proceeds in absence of designated beneficiary on death of original beneficiary as against insured's heirs. *O'Brien v. Grand Lodge A. O. U. W. of Massachusetts*, 111 N. E. 955, 223 Mass. 237.

Under the Pennsylvania statute (Act May 24, 1893 [P. L. 126]), where beneficiary of death benefit certificate died before member, next of kin were entitled to fund, notwithstanding member's expression of desire that it should be paid to named person. *Grant v. Faires*, 97 Atl. 1060, 253 Pa. 232.

Construction of particular contracts, see *Pratt v. Hill*, 124 Md. 252, 92 Atl. 543, and *Di Mombercelli v. Van Riper*, 87 Misc. Rep. 453, 150 N. Y. Supp. 841.

3779 (u). If the beneficiary, having a vested interest, dies before the insured her rights, so vested, pass to her representatives, and on the death of the insured the proceeds of the policy belong to the representative of the beneficiary, and not to the estate of the insured.

Perry v. Tweedy, 57 S. E. 782, 128 Ga. 402, 119 Am. St. Rep. 393, 11 Ann. Cas. 46; *Neal's Adm'r v. Shirley's Adm'r*, 127 S. W. 471, 137 Ky. 818; *Smith v. Grand Lodge A. O. U. W. of Missouri*, 101 S. W. 662, 124 Mo. App. 181; *Pool v. New England Mut. Life Ins. Co.*, 108 N. Y. Supp. 431, 123 App. Div. 885; *Bradshaw v. Mutual Life Ins. Co.*, 112 N. Y. Supp. 107, 127 App. Div. 817, judgment modified 205 N. Y. 467, 98 N. E. 851; *Perkinson v. Clarke*, 135 Wis. 584, 116

N. W. 229. But see *Smith v. Metropolitan Life Ins. Co.*, 71 Atl. 11, 222 Pa. 226, 20 L. R. A. (N. S.) 928, 128 Am. St. Rep. 799.

The vested interest which a wife took under policies in her favor on her husband's life passed to the husband on her prior decease subject to her debts, so that, when he died without making any change as to beneficiary, they became a part of his estate subject to his debts. *Rankin v. Rankin*, 83 N. J. Law, 282, 84 Atl. 197.

Under life policy payable to wife or, she predeceasing insured, to her children, beneficiaries took vested interests, so that, all dying before insured, issue of each child takes what their parent would have taken. *Germania Life Ins. Co. v. Wirtz* (Mich.) 162 N. W. 981.

Under Ky. St. § 655, in absence of authority by policy or charter provision of insurer, husband, who took out life policy in favor of wife, had no authority, before or after her death, to change beneficiary, so that the policy, which was paid up, passed under her will. *O'Bryan v. England*, 189 S. W. 1126, 173 Ky. 12.

So, under policies payable to insured's wife and children, their executors, etc., a child living when the policies were delivered, but who died before insured did, took a vested interest in the policies on their delivery, and upon her death the interest passed by descent or succession the same as her other personal assets (*Woodworth v. Ætna Life Ins. Co.*, 154 Ala. 392, 45 South. 417). A Rhode Island case (*In re Peckham*, 29 R. I. 250, 69 Atl. 1002, 132 Am. St. Rep. 813), illustrates the rule. A husband took out a policy payable to his wife, C., or in the event of her prior death to their children, executors, administrators, or assigns. The wife died before insured, never having had any child born alive, leaving a will by which she gave her property to her husband for life, remainder to the children of her brother. Insured married petitioner, by whom he had living issue, and died, leaving a will bequeathing one-half of his property to petitioner, his widow, and one-half to his son. It was held that insured's first wife acquired a vested interest in the policy, and, having died without issue before insured, on his death the proceeds passed to her administrator de bonis non with the will annexed for distribution under her will. Of course, the terms of the policy may be such that the strict rule is not applicable. Thus under a policy providing that the insurance should be payable to the heirs at law of the insured, if he should outlive the beneficiary, on the death of the beneficiary, the interest in the policy as such passed to her son and on his death to the heirs at law of the insured, and became vested in him on his death (*Birge v. Franklin*, 115 N. W. 278, 103 Minn. 482).

3781 (u). Under a policy naming the wife as beneficiary contingent upon her surviving insured and also containing an endowment clause providing for payment to the wife or assigns, the rights of the wife and her assigns under the endowment clause were not contingent upon her surviving insured, whether the law of New York or Connecticut governed (*C. E. Shepard & Co. v. New York Life Ins. Co.*, 89 Atl. 186, 87 Conn. 500).

As the beneficiary designated in the certificate of a mutual benefit association ordinarily has no vested interest, if such beneficiary dies before the member, the proceeds of the certificate on the death of the insured will not belong to the heirs of the beneficiary, but, subject to the rules of the association, to the heirs of the insured.

Supreme Colony United Order of Pilgrim Fathers v. Towne, 89 Atl. 264, 87 Conn. 644, Ann. Cas. 1916B, 181; *Sheppard v. Crowley*, 61 Fla. 735, 55 South. 841; *Pilcher v. Puckett*, 77 Kan. 284, 94 Pac. 132, 17 L. R. A. (N. S.) 1083; *Dennis v. Modern Brotherhood of America*, 95 S. W. 967, 119 Mo. App. 210; *Schneider v. Modern Woodmen of America*, 148 N. W. 384, 96 Neb. 545.

Rights of widow and of those claiming under her as beneficiary of certificate are as potent where she only survives her husband one hour as they would be if she survived him for years. *Beeson v. Brotherhood of Locomotive Firemen and Enginemen* (Kan.) 166 Pac. 466.

Provision in clause of fraternal beneficiary order for payment of benefits to legal representative of beneficiary does not authorize payment to legal representative of beneficiary who predeceased insured. *Order of Scottish Clans v. Reich*, 97 Atl. 863, 90 Conn. 511.

In *Hunt v. Remsberg*, 83 Kan. 665, 112 Pac. 590, 32 L. R. A. (N. S.) 246, 21 Ann. Cas. 1267, the association issued a certificate of membership to a man who named his wife as beneficiary. It provided that if his wife died before he did, he might name another beneficiary, but if he failed to do so, the insurance should be paid to his legal representative. The wife died; he died later; an administrator was appointed to whom the association paid the money. The insured left three children who sued the administrator to recover the money. It was held that the administrator was the legal representative of the deceased within the meaning of that term and was entitled to the money. However, the by-laws of the association may provide that on the death of one or more beneficiaries prior to the death of the member, if no change of beneficiary should have been made, the share or shares to which such beneficiary or beneficiaries would have been entitled shall be paid to the beneficiary's legal

representative, to be distributed to his or her heirs at law. Under such a by-law, where a member of the order died after the death of his wife, who was named as his beneficiary, without appointing a new beneficiary, the heirs of the wife at the time of the member's death were entitled to the fund (*Anderson v. Supreme Council Catholic Benev. Legion*, 60 Atl. 759, 69 N. J. Eq. 176, affirmed 67 Atl. 1103, 70 N. J. Eq. 810).

See, also, *Vaughan's Adm'r v. Modern Brotherhood of America*, 149 S. W. 937, 149 Ky. 587; *Buckler v. Supreme Council Catholic Knights of America*, 136 S. W. 1006, 143 Ky. 618; *Simms v. Randall*, 117 Tenn. 543, 96 S. W. 971.

Where a beneficiary dies before insured, who does not name a new beneficiary, the proceeds will, in absence of provisions in policy, go to the next of kin or heirs at law of the beneficiary. *Finn v. Eminent Household of Columbian Woodmen*, 163 Ky. 187, 173 S. W. 349.

3783 (u). If the interest of the beneficiary becomes vested by the death of the insured, the fact that she dies before the benefit is payable does not affect the disposition of the fund, but it will pass to her representatives (*Clarkston v. Metropolitan Life Ins. Co.*, 190 Mo. App. 624, 176 S. W. 437).

Where the by-laws of the association or the statute provide that on a failure of a properly designated beneficiary the fund shall go to certain classes of persons named, in a certain order, on the death of a beneficiary and the failure of the member to designate another beneficiary the fund is payable to the persons so named in the rules of the association or statute.

Morey v. Monk, 40 South. 411, 145 Ala. 301; *Emmons v. Grand Lodge A. O. U. W. of Delaware*, 4 Boyce (Del.) 272, 88 Atl. 459; *Kaemmerer v. Kaemmerer*, 137 Ill. App. 28, affirmed 83 N. E. 133, 231 Ill. 154; *Pilcher v. Puckett*, 77 Kan. 284, 94 Pac. 132, 17 L. R. A. (N. S.) 1083; *Davis v. McGraw*, 92 N. E. 332, 206 Mass. 294, 138 Am. St. Rep. 398; *Sykes v. Armstrong*, 111 Miss. 44, 71 South. 262.

Where the beneficiary died before the insured, and no new beneficiary was designated, the right to the insurance money passed to the only heirs at law and next of kin of insured as beneficiaries, and not by descent. *Devaney v. Ancient Order of Hibernians Life Ins. Fund*, 142 N. W. 316, 122 Minn. 221.

Where the constitution of a mutual benefit association provided that the designation by the board of directors of the beneficiary, where the one designated in the certificate is dead, and the member designated no other, should not conflict with the provisions of the charter as to the beneficiary, the charter provision that in case

of the death of insured without a wife or issue the certificate should be payable to insured's heirs at law would control over any other designation of the board of directors, entitling the father of a deceased member dying without wife or children to the proceeds of the certificate (*Gienty v. Knights of Columbus*, 131 N. Y. Supp. 792, 146 App. Div. 497). In *Walker v. Peters*, 139 Mo. App. 681, 124 S. W. 35, it appeared that two beneficiary certificates were payable to testator's mother, who died before he did. The certificates provided that in such case they should be payable to the "legal representatives" of the member. The articles of incorporation declared the object of the association to be the equitable distribution of the fund among the "families or beneficiaries" of deceased members, and declared that each certificate entitled "the heirs or legal representatives or designated beneficiaries" to \$2,000. Testator's will gave each of his two sisters such of his property as they might have in charge at his death, and all the "residue of which I may die seised, real, personal and mixed," absolutely to his affianced. It was held that, while the words "legal representatives" might sometimes be interpreted as "legal heirs," here they must be given their usual meaning and carried the certificates to the executor, and they went to the affianced by the residuary clause.

3784 (u). Where the rules of the association and the statute are silent as to the disposition of the fund, if the beneficiary predeceases the insured and no new beneficiary is designated by the member, the insurer is not liable on the certificate.

Cook v. Supreme Conclave Improved Order of Heptasophs, 88 N. E. 584, 202 Mass. 85; *Home Circle Soc. v. Hanley*, 86 S. W. 641, 38 Tex. Civ. App. 547. And see *Smith's Adm'r v. Hatke*, 115 Va. 230, 78 S. E. 584.

3785 (u). Where a certificate in a beneficial association was issued in accordance with a written application for membership, wherein the member named as his beneficiaries one of his daughters for a certain amount and another daughter for a certain amount, the amount of the benefit applied for being the total of such sums, the words of appointment used in the certificate were to be regarded as the same as if the fund was payable to the member's children, naming them, and the survivor of such children was entitled to the entire fund (*Dennis v. Modern Brotherhood of America*, 95 S. W. 967, 119 Mo. App. 210). Where the member took out a certificate payable to his wife and his three sisters, and his wife died intestate, leaving insured as sole heir at law, and he subsequently married

again, and made no provision for the disposition of the amount payable to his first wife under the certificate, and a law of the society provided that, on the death of a beneficiary before the decease of a member, that part of the benefit payable to the deceased beneficiary should be paid to the surviving beneficiary, if insured has made no other disposition thereof, on the death of insured his three sisters were entitled to take the share which would have gone to his first wife and the second wife was not entitled to any (*Polhill v. Battle*, 52 S. E. 87, 124 Ga. 111).

3786-3787. (v) Policy procured with money wrongfully obtained

3786 (v). Where a cashier indebted on an overdraft checked out moneys of the bank for his insurance premiums, and the receipts were charged against him, on the books to the knowledge of the officers, and on a settlement with the cashier, the bank took notes for his debt, the proceeds of the policy in the hands of the beneficiary were not impressed with any trust in favor of the bank (*Bank of Stewart County v. Mardre*, 142 Ga. 110, 82 S. E. 519).

3. RIGHTS OF CREDITORS AND ASSIGNEES

3787-3789. (a) Rights of creditors in general

3787 (a). In the absence of special equities existing in their favor creditors of insured have no interest in the proceeds of a policy designating or for the benefit of a special beneficiary.

Lehman v. Gunn, 154 Ala. 369, 45 South. 620; *Renfro v. Metropolitan Life Ins. Co.*, 148 Mo. App. 258, 129 S. W. 444; *Johnson v. Bacon*, 92 Miss. 156, 45 South. 858; *Lowenstein v. Koch*, 165 App. Div. 760, 152 N. Y. Supp. 506.

Under the Massachusetts statute (Rev. Laws, c. 118, § 73), providing that every life insurance policy made payable to or for the benefit of a married woman shall inure to her separate use and to that of her children, where policies on the life of plaintiff's husband were never made payable to her, and were never legally assigned for her benefit, they were not within the statute. *Frost v. Frost*, 88 N. E. 446, 202 Mass. 100, 27 L. R. A. (N. S.) 184, 132 Am. St. Rep. 476.

The rule in bankruptcy as to interest of trustee in life insurance policies of bankrupt does not apply to case of a creditor seeking to subject insured's policy interest to his judgment. *Chelsea Exch. Bank v. Travelers' Ins. Co.*, 160 N. Y. Supp. 225, 173 App. Div. 829.

Where the insured reserves the right to change the beneficiary without her consent, the property in the policy is in the insured and

liable for his debts (*Jacobs v. Strumwasser*, 145 N. Y. Supp. 916, 84 Misc. Rep. 28). And if insured in a policy of life insurance accepted cash surrender value and company had forwarded a check to its agent to be delivered upon execution of a proper release, fund was subject to attachment as property of insured (*Cooper v. West*, 190 S. W. 1085, 173 Ky. 289).

3788 (a). The proceeds of a policy payable to a creditor inure to him to the extent of the debt owing him at the time the policy issued, and advances afterwards made by him on the faith thereof.

Fitzgerald v. Rawlings, 79 Atl. 915, 114 Md. 470, Ann. Cas. 1912A, 650;

Morrow v. National Life Ass'n of Des Moines, Iowa, 184 Mo. App. 308, 168 S. W. 881.

- Money advanced by reason of an agreement, to be secured by a life insurance policy to be obtained, will be protected and impressed as an equitable lien against the fund accruing upon the death of the insured where the insured has caused the original beneficiary named in such policy to be changed. *Gillham v. Estes*, 158 Ill. App. 211.

Where life insurance policy taken out to secure debt makes no provision as to what shall be done with any surplus after debt is paid, insured's personal representative is entitled to such surplus. *Haberfeld v. Mayer*, 256 Pa. 151, 100 Atl. 587.

Where a person insured his life for the benefit of a creditor, who has no insurable interest therein other than such as he may have for the payment of his claims, the beneficiary can retain only enough of the proceeds to pay his claim. *Deal v. Hainley*, 116 S. W. 1, 135 Mo. App. 507.

Where, after an account stated, the creditor insured the debtor's life as security, the creditor, in the event of the debtor's death, could only recover on the policies the amount of his debt and interest at 6 per cent. and the amount of premiums paid by him. *Stacy v. Parker*, 63 Tex. Civ. App. 129, 132 S. W. 532.

In *Fitzgerald v. Rawlings*, 114 Md. 470, 79 Atl. 915, Ann. Cas. 1912A, 650, a life policy was issued for the benefit of a creditor of insured, and he assigned the policy to the creditor to more effectually carry out the intention of the parties. At the death of insured, he was indebted to the creditor in pursuance of a line of credit given as a part of the consideration for the assignment. All of the premiums on the policy were paid by the creditor pursuant to the assignment. It was held that the policy was enforceable by the creditor whether the policy be deemed as having been originally issued to him or subsequently assigned to him.

3789 (a). A purchaser of a life policy on the life of another, in which he has no insurable interest except as creditor, holds the

proceeds of the policy above his debt in trust for the beneficiaries of the policy, and where the purchaser has no insurable interest, the assignment of the policy operates at most only as a pledge to secure the amount paid for it; anything over that being held by him in trust for the beneficiaries named in the policy (*Irons v. United States Life Ins. Co. of New York*, 108 S. W. 904, 128 Ky. 640, 33 Ky. Law Rep. 46, 129 Am. St. Rep. 318).

3790-3792. (b) Same—Mutual benefit certificate

3790 (b). An agreement by which disbursements are made on behalf of a member with the understanding that the proceeds of such certificate should pass to the party making such disbursements gives such party a vested interest in such proceeds, notwithstanding the certificate is not assignable at law (*Supreme Lodge K. P. v. Reyman*, 126 Ill. App. 482). If the by-laws of a beneficial association provide a particular way by which the name of the beneficiaries may be changed, and expressly exclude creditors, a judgment entered on a judgment bond signed by a member and his wife, who is the beneficiary, cannot after the death of the member be made the basis for an attachment execution against the association to attach the death benefit represented by the certificate in the wife's name (*Algeo v. Fries*, 27 Pa. Super. Ct. 157). Rev. St. 1899, § 1418 (Ann. St. 1906, p. 1117), provides that the proceeds of fraternal insurance shall not be applied to pay the debts of a certificate holder. Plaintiffs filed a claim against the estate of the minor heirs of a certificate holder for medical services rendered the decedent in his last illness. The money which the certificate of fraternal insurance had yielded constituted the estate out of which plaintiffs were allowed their claim. It was held in *Beall v. Graham*, 102 S. W. 636, 125 Mo. App. 38, that the claim should not be allowed.

Parties contracting to care for decedent and his wife, in consideration of being made his insurance beneficiaries, by repudiating their obligation, lost their rights to enforce any equitable lien arising from the transaction, and were not entitled to recover the amount advanced by them for dues and assessments (*Ptacek v. Pisa*, 83 N. E. 221, 231 Ill. 522, 14 L. R. A. [N. S.] 537). Where an uncle took out an insurance policy payable to his nephew, who was also his ward, and on the death of the insured the company paid to the beneficiary, neither the creditors nor the administrator of the insured can recover of the beneficiary the excess collected after dis-

charging the guardian's debt to the beneficiary on the ground that insured was indebted as guardian of the beneficiary and used the ward's money in paying all premiums subsequent to the first payment (*W. A. Doody Co. v. Green*, 62 S. E. 984, 131 Ga. 568).

Where the death of a member of a benefit association deprives his divorced wife of all means of enforcing a judgment provided for in the divorce decree, she is "dependent" upon him within Gen. St. Kan. 1909, § 4303, to the extent of her interest in the judgment, and may sue to recover the amount of the judgment and costs. *Johnson v. Grand Lodge of A. O. U. W. of Kansas*, 137 Pac. 1190, 91 Kan. 314, 50 L. R. A. (N. S.) 461.

In *Kelly v. Searcy*, 100 Tex. 566, 102 S. W. 100, reversing (Tex. Civ. App.) 98 S. W. 1080, the facts were these: A person insured in a fraternal insurance society, being unable to pay his dues and assessments, allowed his benefit certificate to lapse, but subsequently an agreement was entered into between insured, the beneficiaries under the certificate of insurance, and plaintiff, by which plaintiff agreed to pay the money required to reinstate insured and to pay the dues and assessments required to keep the benefit in force during the life of insured, for which he was to be reimbursed out of the proceeds of the certificate at insured's death. Before the death of the insured the beneficiaries died, and no new designation was made. By the laws of the society the minor children of insured succeeded to the rights of the original beneficiaries. It was held that, such children having received the benefit of the contract made with the original beneficiaries for the preservation of the certificate through the payment of the installments which fell due at different times, the funds which they thereby received should be subjected to plaintiff's claim for reimbursement.

The vested equitable right of beneficiaries in the gratuity fund of a benefit association could be reached by their creditors in equity, under Rev. Laws Mass. 1902, c. 159, § 3, cl. 7, giving the superior and Supreme Judicial Courts jurisdiction in equity of suits by creditors to reach legal or equitable interests of a debtor which cannot be reached or taken on execution in an action at law, etc. *Conant v. Boston Chamber of Commerce*, 87 N. E. 906, 201 Mass. 479.

3792-3794. (c) Persons paying premiums

3793 (c). Where a third person, at the request of insured and the beneficiary, pays the premiums on life insurance, such payments are chargeable on the policy and the proceeds thereof.

Morgan v. Mutual Ben. Life Ins. Co., 16 Cal. App. 85, 116 Pac. 385, rehearing denied 16 Cal. App. 85, 116 Pac. 389; *Morgan v. Mutual*

Ben. Life Ins. Co., 116 N. Y. Supp. 989, 132 App. Div. 455, judgment affirmed 91 N. E. 1117, 197 N. Y. 607; Hall v. Prudential Ins. Co. of America, 130 N. Y. Supp. 355, 72 Misc. Rep. 525.

- A stepdaughter paying the assessment of a mutual benefit certificate under oral promise that she should receive the proceeds was entitled to recover the assessments with interest from the insured's heirs, who received the benefit. O'Brien v. Grand Lodge A. O. U. W. of Massachusetts, 111 N. E. 955, 223 Mass. 237.

Where moneys used to pay the premium on life policies were not borrowed under any agreement having reference to the policies, the persons loaning the moneys are not entitled to liens on the proceeds.

Lauterbach v. New York Inv. Co., 117 N. Y. Supp. 152, 62 Misc. Rep. 561, judgment affirmed Minrath v. New York Inv. & Imp. Co., 122 N. Y. Supp. 1137, 137 App. Div. 919.

Under the Massachusetts statute (Rev. Laws, c. 119, § 6), providing that benefits may be paid only to persons standing in specified relations to insured, one not falling within the enumerated class takes no rights by reason of the payment of dues for insured (Kerr v. Crane, 98 N. E. 783, 212 Mass. 224, 40 L. R. A. [N. S.] 692).

In Reed v. Provident Sav. Life Assur. Soc., 190 N. Y. 111, 82 N. E. 734, modifying 112 App. Div. 922, 98 N. Y. Supp. 1111, it appeared that the plaintiff made an agreement with insured, whereby insurance was to be taken out upon his life, of which his children were to be the principal beneficiaries and to be named as such in the policies. Plaintiff was to keep the policies in force until insured's death by paying all premiums, and from the proceeds was to be reimbursed his advances of premiums, with interest on his payments, and be paid a substantial sum in addition. Policies were obtained, in some of which the children were named as sole beneficiaries, in others plaintiff was joined with them, and one was made payable to plaintiff and his assigns. It was held that the insurance was effected by plaintiff under the agreement, upon the insurable interest of insured's children, and he could be held to its performance as their trustee, even though some of the policies named him as a beneficiary.

The right of the parties to an agreement to share in the proceeds of a life insurance policy after the death of the insured, if they should continue to contribute towards the payment of the annual premiums, is not an "estate" of which they are tenants in common, but is a mere expectancy on the part of each, which, if they have

so agreed as between themselves, will be defeated on failure of one to continue to contribute, in which event those continuing the contributions may take an assignment of the policy by insured (*Waters v. Kopp*, 34 App. D. C. 575; *Mitchell v. Lambert*, Id. 583).

3794-3798. (d) Exemption statutes in general

3797 (d). In *Johnson v. Bacon*, 92 Miss. 156, 45 South. 858, it was held that while the law exempts to the amount of \$10,000 the proceeds of insurance policies payable to a definite beneficiary from liability for the insured's debts, even for premiums paid while he was insolvent, the proceeds in excess of that sum are liable for the premiums paid by insured while insolvent to keep up the entire policy, and not merely that part in excess; and hence, where defendant was beneficiary of a policy for \$25,000, the premiums on which were paid by the insured while insolvent, creditors are entitled, out of the excess over \$10,000, to the amount paid for premiums on the entire policy, but are not entitled to the whole amount in excess of that sum to satisfy their debts. In *Red River Nat. Bank v. De Berry*, 47 Tex. Civ. App. 96, 105 S. W. 998, the court said that Mansf. Dig. Ark. § 4623, authorizing insurance on one's life for the benefit of his wife, which shall be payable to her free from the claims of his creditors, provided that such exemption shall not apply where the amount of premium annually paid out of the funds of the husband shall exceed \$300, limits the amount only which one insolvent or financially embarrassed may so expend in premiums; and creditors of insured, who pays a greater amount of annual premium, which is a reasonable provision according to his condition in life, are entitled, as against the wife, to such proportion only of the insurance as the payments in excess of \$300 per year, made when he was insolvent or financially embarrassed, bear to the entire amount of premiums paid. And, further, the right of creditors of insured to insurance on his life in favor of his wife, derived from premiums in excess of \$300 per year, the amount limited by the statute in case of one not free from financial embarrassment, does not depend on whether the present claims of creditors are those they held when he paid such premiums, or on whether the present creditors then held claims against him, he having at all times been so largely indebted to some one or other that he would have proved insolvent had he been forced to meet his liabilities, and such continuing indebtedness having been merely shifted from one creditor to another, or from one form of indebtedness to another.

Under the New Hampshire Statute (Pub. St. 1901, c. 171, § 1), providing that life insurance for benefit of a married woman shall inure to her sole use as against the claims of creditors or representatives of her deceased husband, payment of such proceeds by the insurer to her husband's representatives does not affect her right (*Tennant v. Upton* [N. H.] 99 Atl. 652). So, too, under Act Pa. April 15, 1868 (P. L. 103), insurance moneys collected on policies payable to wife are free from claims of creditors and are not recoverable from the wife in a suit by administratrix of insured; Act May 1, 1876 (P. L. 53), Act June 1, 1911 (P. L. 581), and Act May 5, 1915 (P. L. 253), not applying (*Weil v. Marquis*, 256 Pa. 608, 101 Atl. 70). Under N. Y. Laws 1840, c. 80, § 1, declaring that any married woman may, with his consent, procure a policy upon the life of her husband, and the proceeds of which shall be free from the claims of the creditors or representatives of the husband, a husband cannot interfere with a policy upon his life payable to his wife (*Gremş v. Traver*, 87 Misc. Rep. 644, 148 N. Y. Supp. 200, judgment affirmed 164 App. Div. 968, 149 N. Y. Supp. 1085).

Under Domestic Relations Law, § 52, as to insurance on husband's life, the insurance money being paid to the widow under power given the insurer by the policy, she had it free from assignment of the policy by the husband to a creditor. *Lukasik v. Czarczynski* (Sup.) 162 N. Y. Supp. 1.

3802-3804. (g) Assignments in general

3802 (g). Where a life insurance policy was payable to insured's wife, for her sole use and benefit, if she survived until time of payment, her interest in the policy was "settled" upon her as separate property, within a statute permitting married women to dispose of their separate estate, settled upon them for their separate use, and hence a pledge of her interest therein was enforceable (*Troendle v. Highleyman* [Ky.] 113 S. W. 812). The interest of an assignee of the beneficiary of a life insurance policy rests on the validity of the contract, as provided by Rev. Laws Mass. c. 173, § 4; and hence the insurer is entitled to prove fraud or material false representations on the part of the insured, in order to avoid liability to such assignee (*Langdeau v. John Hancock Mut. Life Ins. Co.*, 194 Mass. 56, 80 N. E. 452, 18 L. R. A. [N. S.] 1190). As against assignee of endowment policy which named insured's wife or her assigns as the beneficiary under the endowment clause, insurance company by placing papers in insured's hands indicating that he was sole beneficiary, and by dealing with the policy inconsist-

(1611)

ent with the existence of any outstanding interest, is estopped to deny that insured was the beneficiary (*C. E. Shepard & Co. v. New York Life Ins. Co.*, 89 Atl. 180, 87 Conn. 500).

An insurance policy being a nonnegotiable instrument, an assignee of the beneficiary has no better claim to the proceeds than the assignor. *Equitable Life Assur. Soc. of United States v. Weightman* (Okla.) 160 Pac. 629, L. R. A. 1917B, 1210.

Where insured assigns life policy to his wife, her death does not restore title to insured, and alteration in assignment by striking out her name, substituting the words "my wife," does not transfer title to proceeds to second wife (*Devin v. Connecticut Mut. Life Ins. Co.* [Okla.] 158 Pac. 435, L. R. A. 1916F, 783).

The agreement of a surviving husband for the assignment of all his interest in his deceased wife's estate, which includes a policy on his life for her benefit, followed by payment of the consideration, is equivalent to an equitable assignment; so that on the policy afterwards maturing on the death of the husband the equitable right to the money collectible thereon is in such assignee, though the legal title be still in the estate of the wife; and, the money being paid by the insurance company to the administratrix of the wife, she receives it as trustee for the assignee (*In re Grattan's Estate*, 78 N. J. Eq. 225, 78 Atl. 813). Where the assignment of a policy of insurance provides that the assignment is subject to proof of interest of the assignee, and the evidence shows that the assignee made timely proof of loss, in which he stated that he held the policy as an absolute purchaser for value, and not as collateral security, and subsequently, in reply to letters from the company asking for proof of interest, wrote to the company that his interest was that of an absolute purchaser for value, and repeated the same statement to the special agent of the company, who was sent to him by the company for the purpose of finding out the interest of the assignee and making a settlement with him of the policy, this would be a substantial compliance with the provision of the assignment (*Volunteer State Life Ins. Co. v. Buchanan*, 10 Ga. App. 255, 73 S. E. 602).

Where, in an action on a life insurance policy by the administrator of insured, defendant alleged that insured had assigned the policy, plaintiff was entitled to impeach the assignment by evidence that the consideration therefor was the agreement of the assignee to continue illicit relations with insured, the assignor. *Harrison's Adm'r v. Northwestern Mut. Life Ins. Co.*, 66 Atl. 787, 80 Vt. 148, 15 L. R. A. (N. S.) 206, 130 Am. St. Rep. 1012, 13 Ann. Cas. 515.

Where a life policy, payable to insured's wife, or, if she was dead, to his children, contained a provision that at the end of 10 years, or at the end of each 5-year period thereafter, the company would pay to the insured a cash value on surrender of the policy, such right of surrender was personal to the insured, and could not be exercised by an assignee of the policy for value (*Moser v. Connecticut Mut. Life Ins. Co. of Hartford*, 134 Ky. 215, 119 S. W. 792).

Where life insurance policy was assigned and notice thereof given to insurer, it was no defense, in an action by the assignee, that it had paid the amount of the insurance to the assignor. *Metropolitan Life Ins. Co. v. Lewis*, 14 Ga. App. 10, 80 S. E. 17.

In a Pennsylvania case (*In re Sanson's Estate*, 217 Pa. 203, 66 Atl. 334), it appeared that decedent, having a life policy payable to his estate, assigned it to his wife; the assignment providing that, if the insured survived the tontine period of 15 years, the assignment should be void. The insured had an option at the end of such period to withdraw the accumulated surplus. This option could be exercised by the insured without the consent of the beneficiary. After the exercising of such option, the policy and original assignment remained in the custody of the decedent. There was evidence that the wife joined with the husband in signing the papers necessary to effect the option exercised, and that at the time an agent of the company told them that the assignment would continue in force. It was held that no formal reassignment of the policy to the wife was necessary, and that after the death of the husband she was entitled to proceeds of the policy.

An assignment without consideration of a 20-year tontine policy prior to the date when it matures conveys a contingent future interest only, subject, in equity, to the right of the wife of the insured, who was also the beneficiary named in the policy, to have a reasonable provision made for her support and maintenance (*Cox v. Cox*, 192 Ill. App. 286). Where a life policy payable to the insured's executor, administrator, or assigns, was assigned by the insured to his adopted daughter, and the proceeds thereof paid to the daughter after the death of the insured, the executor of the insured cannot recover the amount of the policy on the ground that the insured was insolvent at the date of the assignment, where there is no evidence whatever that the insurance company had any knowledge of the alleged insolvency, or of any fraud in the assignment (*Bennett v. New York Life Ins. Co.*, 60 Pa. Super. Ct. 605).

A provision in an employer's indemnity policy, that assignments

of policy are void unless consented to by insurer, applies only to assignments during lifetime of policy, and not to assignment made after liability has accrued (*McBride v. Ætna Life Ins. Co.*, 126 Ark. 528, 191 S. W. 5).

3804-3805. (h) Assignees without interest

3804 (h). Where a life insurance policy was valid when issued, the fact that an assignment thereof to one having no insurable interest was invalid did not affect the liability of the insurer on the policy to persons entitled to take in the face of the assignment (*Russell v. Grigsby*, 168 Fed. 577, 94 C. C. A. 61).

In *Irons v. United States Life Ins. Co.*, 128 Ky. 640, 108 S. W. 904, 129 Am. St. Rep. 318, a paid-up life policy payable to insured's sister and her minor children was sold at a judicial sale to raise money for the support of the children. The sale was confirmed without exceptions being filed. The purchaser had no insurable interest in the life of insured. It was held that the purchaser did not acquire the absolute title to the policy, and must account to the children for the surplus after deducting what he had paid at the sale.

Where an insurance company had knowledge at the time it paid the face value of policies to an assignee having no insurable interest in insured's life that such assignee claimed to own all of such proceeds adversely to insured's estate, less the amount of loans due to the insurer, and that the assignee would not recognize a trust in favor of those equitably entitled to the benefit of the funds, taking from such assignee a bond to indemnify it against liability from such payment, it was not entitled to defend on the theory that it was entitled to pay the proceeds to the assignee as trustee for the benefit of those entitled in equity to receive the same (*Manhattan Life Ins. Co. v. Cohen* [Tex. Civ. App.] 139 S. W. 51).

3805-3809. (i) Collateral assignment of the policy

3805 (i). An assignment of a policy of life insurance, though absolute, may be proven to be in truth a trust to secure indebtedness (*Protzman's Ex'r v. Joseph*, 65 S. E. 461, 65 W. Va. 788). And where a life insurance policy is transferred to creditors and premiums paid on the policy are charged to the debtor, and it does not clearly appear that the transfer was absolute, it will be deemed to have been made to secure the debt (*Pittman v. Milton*, 69 Fla. 304, 68 South. 658). Where a policy is assigned or pledged to a creditor as collateral security, the creditor is entitled to such an

amount of the proceeds as will pay the debt, the premiums and other necessary expenses incident to the policy paid by him.

Bridge v. Connecticut Mut. Life Ins. Co., 141 Pac. 375, 167 Cal. 774; *Lombard v. Balsley*, 181 Ill. App. 1; *Des Moines Savings Bank v. Kennedy*, 142 Iowa, 272, 120 N. W. 742; *Morgan v. Mutual Ben. Life Ins. Co.*, 104 N. Y. Supp. 185, 119 App. Div. 645, order affirmed 189 N. Y. 447, 82 N. E. 438; *New York Finance Co. v. United Security Life Ins. & Trust Co.*, 66 Atl. 984, 218 Pa. 47; *Smith v. Hessey*, 63 Tex. Civ. App. 478, 134 S. W. 256; *Harde v. Germania Life Ins. Co. (Tex. Civ. App.)* 153 S. W. 666.

Assignee of insurance policy, who furnished money to take insured, husband, and child back to native country in Europe, is entitled, after insured's death, to the insurance money under the terms of the policy. *Foryciarz v. Prudential Ins. Co. of America*, 158 N. Y. Supp. 834, 95 Misc. Rep. 306.

The pledgee of an insurance policy, who holds it as collateral, in the absence of a distinct provision permitting its sale, has only the right to collect, and has not the right to sell or surrender it; and if the pledgee does wrongfully surrender the policy the debt is satisfied to the extent of the value of the security surrendered (*Grossman v. Lindemann*, 123 N. Y. Supp. 108, 67 Misc. Rep. 437). Where an assignment of a life policy as collateral security vests the title thereto in the assignee, payment by the insurer to the assignee of the amount due him is a discharge of the claim on the policy to the extent of the payment, and therefore, in an action by the assignee against the insurer for the amount due him, the beneficiaries are not necessary parties (*Morgan v. Mutual Ben. Life Ins. Co.*, 104 N. Y. Supp. 185, 119 App. Div. 645, order affirmed 189 N. Y. 447, 82 N. E. 438).

Where a wife joined in the assignment of a paid-up policy of insurance on the life of her husband, in which she was beneficiary, to a bank, with the understanding on her part, justified by the conversation at the time between her husband and the officer of the bank that the assignment was made only as security for a loan then made her husband, it can be enforced after the death of her husband only to that extent as against her, notwithstanding a further agreement, made contemporaneously between her husband and the bank, that the assignment should stand as security for other indebtedness (*Aldrich v. Brinker [D. C.]* 143 Fed. 563). In *Nashville Trust Co. v. First Nat. Bank*, 123 Tenn. 617, 134 S. W. 311, it was held that an assignment by a husband of a life policy issued on his life and made payable to his executors, administrators,

and assigns, which is absolute in form, but which is in fact made to secure the payment of a particular debt, vests the legal title in the assignee, and the husband's interest in it thereafter is an equity merely; and where he, after payment of the particular debt, permits the policy to remain in the hands of the assignee as a general collateral under the original assignment to secure all accounts he may owe to the assignee from time to time, the widow and heirs at law of the husband are clothed only with his equity, and are not entitled to recover the proceeds of the policy from the assignee without paying the debts due from the husband.

3809-3811. (j) Assignment for benefit of creditors—Bankruptcy

3810 (j). Where a bankrupt assigned certain insurance policies having no surrender value, to a bank as collateral security for certain loans, and there was no agreement as to the mode in which the value of the policies should be determined or the manner in which they should be sold or disposed of to realize thereon in case of the buyer's default, the bank was authorized at its election to convert the policies into money and apply the proceeds to the debt, and was not required to continue the loan until the maturity of the policies, paying the premiums to preserve the security and trusting to it for reimbursement on the death of the insured (*In re Davison* [D. C.] 179 Fed. 750). An insurance company could not escape liability to insured under a life insurance policy because of his innocent failure to list the policy among his assets when filing a petition in bankruptcy; the legal title to the assets having remained in him, since no trustee was ever appointed (*Equitable Life Assur. Soc. of the United States v. Perkins*, 41 Ind. App. 183, 80 N. E. 682).

3811-3812. (k) Assignment of matured claim

3811 (k). A life policy, providing that insurer, on the death of insured, will pay \$10,000 to his wife in equal semiannual installments, and will pay her \$10,000 six months after the payment of the last semiannual installment, creates on the death of insured an absolute debt to the wife, which is assignable by her, as against the objection that an assignment is contrary to public policy (*Black v. New York Life Ins. Co.* [Sup.] 126 N. Y. Supp. 334). Under Code Iowa, § 3046, providing that an assignment of an instrument, which by its terms prohibits an assignment, shall be valid, a cause of action arising under a life policy is assignable after it has accrued

by death of insured, regardless of any prohibition, and every defense available to insurer against the beneficiary is available against the assignee (*McCombs v. Travelers' Ins. Co. of Hartford, Conn.*, 159 Iowa, 445, 141 N. W. 327).

In *Lawson v. Lyon*, 136 Ga. 214, 71 S. E. 149, it appeared that a beneficiary certificate was issued by a fraternal association to a member of a local lodge, the rules of which association provided that the Grand Lodge pay to a member under named conditions the amount of the certificate held by him if he should suffer amputation of an entire hand at or above the wrist joint, that claims for disability not coming within the foregoing provision should be addressed to the systematic benevolence of the association, and should not be the basis of legal liability, that such claims should be referred to the beneficiary board, and that, if approved by such board, claimant should be paid an amount equal to the certificate held by him. The hand of a member was cut off below the knuckle in front of the thumb, and his claim was approved by the board. It was held that such claim, after approval, was not a bare contingency or possibility not subject of sale, under the express provisions of Civ. Code 1910, § 4117, but could be assigned by the holder of the certificate.

Where an insurance policy was payable in installments, and before making payments to its agent as transferee thereof, the insurance company knew of the necessity of a valid transfer from administratrix of decedent, and of a private transfer to the agent of the company as an individual, and of a compromise of a claim of the estate, where there was in fact no dispute, it affected the company with notice of the title claimed by its agent, and payment to him was at the peril of the company (*Empire Life Ins. Co. v. Mason*, 78 S. E. 935, 140 Ga. 141).

4. ACTIONS TO DETERMINE RIGHTS

3812-3815. (a) In general

3812 (a). Where defendant surety company was liable to certain creditors of P. on a fidelity bond because of P.'s default, the creditors being entitled to share pro rata in any recovery against defendant, the fund could be reached only by a suit in behalf of all in equity (*Illinois Surety Co. v. Mattone*, 122 N. Y. Supp. 928, 138 App. Div. 173).

The right of a beneficiary in a life policy cannot be adjudicated in an action on the policy by the other beneficiaries (*Irons v. United*

States Life Ins. Co., 128 Ky. 640, 108 S. W. 904, 33 Ky. Law Rep. 46, 129 Am. St. Rep. 318).

Where a fraternal benefit association pays the fund into court, such payment does not admit its liability to any particular claimant, but is a demand that court protect it against double liability by determining ownership (*Logan v. Modern Woodmen of America*, 137 Minn. 221, 163 N. W. 292).

3815-3818. (b) Pleading

3815 (b). One asserting rights as a beneficiary under a new certificate issued by a fraternal insurance order cannot question the sufficiency of the complaint in an action by the original beneficiary on the original certificate, on the ground that the complaint does not aver the performance of the conditions prescribed in the certificate; only the insurer being entitled to demur on that ground (*McKeon v. Ehringer*, 48 Ind. App. 226, 95 N. E. 604). Where a benefit order sued on a certificate by the beneficiary named therein pleaded that the member attempted to change the beneficiary by making the certificate payable to his children instead of his wife, and which asked that the wife named as beneficiary in the original certificate and the curator of the children interplead, and the wife averred that at the time of the attempted change the member was not of sound mind, and the curator claimed the certificate by virtue of the attempted change of beneficiaries, the cause became a suit in equity, and the controversy must be determined according to equitable principles (*Walsh v. St. Louis Union Trust Co.*, 148 Mo. App. 179, 127 S. W. 645). A complaint, alleging that deceased, pursuant to an antenuptial agreement, made plaintiff his beneficiary in an insurance policy, but later substituted his children as beneficiaries, states a cause of action against the children (*Freitas v. Freitas*, 159 Pac. 611, 31 Cal. App. 16).

In an action by an assignee of a life policy, an answer alleging that prior to the assignment to plaintiff the policy had been assigned to defendant is sufficiently definite, in the absence of a motion to make the same more specific, to permit proof of a prior assignment to defendant as collateral only, instead of an absolute assignment; Code Civ. Proc. § 519, requiring pleadings to be liberally construed with a view to substantial justice (*Howe v. Hagan*, 97 N. Y. Supp. 86, 110 App. Div. 392).

Sufficiency of complaint in general, see *Metropolitan Life Ins. Co. v. McCray*, 156 Ala. 589, 47 South. 65; *Cain v. Knights of Pythias*

of North & South America, etc., 75 S. E. 444, 11 Ga. App. 364; Pine v. Supreme Circle Brotherhood of the Union, 77 N. J. Law, 344, 71 Atl. 1130; Leumann v. Grand Lodge A. O. U. W., 85 Neb. 803, 124 N. W. 475; Sterling v. Head Camp, Pacific Jurisdiction, Woodmen of the World, 28 Utah, 505, 80 Pac. 375, rehearing denied 28 Utah, 526, 80 Pac. 1110.

3818-3820. (c) Evidence

3819 (c). While it is presumed, in the absence of proof as to the contents of a life insurance policy, that the issuance of the policy payable to a beneficiary named therein, creates an interest in the proceeds in favor of the beneficiary, yet such presumption cannot prevail over the presumption in favor of the legality of the act of the insurance company in issuing in lieu of such policy apparently valid policies payable to a different beneficiary (Baker v. Baker, 97 N. Y. Supp. 455, 110 App. Div. 660).

In an action by insured's administrator upon a policy entitling insured's legal representatives to recover thereon only where the beneficiary died before insured, the burden was upon plaintiff to prove an allegation of the complaint that the beneficiary named died before insured (Dunn v. New Amsterdam Casualty Co., 121 N. Y. Supp. 686, 67 Misc. Rep. 109, affirmed in 141 App. Div. 478, 126 N. Y. Supp. 229). And in an action involving the respective claims of insured's administratrix, and of his son to insurance money where the policies were on their face payable to insured's personal representative, the burden was on the son to establish his claim that the policies were issued in lieu of lapsed policies surrendered by insured, in which the son had a vested right of which he could not be deprived by the act of insured in changing the beneficiary (Baker v. Baker, 97 N. Y. Supp. 455, 110 App. Div. 660). A party contesting the validity of a change of beneficiary in a benefit certificate whereby the member made his brother and sisters beneficiaries in place of his wife on the ground that the association did not have authority prior to Pub. Acts 1901, No. 192, to permit the naming of brothers and sisters beneficiaries, must prove that the association had not amended its articles of association or had not reincorporated subsequent to the passage of the act, and the facts must be shown by affirmative proof (Grand Lodge, A. O. U. W., v. Brown, 125 N. W. 400, 160 Mich. 437).

Burden of proof as to dependency, see Modern Woodmen of America v. O'Connor, 182 Ill. App. 562; Bush v. Modern Woodmen of America (Iowa) 152 N. W. 31; Johnson v. Grand Lodge of A. O.

U. W. of Kansas, 137 Pac. 1190, 91 Kan. 314, 50 L. R. A. (N. S.) 461.

Burden of proof to show change of beneficiary, see *Longer v. Carter*, 102 Ark. 72, 143 S. W. 575; *Darter v. Grubb*, 56 Ind. App. 206, 102 N. E. 843; *Grand Lodge A. O. U. W. of Maine v. Edwards*, 89 Atl. 147, 111 Me. 359; *Barner v. Lyter*, 31 Pa. Super. Ct. 435; • *Hazard v. Western Commercial Travelers' Ass'n*, 54 Tex. Civ. App. 110, 116 S. W. 625.

Rev. Laws Mass. c. 118 (now St. 1907, c. 576) § 73, provides that, in any claim arising under a life policy issued within the state without previous medical examination or without insured's knowledge and consent, the statements in the application as to insured's age, etc., shall bind the company unless shown to have been willfully false, and requires "every policy containing a reference to the application of insured, either as a part of the policy or as having a bearing thereon, to have attached thereto a correct copy of the application, and provides that such application shall not be received in evidence unless so attached." In *Knowles v. Knowles*, 205 Mass. 290, 91 N. E. 213, it was held that the part quoted only applied to actions between the company and persons claiming under the policy, so that, in a suit by insured's parents against his widow and administratrix to recover possession of the policy, the application was admissible, if competent, though not attached to the policy. Where, in an action on a benefit certificate by a substituted beneficiary, a stranger to the member, the answer alleged that plaintiff was neither a relative of the insured nor dependent on him, nor entitled to the proceeds of the certificate under the by-laws of the society or under the laws of the state in which the society was organized, evidence that a by-law of the society provided that certificates should be payable only to the wife or surviving children of the member or a person related to him as heir was admissible, as showing that plaintiff was disqualified from becoming a beneficiary (*Foss v. Petterson*, 104 N. W. 915, 20 S. D. 93).

Admissibility of evidence to determine right to proceeds is considered in the following cases: *Longer v. Beakley*, 106 Ark. 213, 153 S. W. 811; *Great Camp Knights of the Modern Maccabees v. Deem*, 107 N. W. 447, 143 Mich. 652; *Maxey v. Franklin Life Ins. Co.* (Tex. Civ. App.) 164 S. W. 438.

In an action over the proceeds of an insurance policy, the defendant, to sustain his contention that the assignment of the policy to plaintiff though absolute in form, was in fact merely a pledge, need

only produce a preponderance of the evidence, and not necessarily "clear and convincing" evidence (*Carson v. National Life Ins. Co.*, 77 S. E. 353, 161 N. C. 441). Where a parish baptismal record showed that infants born to Richard Collins and Anastasia Collins (née Hackett) were baptized in a certain parish, and plaintiff in an affidavit attached to proofs of loss under a policy on the life of Anastasia Collins, stated that she (plaintiff) was born in Ireland; that her father's name was Richard Collins, born in the same place; and her mother's name was "Anna Stacia Collins," also born and married in the same place—the evidence was sufficient to identify the person who was baptized Anastasia Hackett as assured (*Collins v. German-American Mut. Life Ass'n*, 86 S. W. 891, 112 Mo. App. 209).

The sufficiency of the evidence to show an assignment of the policy is considered in *Searles v. Northwestern Mut. Life Ins. Co. of Milwaukee*, 148 Iowa, 65, 126 N. W. 801, 29 L. R. A. (N. S.) 405; *Ely v. Hartford Life Ins. Co.*, 128 Ky. 799, 110 S. W. 265, 33 Ky. Law Rep. 272; *Northwestern Mut. Life Ins. Co. v. Collamore*, 62 Atl. 652, 100 Me. 578; *Great Camp Knights of Modern Macabees v. Deem*, 107 N. W. 447, 143 Mich. 652; *Baker v. Metropolitan Life Ins. Co.*, 97 N. Y. Supp. 1088, 111 App. Div. 500, affirmed 80 N. E. 1105, 187 N. Y. 562; *Gould v. John Hancock Mut. Life Ins. Co.*, 99 N. Y. Supp. 833, 114 App. Div. 312; *Flynn v. Prudential Life Ins. Co.*, 137 N. Y. Supp. 126, 76 Misc. Rep. 573; *Ormond v. Connecticut Mut. Life Ins. Co.*, 58 S. E. 997, 145 N. C. 140.

The sufficiency of the evidence to show a change of beneficiary is considered in *Begley v. Miller*, 137 Ill. App. 278; *Kiolbassa v. Polish Roman Catholic Union of America*, 141 Ill. App. 297; *Jacob v. Jacob's Ex'r*, 89 S. W. 246, 28 Ky. Law Rep. 327; *Coston v. Coston*, 108 N. W. 736, 145 Mich. 390; *Franken v. Supreme Court I. O. F.*, 116 N. W. 188, 152 Mich. 502; *Supreme Council of Ladies' Catholic Benev. Ass'n v. Scherer*, 174 Mich. 25, 140 N. W. 505; *Grand Lodge, A. O. U. W., v. Brown*, 125 N. W. 400, 160 Mich. 437; *Blood v. Sovereign Camp Woodmen of the World*, 140 Mo. App. 526, 120 S. W. 700; *Superior Lodge, Degree of Honor, v. Satchwell*, 87 S. W. 58, 112 Mo. App. 280; *Stronge v. Supreme Lodge K. P.*, 97 N. Y. Supp. 661, 111 App. Div. 87, reversed 82 N. E. 433, 189 N. Y. 346, 12 L. R. A. (N. S.) 1206, 121 Am. St. Rep. 902, 12 Ann. Cas. 941; *Barner v. Lyter*, 31 Pa. Super. Ct. 435; *Maxey v. Franklin Life Ins. Co. (Tex. Civ. App.)* 164 S. W. 438.

XXVIII. PAYMENT, DISCHARGE, AND SUBROGATION

1. INSURER'S RIGHT TO REPAIR OR REBUILD

3823-3825. (a) In general

3823 (a). A provision in a policy limiting liability to the cost to insured of repairing or replacing the property loss does not entitle the insurer to repair or replace the property in lieu of paying the loss (*Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 161 Iowa, 5, 141 N. W. 447).

3825 (a). In *Bankers' Mut. Casualty Co. v. State Bank of Goffs*, 150 Fed. 78, 80 C. C. A. 32, the insurer agreed to indemnify the bank against loss of money stolen from its safe, damage done to the safe, damage done to the premises, and for loss of money violently taken from the bank in the daytime, in the aggregate sum of \$3,000. The policy reserved the right to the insurance company to repair any damage to property or to replace any damaged article with one of like quality and value, "instead of paying for the same in money." The bank safe was blown open by burglars and money taken from the safe largely exceeding in value the sum of \$3,000. It was held that, the bank having made no claim for damages to the safe, but only for the loss of the money stolen therefrom, the insurer was not entitled to replace the damaged safe as part payment of its liability.

3825-3827. (b) Election, and effect thereof

3826 (b). A notice by an insurer entitled under the policy to rebuild, which recites that it will exercise its right to rebuild, unless insured will accept a cash offer as a compromise, is insufficient, because it undertakes to use the privilege of rebuilding as a means of forcing the insured to accept a compromise (*German Ins. Co. v. Hazard Bank*, 126 Ky. 730, 104 S. W. 725, 31 Ky. Law Rep. 1126).

3827-3828. (c) Waiver of right

3827 (c). Where the insurance company failed to promptly give notice of an intention to replace the goods, and demanded an appraisal of the loss, the right of replacement, if any existed,

was waived (*Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co.*, 129 Minn. 292, 152 N. W. 650). And where a policy on a stock of goods gives the company either the right to pay a loss in money, or to take the articles at their appraised value, or to replace them, an agreement by the adjuster of the company to pay the amount determined by appraisers waives the company's option to take or replace the goods (*Post v. American Cent. Ins. Co.*, 51 Pa. Super. Ct. 352).

3828-3829. (d) Election as precluding recovery on policy

3828 (d). Where a tornado policy gave insurer the right to rebuild or replace the property lost or damaged, and after a loss the insurer notified the insured of the election to rebuild, but did nothing toward rebuilding, such election, while binding on the insurer, did not discharge its liability under the policy; and the insured could bring action thereon (*Gage v. Connecticut Fire Ins. Co. of Hartford, Conn.*, 34 Okl. 744, 127 Pac. 407).

3830-3832. (f) Failure or delay to repair or restore

3830 (f). Where an insurer failed to give proper notice of its intention to elect to repair, as authorized by the policy, the insured, after the expiration of the time in which the notice could be given, could repair. And if insurer elects to repair the election must be carried out within a reasonable time (*German Ins. Co. v. Hazard Bank*, 126 Ky. 730, 104 S. W. 725, 31 Ky. Law Rep. 1126).

3832-3833. (g) Election as contract to rebuild

3833 (g). Where the lessor of a drug store insured the plate glass window front, and on its being broken the insurer elected to replace it, which was not done for several days, the lessee not being privy to the agreement, could not recover from the insurer for damages sustained during the delay in repairing the window (*Munk v. Maryland Casualty Co.*, 107 N. Y. Supp. 215, 122 App. Div. 487). And the landlord was not entitled to recover damages for the delay if it did not appear that he had suffered any loss, or that he was under any liability to the tenant on account of the delay (*Munk v. Maryland Casualty Co.*, 102 N. Y. Supp. 164, 116 App. Div. 756).

2. PAYMENT AND DISCHARGE—INSURANCE OTHER THAN LIFE**3836-3838. (a) In general .**

3837 (a). An insurer who advances money to insured on conditions of the presentation of a claim to a carrier for the amount of the loss, and a refunding of the amount on receiving payment from the carrier, does not thereby pay the policy or waive any of its defenses (*Kalle & Co. v. Morton*, 141 N. Y. Supp. 374, 156 App. Div. 522).

3838-3841. (b) Interest on amount due

3838 (b). Interest may be recovered in an action upon an insurance policy notwithstanding the question of liability is disputed (*Gray v. Merchants' Ins. Co. of Newark*, 125 Ill. App. 370). If insurer, before the time that the policy provided loss should be payable, tendered an amount, which a jury subsequently found to be the amount of the loss as well as the amount agreed upon, insured is not entitled to interest from the adjustment (*Kiefert v. Maple Valley Mut. Home Fire Ins. Co.*, 148 N. W. 864, 158 Wis. 340).

Where an insured building is totally destroyed, the amount of the policy is due when the loss occurred, and it will bear interest from that date.

Fire Ass'n of Philadelphia v. Strayhorn (Tex. Civ. App.) 165 S. W. 901;
Camden Fire Ins. Ass'n v. Bomar (Tex. Civ. App.) 176 S. W. 156.

3839 (b). If the policy is made payable at a designated time, interest is allowed only from the date the policy was made payable, not from the date of the fire (*Hartford Fire Ins. Co. v. Enoch*, 96 S. W. 393, 79 Ark. 475). So, where the policy is made payable at a designated time after furnishing notice and proofs of loss, insured is entitled to interest from the expiration of such time.

Ledford v. Hartford Fire Ins. Co., 161 Ill. App. 233; *Granite City Lime & Cement Co. v. Hanover Fire Ins. Co. of New York*, 194 Ill. App. 68; *Palatine Ins. Co. v. O'Brien*, 107 Md. 341, 68 Atl. 484, 16 L. R. A. (N. S.) 1055; *Berry v. Virginia State Ins. Co.*, 64 S. E. 859, 83 S. C. 13; *Mecca Fire Ins. Co. of Waco v. Wilderspin* (Tex. Civ. App.) 118 S. W. 1131; *Hamburg-Bremen Fire Ins. Co. v. Swift*, 62 Tex. Civ. App. 78, 130 S. W. 670. And see *Reed v. Continental Ins. Co.*, 6 Pennewill (Del.) 204, 65 Atl. 569.

If, however, the provision is waived by a denial of liability, interest is to be computed from the date of loss (*Jensen v. Palatine* (1624)

Ins. Co., 81 Neb. 523, 116 N. W. 286). Where policies provided for present indemnity in case of loss after adjustment, but required the policy holder to furnish proofs of loss as a condition to adjustment, insured was only entitled to recover interest from the date proofs of loss were furnished (*Wensel v. Property Mut. Ins. Ass'n of Waterloo*, 105 N. W. 522, 129 Iowa, 295). If the amount of a loss is payable to mortgagees as their interests might appear, and is payable 60 days from the time of notice, interest should be allowed on the amount from that time, if the amount was ascertained, and otherwise from the date when it was subsequently ascertained (*Amory v. Reliance Ins. Co.*, 94 N. E. 677, 208 Mass. 378).

Under a contract to renew a fire policy, which made a loss payable 60 days after proof of loss, where it appeared that the renewal policy, if issued, would have terminated within 60 days after the loss, and that within the 60 days the insurer denied liability, interest on the amount recovered by insured did not commence to run until the date of the denial of liability. *Orient Ins. Co. v. Wingfield*, 49 Tex. Civ. App. 202, 108 S. W. 788.

Where a policy provides that, when an appraisal has been required, the award of the appraisers must be furnished to the company before the loss becomes payable, an irregular and illegal award by appraisers does not affect the right of the insured to recover interest upon the loss after the time fixed by the policy for payment, in case there is no appraisal (*Home Ins. Co. of New York v. Schiff's Sons*, 64 Atl. 63, 103 Md. 648). If the policy provides that nothing shall be due until 60 days after an appraisal, and demand for an appraisal is made about 2 years after loss, and ignored by the company, the company cannot object to the allowance of interest from 60 days after the loss (*Gragg v. Northwestern Nat. Ins. Co.*, 126 S. W. 766, 140 Mo. App. 685).

3841 (b). If indemnity policy indemnifies against loss or damage and not against liability, interest accrues against insurer only from payment of judgment by insured and submission of proofs of loss (*Kingan & Co. v. Maryland Casualty Co.*, [Ind. App.] 115 N. E. 348). And to the same effect is *Henderson v. Maryland Casualty Co.*, 29 Pa. Super. Ct. 398. But in Texas it is held that an insured recovering by reason of its payment of judgment obtained by insured's employé is entitled to interest on its judgment from date of employé's judgment against it, rather than from the

date of its payment thereof (*Ætna Life Ins. Co. v. El Paso Electric Ry. Co.* [Tex. Civ. App.] 184 S. W. 628).

As the obligation of an insurer issuing a policy to indemnify insured against loss from common-law or statutory liability for injuries to employes does not become fixed until insured has paid the judgment rendered against it for injuries to an employé, and insured may not recover interest on the judgment for time between date thereof in circuit court and its affirmance by the Supreme Court (*Conqueror Zinc & Lead Co. v. Ætna Life Ins. Co.*, 133 S. W. 156, 152 Mo. App. 332). And to the same effect is *Curtis & Gartside Co. v. Ætna Life Ins. Co.* (Okla.) 160 Pac. 465.

Under Pub. St. N. H. 1901, c. 231, § 9, insurer assuming defense in action to enforce judgment for death of plaintiff's decedent and suffering judgment establishing its liability was chargeable with interest on the judgment. *Lombard v. Maguire Penniman Co.*, 78 N. H. 280, 99 Atl. 295.

3841-3845. (c) Persons entitled to receive payment, and effect thereof

3842 (c). The mortgage clause in the standard fire policy is notice to the company of the rights of the mortgagee, and, if the company by mistake pays the amount of the policy to the mortgagor, it will still be liable to the mortgagee (*Ebensburg Building & Loan Ass'n v. Westchester Fire Ins. Co.*, 28 Pa. Super. Ct. 341).

3845 (c). Money paid by an employers' liability insurance company for a release of liability under a policy is not impressed with any trust in favor of any one, though an action was pending against the employer to recover for injuries to an employé (*Maahs v. Antigo Lumber Co.*, 145 N. W. 222, 156 Wis. 1).

3847-3854. (e) Settlement and release

3847 (e). In an action by the mortgagee as the mortgagor's assignee, where defendant admitted that the mortgagor had been paid nothing, but had claimed that no liability existed as to the mortgagor, a joint receipt of the mortgagor and mortgagee for the amount would not defeat a recovery (*Sun Ins. Office v. Heiderer*, 99 Pac. 39, 44 Colo. 293).

Where a settlement is accepted under a mutual mistake as to the rights of the insurer under the contribution clause, such settlement is not conclusive.

Penn Furniture Co. v. Lumbermen's Mut. Fire Ins. Co., 47 Pa. Super. Ct. 77; *Same v. Pennsylvania Lumbermen's Mut. Fire Ins. Co.*, Id. 83.

3851 (e). Where insured, holding a fire policy for \$700 on a house and personalty, was refused payment on the ground of misrepresentation as to his ownership of the property, and, after consulting an attorney of his own selection and another recommended to him by a friend accepted \$350 in compromise of his claim, he cannot recover on the policy on the ground that the agents of the insurer, knowing that he was an ignorant colored man, took advantage of him and overreached and deceived him, without first repaying or tendering back the money received (*Thomas v. Continental Ins. Co. of New York*, 134 S. W. 199, 142 Ky. 265).

3853 (e). Where liability for a portion of a loss on a vessel was in dispute between successive insurers, a contract between the company issuing the first policy, which admitted its liability for and paid a part of the loss, and the owner, by which the company lent the owner the sum in dispute, to be repaid in case it was recovered from the other insurers, is valid, and does not amount to a voluntary payment of the remainder of the loss which prevents a recovery by the owner from the other insurers (*Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co.* [D. C.] 185 Fed. 172). In *Klauck v. Federal Ins. Co.*, 131 App. Div. 519, 115 N. Y. Supp. 1049, reversing 60 Misc. Rep. 170, 182, 111 N. Y. Supp. 1037, it appeared that the owner of stranded vessels entitled under an insurance policy to float the vessels itself and be reimbursed by the insurer, permitted the insurer to contract for floating the vessels within a stated time. The contractor failed to finish within the stated time, and sued the insurer for the contract price, upon which the insurer contracted with the owner that the owner should take charge of the defense and of any other action on the same contract at its own expense; that insurer would pay any judgment recovered against them, not exceeding a specified amount claimed as the owner's damages from delay in releasing the vessels, and if the judgment were less than that sum to pay the balance of the sum to the owner; that the owner would secure the insurer against any other liability in the suits and would dismiss suits brought by it against the insurer and the contractor, and would enforce its claims in that action; and that it would release the insurer from all claims, except so far as they could be worked out in that action, and would not enforce them against the insurer. It was held that the agreement did not release all the owner's claims against the insurer, but provided that they should be enforced through the action then begun, and that the owner, having secured all it was en-

titled to in the action, should release the insurer from payment of any additional sum.

3854-3858. (f) Recovery of payments

3854 (f). In *Whitehurst v. Mason*, 140 Ga. 148, 78 S. E. 938, the policy was illegally transferred by an administratrix, and the assignee bought property from a third person, who had knowledge of the fraud, giving notes for the price in the same amounts and at the same maturities as installments on the policy became due, and assigned the policy as security. The insurance company with knowledge of the facts paid several installments to the second assignee. It was held that the insurance company could not recover the installments so paid.

3856 (f). Where insured, in preparing and verifying proof of fire loss, knowingly misrepresented material facts concerning the property claimed to have been destroyed with intent that the plaintiff insurer should act thereon, and plaintiff was thereby deceived and induced to pay a certain sum in settlement of the loss, plaintiff was entitled to recover the same in an action for deceit (*Palatine Ins. Co. of London v. Kehoe*, 96 N. E. 1099, 210 Mass. 426). A marine insurer, which expended money in salving a sunken vessel, is entitled to recover back such expenditures, when it appears that it was not liable under the policy (*Mannheim Ins. Co. v. Charles Clarke & Co.* [Tex. Civ. App.] 157 S. W. 291).

3860-3863. (h) Contribution between insurers

3860 (h). In insurance law, the term "contribution" has a fixed legal meaning. It is a principle sanctioned in equity, and arises between coinsurers only, permitting one who has paid the whole loss to obtain contribution from other insurers, who are also liable therefor (*National Fire Ins. Co. v. Dennison*, 113 N. E. 260, 93 Ohio St. 404, L. R. A. 1916F, 992). Double insurance takes place when the assured makes two or more insurances on the same subject, the same risk, and same interest, and all are insurers, and liable pro rata, and therefore any one insurer who pays more than his portion may claim a contribution from others who are liable (*P. W. Ziegler Co. v. Commercial Union Assur. Co.*, 38 Pa. Super. Ct. 532).

Insurers held not to be concurrently liable, see *Citizens' Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co.*, 86 Vt. 267, 84 Atl. 970.

Policies construed as independent contracts not calling for contribution, see *Rochester German Ins. Co. of Rochester, N. Y., v. Schmidt*, 175

Fed. 720, 99 C. C. A. 296, affirming on rehearing 162 Fed. 447, 89 C. C. A. 333; *Scruggs & Echols v. American Cent. Ins. Co. of St. Louis*, 176 Fed. 224, 100 C. C. A. 142.

Contribution between members of Lloyds association, see *Jewett v. Maytham*, 64 Misc. Rep. 488, 118 N. Y. Supp. 635.

3861 (h). Policies on a main building, which were also to cover additions, provided that the companies should not be liable for a greater proportion of any loss than the amount insured should bear to the whole insurance covering the property. Afterwards an addition was built and specifically insured by policies containing the same clause. It was held that the latter policies were entitled to contribution from the earlier policies as to a loss on the addition (*Meigs v. London Assur. Co.*, 134 Fed. 1021, 68 C. C. A. 249, affirming [C. C.] 126 Fed. 781). Under the "average clause" attached to fire policy, covering lumber yard and contents, several buildings and piles of stock within common inclosure will be regarded as one of the premises named in average clause and same class of property on lot across street as another (*Mangold v. American Ins. Co. of Newark, N. J.*, 157 N. W. 632, 99 Neb. 656).

In *Fireman's Fund Ins. Co. v. Palatine Ins. Co.*, 150 Cal. 252, 88 Pac. 907, the plaintiffs and defendants insured the property of a publishing company under policies, all of which in fact covered certain typesetting machines with other property. After loss, the insurers jointly authorized an adjuster to adjust the loss with the insured and to apportion the same among the insurers as their policies might require. The adjuster fixed the total loss by agreement with the insured, and then on the mistaken theory that defendants' policies did not cover the typesetting machines, so apportioned the loss that plaintiffs were compelled to bear a larger proportion thereof than they were legally bound to do. It was held that the adjustment and apportionment constituted a new agreement, on which plaintiffs were liable to the insured for the amount apportioned against them, and hence plaintiffs were entitled to recover their excess payments from defendants.

A policy payable to mortgagee as his interest might appear gives the mortgagor no right to recover from insurer difference between amount paid by insurer on mortgagee's judgment and face value of policy; such amount being in excess of insurer's liability to mortgagor under contribution clause of policy. *Palmer v. McFadden*, 86 N. J. Eq. 377, 98 Atl. 462.

3. PAYMENT AND DISCHARGE OF LIFE AND ACCIDENT POLICIES

3863-3864. (a) Time for payment

3864 (a). Where a fraternal accident insurance association denied all liability for an accident which caused the death of the insured, it thereby waived proofs of death and the benefit of a provision giving a stipulated time in which to make payment (*Norman v. Order of United Commercial Travelers of America*, 145 S. W. 853, 163 Mo. App. 175).

3864-3866. (b) Interest on amount due

3864 (b). Interest is properly allowed upon money found to be due under a benefit certificate in a fraternal organization from the time that liability thereon becomes fixed (*Boening v. North American Union*, 155 Ill. App. 528). If the loss is not payable until after presentation of proofs of death, interest cannot be recovered upon an amount due under an insurance policy until after such proofs have been presented.

Minnesota Mut. Life Ins. Co. v. Welsh, 131 Ill. App. 103, affirmed *Same v. Link*, 230 Ill. 273, 82 N. E. 637; *Crook v. New York Life Ins. Co.*, 75 Atl. 388, 112 Md. 268; *Wehring v. Modern Woodmen of America*, 119 N. W. 245, 107 Minn. 25; *Equitable Life Assur. Soc. v. Brame*, 112 Miss. 859, 73 South. 812; *Southwestern Ins. Co. v. Woods Nat. Bank* (Tex. Civ. App.) 107 S. W. 114.

Where the proof of death depends on absence for seven years, the interest runs from the expiration of that time (*Martin v. Modern Woodmen of America*, 158 Mo. App. 468, 139 S. W. 231). But in *New York Life Ins. Co. v. Brame*, 112 Miss. 828, 73 South. 806, it was held that where action was brought on life insurance policy after seven years from insured's disappearance, interest on the policy proceeds was recoverable only from date of suit, at which time only proofs of death were received and properly rejected. If the by-laws provide that payments should be made within 90 days after proof of death, and the proof was made within 30 days, interest should not be computed until after 120 days (*Palmer v. Loyal Mystic Legion of America*, 126 N. W. 285, 86 Neb. 596). However, if there is a denial of liability, interest is recoverable from such denial, notwithstanding failure to make proofs of death and surrender of certificate (*Keeton v. National Union* [Mo. App.] 182 S. W. 798). It has been held in Nebraska that insured is entitled to recover in-

terest on the indemnity due from the date of his permanent disability (*Tomson v. Iowa State Traveling Men's Ass'n*, 89 Neb. 791, 132 N. W. 405, reversing judgment on rehearing 129 N. W. 529, 88 Neb. 399).

Where an insurance company sent to a beneficiary under a policy a check for the amount due, which she retained without objection, except an unfounded objection that it was insufficient in amount, this constituted a sufficient tender, and prevented the recovery of interest. *Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., v. Zapp* (Tex. Civ. App.) 160 S. W. 139.

3866 (b). In some cases demand is necessary. Thus it has been held in Kentucky that, where plaintiff, if entitled to recover, had made no demand for payment prior to the bringing of the action, he was not entitled to interest on the certificate prior to the action (*Supreme Council Catholic Knights of America v. Fenwick*, 183 S. W. 906, 169 Ky. 269). So in Illinois it has been held that one entitled to recover on a fraternal benefit certificate is entitled to interest from the time of the filing of his amended declaration, in which he is substituted as plaintiff in place of one not entitled to recover (*Beresh v. Supreme Lodge Knights of Honor*, 99 N. E. 349, 255 Ill. 122, affirming judgment 166 Ill. App. 511). Where defendant had notice of adverse claims to the proceeds of a policy prior to the commencement of a suit therefor, and during the pendency of a former suit might have filed an interpleader petition, and have relieved itself from liability for interest, or could have paid the amount due into court, but did neither, it was liable to plaintiff for interest from the date of the writ (*Davis v. National Life Ins. Co.*, 74 N. E. 330, 188 Mass. 299).

3866-3870. (c) Persons entitled to receive payment, and effect thereof

3867 (c). A stipulation in a policy of life insurance, that payment of the amount of the policy to any relative of the insured belonging to a designated class will discharge the company from liability, is valid (*Ogletree v. Hutchinson*, 55 S. E. 179, 126 Ga. 454). And a payment to such person will discharge the insurer (*Bradley v. Prudential Ins. Co.*, 187 Mass. 226, 72 N. E. 989).

Where policies made out to beneficiaries who have no insurable interest in the life of insured are, under the circumstances, not absolutely void as wagering contracts, and the insurer settles the insurance with the persons named in the policies as beneficiaries without knowledge of their want of insurable interest, and without

notice of the claim of the insured's administrator, the insurer cannot be compelled to pay the amount of the policies a second time to the administrator, but the nominal beneficiaries to whom the insurance money is paid will be treated in equity as having received the same as assignees or appointees for the persons legally entitled thereto, and any action on the part of the administrator is against such beneficiaries (*Griffin's Adm'r v. Equitable Assur. Soc.*, 84 S. W. 1164, 119 Ky. 856, 27 Ky. Law Rep. 313). A payment of a life policy to the person designated as beneficiary, described as insured's wife in the application for insurance and in the policy, on her furnishing proof of the insured's death, is a valid payment as against the representative of the insured, when made in good faith and without knowing that the beneficiary was not insured's wife (*Metropolitan Life Ins. Co. v. Louisville Trust Co.*, 89 S. W. 268, 28 Ky. Law Rep. 426). In *Renick v. Mutual Life Assur. Co. of New York*, 106 S. W. 310, 32 Ky. Law Rep. 506, it appeared that insured, as permitted by his policy, changed the beneficiary, substituting his uncle, who had no insurable interest, for his son; the company indorsing the change upon the policy. Upon insured's death, the uncle collected the amount of the policy, the company paying in good faith, without notice that he was not insured's creditor; and though plaintiff, the son's guardian, who was also insured's administrator, claimed the right to collect the proceeds, and also claimed an interest in the policy for his ward, he made no demand upon the company, either as administrator or guardian, nor did he notify it that he claimed any part of the policy, nor that he objected to the payment to the named beneficiary, who he knew was taking steps to collect it; but after payment had been made as guardian he sued the company for the amount of the policy. It was held that he could not recover.

3868 (c). An insurer is primarily liable to the beneficiary, and hence is not discharged by the sending of a check to officers of the subordinate lodge of which insured was a member (*Tebbins v. Grand Court of State of New York, Foresters of America* [Sup.] 134 N. Y. Supp. 816). And to the same effect is *Ferencz v. Greek Catholic Union*, 54 Pa. Super. Ct. 642.

Where a beneficial society, with notice that plaintiff had an equitable interest in the benefits of the certificate, paid the insurance money to its codefendant as sole beneficiary, such payment constituted no defense for either defendant. *Royal Arcanum v. Riley*, 143 Ga. 75, 84 S. E. 428.

An insurance company that has paid an amount due under a policy to one claimant after having been sued by another, cannot defend on the ground of payment and leave complainant to bring a supplemental bill against the party receiving the payment. *O'Donnell v. Metropolitan Life Ins. Co.* (Del. Ch.) 95 Atl. 289.

3870-3875. (d) Settlement and release

3870 (d). A release of a simple contract debt or claim for breach of such contract, such as a policy of accident insurance, need not be in writing, or in any set form of words (*Reliance Life Ins. Co. of Pittsburgh, Pa., v. Garth*, 192 Ala. 91, 68 South. 871). A release not under seal, given by a beneficiary in a mutual benefit certificate in consideration of receiving a part of the amount of the certificate, is a mere receipt in full of the society's liability, and the acceptance by the beneficiary thereof is a discharge only of so much of the debt as is equal in amount to the sum received (*Farmers' & Mechanics' Life Ass'n v. Caine*, 79 N. E. 956, 224 Ill. 599, affirming 123 Ill. App. 419). So, too, a signing of a receipt indorsed on the back of a check for money due under a policy is not an acknowledgment of full satisfaction and final settlement of all claims accrued or to accrue under the policy, and the terms of such receipt are subject to contradiction and explanation like any other receipt (*Clark v. Pacific Mut. Life Ins. Co. of California*, 185 Ill. App. 580).

3871 (d). The surrender of a benefit certificate ordinarily operates as a full release and discharge from liability thereon.

Smith v. Mutual Reserve Fund Life Ass'n, 140 Ill. App. 409; *Grand Lodge Illinois Independent Order Mut. Aid v. Peiffer*, 129 Ill. App. 208.

A release for a nominal consideration of a claim on a life policy representing a liquidated demand can be sustained only on the theory that it was a compromise of a doubtful claim (*Rauen v. Prudential Ins. Co.*, 106 N. W. 198, 129 Iowa, 725). And the rule seems to be well settled that, if there is a bona fide disagreement as to the amount due on the policy, the payment by the insurer of an amount concededly due is not consideration for a full release.

Weber v. Head Camp, Pacific Jurisdiction, Woodmen of the World, 60 Colo. 529, 154 Pac. 728; *National Life Ins. Co. v. Jackson*, 89 S. E. 633, 18 Ga. App. 494; *Coulter v. Travelers' Protective Ass'n of America*, 144 Ill. App. 255; *Commonwealth Life Ins. Co. v. Hughes*, 139 S. W. 769, 144 Ky. 608, judgment modified on rehearing 145 Ky. 650, 140 S. W. 1014; *Crowder v. Continental Casualty Co.*, 91 S. W. 1016, 115 Mo. App. 535; *Harms v. Fidelity & Casualty Co.*

of New York, 157 S. W. 1046, 172 Mo. App. 241; *Bolton v. Inter-Ocean Life & Casualty Co.*, 187 Mo. App. 167, 172 S. W. 1187.

So, too, a release on payment of indemnity to a certain date refers only to the claim to that date, and not to future claims arising from the same sickness (*Moore v. Maryland Casualty Co.*, 63 S. E. 675, 150 N. C. 153, 24 L. R. A. [N. S.] 211). In *Graham v. Union Casualty & Surety Co.*, 120 Mo. App. 671, 97 S. W. 614, an accident policy, insuring one against loss resulting from bodily injury, bound the insurer to pay the insured, if surviving, or to his wife, an indemnity, and provided for payment of an indemnity for the death of the insured, if occurring within 90 days after the injuries. for serious injuries like the loss of an eye, etc., or for a weekly benefit to insured when disabled, and declared that no claim on account of injuries for more than one of the benefits provided for should be valid. The insured received an injury, causing his death within 90 days. He, without the knowledge of his wife, accepted a week's indemnity and released the insurer from further liability. It was held that the wife was entitled to the death indemnity.

3872 (d). A settlement and release obtained by fraud is invalid and will be set aside.

Industrial Mut. Indemnity Co. v. Thompson, 83 Ark. 574, 104 S. W. 200, 10 L. R. A. (N. S.) 1064, 119 Am. St. Rep. 149; *Farmers' & Mechanics' Life Ass'n v. Caine*, 123 Ill. App. 419, judgment affirmed 79 N. E. 956, 224 Ill. 599; *Hartford Life Ins. Co. v. Sherman*, 78 N. E. 923, 223 Ill. 329, affirming judgment 123 Ill. App. 202; *American Patriots v. Cavanaugh*, 157 S. W. 1099, 154 Ky. 653; *McNicholas v. Prudential Ins. Co. of America*, 77 N. E. 756, 191 Mass. 304; *Wisenshine v. Interstate Business Men's Acc. Ass'n*, 98 Neb. 365, 152 N. W. 742; *Jones v. Commercial Travelers' Mut. Accident Ass'n of America (Sup.)* 114 N. Y. Supp. 589, affirmed in 134 App. Div. 936, 118 N. Y. Supp. 1116; *Holleran v. Prudential Ins. Co. of America*, 159 N. Y. Supp. 284, 172 App. Div. 634; *Mowry v. National Protective Soc.*, 27 Pa. Super. Ct. 390; *North American Accident Ins. Co. v. Miller (Tex. Civ. App.)* 193 S. W. 750.

The sufficiency of the facts and circumstances to show that a release was obtained by fraud is considered in the following cases: *Magnuson v. Continental Casualty Co.*, 101 S. W. 1125, 125 Mo. App. 206; *McCloskey v. Supreme Council, American Legion of Honor*, 96 N. Y. Supp. 347, 109 App. Div. 309; *Conroy v. Equitable Acc. Co.*, 63 Atl. 356, 27 R. I. 467.

Where, upon the death of a member of a fraternal benefit association, it directs its agent to obtain an adjustment of the beneficiary's claim, and the agent secures a surrender of the benefit cer-

tificate, with a receipt on the back thereof signed in blank by the beneficiary, under an agreement that the association will pay the full amount of the certificate or return it to the beneficiary, and the association retains the certificate, but pays to the beneficiary only a portion of the amount named therein, filling in the blank receipt with such amount, the amount so paid will be treated as a partial payment only, and the beneficiary may maintain an action for the balance due under the policy (*Bergeron v. Modern Brotherhood of America*, 119 N. W. 681, 83 Neb. 419).

3877-3879. (f) Recovery of payments

3878 (f). Where a member of a mutual benefit association disappeared and was unheard of for seven years, and the association, on the presumption of his death, paid the death benefits to the beneficiary, taking from her a bond conditioned for repayment of the money if insured should return alive, and insured returned after the death of the beneficiary and died shortly thereafter, the association could recover on the bond against the beneficiary's executrix for the full amount of the benefit paid, with interest from date of payment.

Ancient Order of United Workmen v. Mooney, 79 Atl. 233, 230 Pa. 16;
Supreme Council of Royal Arcanum v. Mooney, 79 Atl. 234, 230 Pa. 22.

3879-3883. (g) Pleading and practice

3882 (g). A finding that insured had not received payment of a weekly indemnity, to which he made claim under an accident policy, which payment, if received, would release the insurer from liability for payment on insured's death from the accident, is authorized, though the insurer testified to mailing a check for it to insured a few days before his death, and that it had never been returned to it, by admission of the insurer that the check had never been used by insured, and by testimony of insured's wife that she had never seen it, though after his death she had examined his clothes and effects (*Cheswell v. Fraternal Acc. Ass'n of America*, 85 N. E. 96, 199 Mass. 267).

4. PENALTIES FOR REFUSAL OF, OR DELAY IN MAKING, PAYMENT—ATTORNEY'S FEES

3884-3886. (a) Validity and construction of statutes

3884 (a). Statutes imposing a penalty on insurance companies for nonpayment or vexatious delay in the payment of claims are valid.

Arkansas Ins. Co. v. McManus, 86 Ark. 115, 110 S. W. 797; Non-Royalty Shoe Co. v. Phoenix Assur. Co., Limited, of London, England (Mo. App.) 178 S. W. 246; Barber v. Hartford Life Ins. Co. (Mo.) 187 S. W. 867, 874; Dodge v. New York Life Ins. Co. (Mo. App.) 189 S. W. 609; Amarillo Nat. Life Ins. Co. v. Brown (Tex. Civ. App.) 166 S. W. 658; Southern Union Life Ins. Co. v. White (Tex. Civ. App.) 188 S. W. 266.

Apparently the Arkansas statute (Acts 1905, p. 307) does not apply to an alleged oral contract to renew a policy of fire insurance, which had not been consummated by delivering a policy (*Ætna Ins. Co. v. Short* [Ark.] 187 S. W. 657).

3885 (a). The penalty for refusal to pay is one of the inherent rights attaching to a contract of insurance to enable the beneficiaries to obtain, free from deduction, the original benefits of the policy according to its tenor (*Missouri State Life Ins. Co. v. Lovelace*, 58 S. E. 93, 1 Ga. App. 446). Such statutes are in Missouri held to be highly penal, and therefore to be strictly construed (*Mears Min. Co. v. Maryland Casualty Co.*, 162 Mo. App. 178, 144 S. W. 883). But in Texas it is held that the 12 per cent. additional required to be paid under the Texas statute is not a penalty, but damages, and every life insurance policy entered into in the state is made in view of the provision, and embraces it as part of the contract (*Mutual Reserve Life Ins. Co. v. Jay*, 50 Tex. Civ. App. 165, 109 S. W. 1116).

3886 (a). The statutes are regarded as operating prospectively only, and do not apply to policies issued before their passage.

Guardian Fire Ins. Co. of Pennsylvania v. Central Glass Co., 194 Fed. 851, 114 C. C. A. 639; *B. J. Wolf & Sons v. Royal Ins. Co., Limited*, of Liverpool, 194 Fed. 853, 114 C. C. A. 641; *Arkansas Mut. Life Ins. Co. v. Stuckey*, 106 S. W. 203, 85 Ark. 33; *Arkansas Mut. Fire Ins. Co. v. Claiborne*, 82 Ark. 150, 100 S. W. 751; *Arkansas Mut. Fire Ins. Co. v. Woolverton*, 82 Ark. 476, 102 S. W. 226; *Central Glass Co. v. Niagara Fire Ins. Co.*, 59 South. 972, 131 La. 513; *Central Glass Co. v. Hamburg-Bremen Fire Ins. Co.*, 63 South. 236, 133 La. 598; *American Nat. Ins. Co. v. Donahue* (Okla.) 153 Pac. 819.

Rev. St. Tex. 1895, art. 3071, authorizing the recovery of penalty and attorneys' fees in an action on a policy, having been repealed by Acts 31st Leg. c. 108, § 69, and the penalty clause of such act having no application to assessment companies, plaintiff could not recover penalty and attorneys' fees in an action on an assessment policy; the cause of action accruing after such repeal. *National Life Ass'n v. Hagelstein* (Tex. Civ. App.) 156 S. W. 353.

It has been held in Oklahoma that the Texas statute is a law relating to the performance of the contract, and not to the remedy, and that it is therefore enforceable in Oklahoma (*American Nat.-Ins. Co. v. Donahue* [Okl.] 153 Pac. 819). In Georgia it is held that such damages and attorney's fees as would be recoverable by citizens of another state under a policy of life insurance may likewise be recovered by citizens of this state, where the contract sought to be enforced is to be performed in such other state (*Missouri State Life Ins. Co. v. Lovelace*, 58 S. E. 93, 1 Ga. App. 446). So, too, it has been held in Missouri that the Missouri statute (Rev. St. 1909, § 7068) applies where the insured moved to Missouri; and he and beneficiary were living there at the time of his death (*Martin v. Mutual Life Ins. Co. of New York*, 190 Mo. App. 703, 176 S. W. 266). In Texas it is held that, though a contract of accident insurance was made in a foreign state the statute of the forum providing for the recovery of damages and attorney's fees governs an action thereon (*Travelers' Ins. Co. v. Harris* [Tex. Civ. App.] 178 S. W. 816). But it has been held in New York that the Missouri statute is a penal statute, not enforceable in New York in an action on a policy made in Missouri, and an allegation in the complaint in an action on such policy setting up such statute will be stricken out on motion (*Wollman v. National Fire Ins. Co. of Hartford*, 131 N. Y. Supp. 335, 72 Misc. Rep. 477).

3886-3887. (b) Application to different kinds of insurance

3886 (b). The statutes imposing a penalty for failure to pay or delay in payment do not necessarily apply to all kinds of insurance companies. Exceptions exist, either by express provision or by implication.

The Arkansas statute has no application to a mutual insurance society. *United Assur. Ass'n v. Frederick* (Ark.) 195 S. W. 691. Nor to a fraternal beneficiary association. *Knights of Maccabees v. Anderson*, 104 Ark. 417, 148 S. W. 1016. Nor does it extend to a loss caused by cyclone, for which a cyclone insurance company is liable. *Home Fire Ins. Co. of McAlester, Okl., v. Stancell*, 94 Ark. 578, 127 S. W. 966.

The Missouri statute does not apply to a company operating on the assessment plan. *Morrow v. National Life Ass'n, of Des Moines, Iowa*, 184 Mo. App. 308, 168 S. W. 881. Nor to a fraternal insurance association. *Lindsay v. Hotchkiss*, 195 Mo. App. 563, 193 S. W. 902. The statute did not apply to indemnity insurance prior to the amendment thereof in 1911. *Mears Min. Co. v. Maryland Casualty Co.*, 162 Mo. App. 178, 144 S. W. 883.

The Texas statute does not apply to mutual benefit associations. *Sovereign Camp, Woodmen of the World, v. Carrington*, 90 S. W. 921, 41 Tex. Civ. App. 29. Nor to accident insurance policies. *Continental Casualty Co. v. Wade* (Tex. Civ. App.) 99 S. W. 877; *Lane v. General Accident Ins. Co.* (Tex. Civ. App.) 113 S. W. 324. It does not apply to a burglary insurance policy. *Ætna Accident & Liability Co. v. White* (Tex. Civ. App.) 177 S. W. 162. The statute does apply to a policy insuring live stock. *National Live Stock Ins. Co. v. Gomillion* (Tex. Civ. App.) 178 S. W. 1050, rehearing denied 179 S. W. 671. A casualty insurance company, carrying on business on the assessment or annual premium plan, under Rev. St. tit. 71, is not exempt from penalties. *International Travelers' Ass'n v. Branum* (Tex. Civ. App.) 169 S. W. 389. But see *International Travelers' Ass'n v. Votaw* (Tex. Civ. App.) 197 S. W. 237.

3887-3890. (c) Operation and effect of statutes

3887 (c). In the absence of statute, there is no liability for damages, beyond legal interest, where an insurance company fails to make payments as provided in the policy (*Baumgarten v. Alliance Assur. Co.* [C. C.] 159 Fed. 275). Under the statutes, the liability accrues in the case of an arbitrary refusal to pay or a vexatious delay not caused by a bona fide belief that a legal and meritorious defense exists.

Metropolitan Life Ins. Co. v. Shane, 98 Ark. 132, 135 S. W. 836; *Queen of Arkansas Ins. Co. v. Taylor*, 100 Ark. 9, 138 S. W. 990; *Tilley v. Camden Fire Ins. Ass'n*, 72 South. 709, 139 La. 985; *Cox v. Kansas City Life Ins. Co.*, 154 Mo. App. 464, 135 S. W. 1013; *Buchholz v. Metropolitan Life Ins. Co.*, 177 Mo. App. 633, 160 S. W. 573; *Gibson v. Pioneer Life Ins. Co.*, 168 S. W. 818, 181 Mo. App. 302; *St. Paul Fire & Marine Ins. Co. v. Kirkpatrick*, 129 Tenn. 55, 164 S. W. 1186; *First Texas State Ins. Co. v. Jiminez* (Tex. Civ. App.) 163 S. W. 656; *New York Life Ins. Co. v. Hagler* (Tex. Civ. App.) 169 S. W. 1064. But compare *National Life Ass'n v. Parsons* (Tex. Civ. App.) 170 S. W. 1038.

That the delay was in bad faith need not be shown by direct testimony, but may be inferred from the circumstances.

Rogers v. Connecticut Fire Ins. Co., 157 Mo. App. 671, 139 S. W. 265; *Stix v. Travelers' Indemnity Co. of Hartford, Conn.*, 175 Mo. App.

171, 157 S. W. 870; *Coscarella v. Metropolitan Life Ins. Co.*, 175 Mo. App. 130, 157 S. W. 873.

In determining whether an insurer should be held liable, the jury is not authorized to find that the refusal to pay was in bad faith, merely because, in their opinion, the claim should have been paid (*Georgia Life Ins. Co. v. McCranie*, 78 S. E. 1115, 12 Ga. App. 855). Bad faith, within the statutes, means a frivolous or unfounded refusal in law or in fact to comply with the policy, or to pay according to its terms and the conditions imposed by statute (*American Ins. Co. v. Bailey & Musgrove*, 65 S. E. 160, 6 Ga. App. 424). Bad faith implies a lack of good or moral intent as the motive for refusal to pay the loss (*Silliman v. International Life Ins. Co.*, 188 S. W. 273, 135 Tenn. 646). An insurer should not be penalized for resisting a claim, a material part of which it has good reason to believe is not due insured (*La Font v. Home Ins. Co.*, 193 Mo. App. 543, 182 S. W. 1029); or where the circumstances are such as to lead a prudent man in good faith to believe there was no liability (*Weston v. American Ins. Co.*, 177 S. W. 792, 191 Mo. App. 282). If the insurer acts in perfect good faith in refusing or delaying payment, it cannot be held liable to the penalty.

Kidd v. National Council of Junior Order of United American Mechanics of United States, 137 Tenn. 398, 193 S. W. 130; *New York Life Ins. Co. v. Veith* (Tex. Civ. App.) 192 S. W. 605.

But the burden is on the company of showing that such failure was in good faith. *St. Paul Fire & Marine Ins. Co. v. Kirkpatrick*, 129 Tenn. 55, 164 S. W. 1186.

So, if there are apparently legal grounds of forfeiture of the policy, the penalty will not be imposed for a refusal to pay based on such grounds.

Silliman v. International Life Ins. Co., 135 Tenn. 646, 188 S. W. 273; *Harowitz v. Concordia Fire Ins. Co.*, 168 S. W. 163, 129 Tenn. 691.

An insurer is not relieved of liability merely because it found in the proofs of death some justification for its contention that death did not result from an accident (*Fidelity & Casualty Co. v. Meyer*, 106 Ark. 91, 152 S. W. 995, 44 L. R. A. [N. S.] 493). While an insurance company cannot be penalized for resisting an unjust or excessive demand, the mere fact that insured was indebted to it on an independent contract which could be set off would not justify the resistance of payment on the plea of total nonliability and thereby relieve from the penalty fixed (*Queen of Arkansas Ins. Co. v. Bramlett*, 103 Ark. 1, 145 S. W. 541).

3888 (c). The insurer is not liable, where there are adverse claimants to the amount due under the policy, and it has merely refused to pay until the claimant entitled thereto has been determined in court.

Renfro v. Metropolitan Life Ins. Co., 148 Mo. App. 258, 129 S. W. 444; *Southwestern Ins. Co. v. Woods Nat. Bank* (Tex. Civ. App.) 107 S. W. 114; *New York Life Ins. Co. v. Veith* (Tex. Civ. App.) 192 S. W. 605.

3889 (c). The insurer cannot be held liable as for a refusal in bad faith, or vexatious delay, when the amount of the loss is materially less than the sum demanded.

Industrial Mut. Indemnity Co. v. Armstrong, 93 Ark. 84, 124 S. W. 236; *Pacific Mut. Life Ins. Co. v. Carter*, 123 S. W. 384, 92 Ark. 378; *Id.*, 92 Ark. 378, 124 S. W. 764; *Fidelity-Phenix Fire Ins. Co. v. Friedman*, 117 Ark. 71, 174 S. W. 215; *Queen Ins. Co. v. Peters*, 10 Ga. App. 289, 73 S. E. 536; *Hart v. Springfield Fire & Marine Ins. Co.*, 136 La. 114, 66 South. 558; *Fager v. Commercial Union Assur. Co.*, 189 Mo. App. 464, 176 S. W. 1064; *Glover v. Liverpool & London & Globe Ins. Co.*, 193 Mo. App. 489, 186 S. W. 583.

Where insurer denied all liability, insured could recover the penalties and attorney's fees provided by the statute, though original complaint, which was amended, prayed recovery of the sums named in policies instead of the actual amount of the loss. *Great Southern Fire Ins. Co. v. Burns & Billington*, 118 Ark. 22, 175 S. W. 1161, L. R. A. 1916B, 1252, Ann. Cas. 1917B, 497.

Under the Missouri statute (Acts 1911, pp. 282, 283), permitting an amount to be added for vexatious refusal to pay a fire policy, "not to exceed" 10 per cent. "of the loss" it was error to permit an allowance fixed at "10 per cent. on the amount of said policy." *City of Aurora v. Fireman's Fund Ins. Co.*, 180 Mo. App. 263, 165 S. W. 357.

If suit on the policy is prematurely brought, there can be no recovery of the statutory penalty for delay in paying losses (*St. Paul Fire & Marine Ins. Co. v. Womack*, 122 Ark. 396, 183 S. W. 203). Nor is there liability for penalty when the company had been garnished by a creditor of the assured before demand for payment of the loss (*Frank I. Abbott Lumber Co. v. Home Ins. Co.*, 72 South. 841, 140 La. 130). So, where plaintiff and defendant insurance company agreed to settle a loss for a specified amount, but before payment the company was garnished and failed to pay plaintiff, who sued for the loss, the defendant was not in default, and the penalty provided by the state should not have been assessed against it (*North State Fire Ins. Co. v. Dillard*, 115 S. W. 154, 88 Ark. 473).

The penalty is not recoverable, where demand for payment of a fire loss was not made until after a receiver for the insurer was appointed (*Massachusetts Bonding & Ins. Co. v. Home Life & Accident Co.*, 119 Ark. 102, 178 S. W. 314).

3890 (c). Generally a proper demand on the insurer for payment of the loss is a prerequisite to liability for penalty.

Mutual Reserve Fund Life Ass'n v. Tuchfeld, 159 Fed. 833, 86 C. C. A. 657; *De Rossett Hat Co. v. London Lancashire Fire Ins. Co.*, 183 S. W. 720, 134 Tenn. 199; *Mutual Life Ins. Co. v. Ford*, 61 Tex. Civ. App. 412, 130 S. W. 769, writs of error denied 103 Tex. 522, 131 S. W. 406; *Bankers' Reserve Life Co. v. Ellison* (Tex. Civ. App.) 135 S. W. 226; *American Nat. Ins. Co. v. Collins* (Tex. Civ. App.) 149 S. W. 554; *General Accident, Fire & Life Assur. Corp. v. Lacy* (Tex. Civ. App.) 151 S. W. 1170; *American Nat. Ins. Co. v. Hollingsworth* (Tex. Civ. App.) 189 S. W. 792; *International Travelers' Ass'n v. Powell* (Tex. Civ. App.) 196 S. W. 957. But see *Phoenix Ins. Co. of Hartford v. Fleenor*, 104 Ark. 119, 148 S. W. 650.

Where the attorneys of a beneficiary, under certain policies, after proofs of death, wrote defendant a letter directed to its home office, notifying it that the policies had been placed in their hands for collection, and that, as the statutes provided for attorney's fees and a penalty in case of suit, the attorneys thought it was fair to notify defendant and request payment in advance of litigation, such letter constituted a sufficient demand (*Penn Mut. Life Ins. Co. v. Maner*, 101 Tex. 553, 109 S. W. 1084). Where, on refusal to pay an indemnity under an accident and sick benefit policy, bill therefor and for the penalty provided by statute, was filed, and, additional losses thereafter accruing, amended and supplemental bills to recover them were filed, more than 60 days having elapsed before their filing, the filing of the bill was a sufficient demand, and the filing of the answers, denying liability, a refusal to pay, as regards right to recover penalty on the additional losses (*Thompson v. Interstate Life & Accident Co.*, 128 Tenn. 526, 162 S. W. 39).

The demand by the beneficiary for payment of a disputed claim on a life policy sufficient to entitle him to recover damages and attorney's fee may be made after bringing action on the policy. *Illinois Bankers' Life Ass'n v. Dodson* (Tex. Civ. App.) 189 S. W. 992.

An absolute refusal to pay has, however, been held in some cases to waive a demand.

Colley v. National Live Stock Ins. Co., 185 Mo. App. 616, 171 S. W. 663; *Ætna Life Ins. Co. of Hartford, Conn., v. Wimberly* (Tex. Civ. App.) 108 S. W. 778, judgment reversed 102 Tex. 46, 112 S. W. 1038, 23 L. R. A. (N. S.) 759, 132 Am. St. Rep. 852.

3890-3892. (d) Attorney's fees

3890 (d). In the absence of statute or condition in a policy authorizing the taxing of attorney's fees, such fees cannot be recovered in an action on an insurance policy (*St. Paul Fire & Marine Ins. Co. v. Peck*, 139 Pac. 117, 40 Okl. 396, reversing judgment on rehearing 130 Pac. 805, 37 Okl. 85).

But statutes allowing recovery of attorney's fees have been upheld in various states.

Maryland Casualty Co. v. Maloney, 119 Ark. 434, 178 S. W. 387, L. R. A. 1916A, 519; *Ætna Life Ins. Co. v. Taylor*, 128 Ark. 155, 193 S. W. 540; *Supreme Lodge K. P. v. Lipscomb*, 39 South. 637, 50 Fla. 406; *Springfield Fire & Marine Ins. Co. v. Fields* (Ind.) 113 N. E. 756; *Manhattan Life Ins. Co. v. Cohen* (Tex. Civ. App.) 139 S. W. 51; *North American Accident Ins. Co. v. Miller* (Tex. Civ. App.) 193 S. W. 750; *Shafer v. United States Casualty Co.*, 156 Pac. 861, 90 Wash. 687.

Laws Fla. 1895, p. 101, c. 4173, authorizing the recovery of reasonable attorney's fees against life and fire insurance companies in actions upon policies issued by them, is not repealed either directly or impliedly by Laws 1895, p. 143, c. 4380. *Supreme Lodge K. P. v. Lipscomb*, 39 South. 637, 50 Fla. 406.

The statute allowing a reasonable attorney's fee in an action on a fire policy means such a fee as would be reasonable to pay an attorney for prosecuting the action (*Merchants' Fire Ins. Co. v. McAdams*, 115 S. W. 175, 88 Ark. 550). Such a statute relates solely to a matter of procedure, and does not govern in an action in another state (*Kline Bros. & Co. v. Royal Ins. Co. (C. C.)* 192 Fed. 378).

The allowance of \$1,000 attorney's fee to the plaintiff in an action to recover on an accident policy for \$5,000 was within the discretion of the jury under Tenn. St. 1901, c. 141, p. 248, which authorizes such an allowance, not exceeding 25 per cent. of the liability on the policy, on a finding that the refusal to pay the loss was not in good faith. *New Amsterdam Casualty Co. v. Shields*, 155 Fed. 54, 85 C. C. A. 122.

3892 (d). The Kansas statute, providing that on recovery on an insurance policy the court shall allow the plaintiff a reasonable sum as attorney's fees, to be recovered as part of the costs, applies to all cases under policies insuring improvements on real property, without reference to whether the loss was total or partial (*Spring Garden Ins. Co. v. Amusement Syndicate Co.*, 178 Fed. 519, 102 C. C. A. 29). The statute applies to a judgment on a policy insuring against loss of rent occasioned by the destruction
(1642)

or injury of a building by fire (*Amusement Syndicate Co. v. Prussian Nat. Ins. Co.*, 116 Pac. 620, 85 Kan. 367, rehearing denied 85 Kan. 616, 118 Pac. 76). Under the Kansas statute (Gen. St. 1909, §§ 4262, 4263), the court, in rendering judgment against a fire insurance company on a Kansas policy, may allow a plaintiff a reasonable sum as attorney fee, though the policy relates to Oklahoma property (*Merriam Mortgage Co. v. St. Paul Fire & Marine Ins. Co.*, 155 Pac. 17, 97 Kan. 190). Attorneys' fees are allowed, under the Kansas statute as part of the costs (*Manhattan Wholesale Grocery Co. v. Westchester Fire Ins. Co.*, 140 Pac. 853, 92 Kan. 336).

A fire insurance company not shown to be authorized to do hail insurance business in state is not liable for an attorney's fee, though its answer admitted its authority to do business in state; there being no authority in Gen. St. 1915, § 5359, or other statutes allowing such fee. *Ring v. Phoenix Assur. Co., Limited, of London*, 100 Kan. 341, 164 Pac. 303.

A Nebraska statute (Rev. St. 1913, § 3212), allowing plaintiff reasonable attorney's fee in action to recover insurance, is applicable to contracts executed before its enactment (*Ward v. Bankers' Life Co.*, 157 N. W. 1017, 99 Neb. 812). Where a person entitled thereto brings an action on a contract of indemnity against a company doing an insurance business in the state, the court must allow plaintiff, as costs, an attorney's fee in addition to the amount of his recovery (*Nye-Schneider-Fowler Co. v. Bridges, Hoyer & Co.*, 155 N. W. 235, 98 Neb. 863, modifying judgment on rehearing 151 N. W. 942, 98 Neb. 27). Where the insured recovers on a policy under which the insurer has paid the amount of a mortgage on condition that it be subrogated to the mortgagee's rights, the insured is entitled to recover reasonable attorney's fees as costs (*Ætna Life Ins. Co. v. National Union Fire Ins. Co.*, 98 Neb. 446, 153 N. W. 553, L. R. A. 1916A, 784).

5. SUBROGATION

3893-3898. (a) Subrogation to insured's claim for damages

3893 (a). When an insurer pays the amount of the loss, it is subrogated, in a corresponding amount, to the insured's right of action against any other person responsible for the loss.

Svea Ins. Co. v. Vicksburg, S. & P. Ry. Co. (C. C.) 153 Fed. 774; *Sea Ins. Co. of Liverpool, England, v. Vicksburg, S. & P. Ry. Co.*, 159

(1643)

Fed. 676, 86 C. C. A. 544, 17 L. R. A. (N. S.) 925; Southern R. Co. v. Blunt & Ward (C. C.) 165 Fed. 258; Southern Ry. Co. v. Stone-wall Ins. Co., 163 Ala. 161, 50 South. 940; Coffman v. Louisville & N. R. Co., 184 Ala. 474, 63 South. 527; Aetna Ins. Co. v. Hann, 196 Ala. 234, 72 South. 48; Norwich Union Fire Ins. Society v. Bainbridge Grocery Co., 16 Ga. App. 432, 85 S. E. 622; Pittsburgh, C., C. & St. L. Ry. Co. v. German Ins. Co., 44 Ind. App. 268, 87 N. E. 995; Gerlach v. Grain Shippers' Mut. Fire Ins. Ass'n, 156 Iowa, 333, 136 N. W. 691; Maryland Casualty Co. v. Cherryvale Gas, Light & Power Co., 162 Pac. 313, 99 Kan. 563, L. R. A. 1917C, 487; Foster v. Missouri Pac. Ry. Co., 128 S. W. 36, 143 Mo. App. 547; Caledonia Ins. Co. v. Northern Pac. Ry. Co., 79 Pac. 544, 32 Mont. 46; Fire Ass'n of Philadelphia v. Schellenger, 83 N. J. Eq. 144, 90 Atl. 240; Fire Ass'n of Philadelphia v. Wells, 83 N. J. Eq. 140, 90 Atl. 244; Moore v. Taylor, 161 N. Y. Supp. 480, 175 App. Div. 37, reversing judgment (Sup.) 157 N. Y. Supp. 921; Cunningham v. Seaboard Air Line Ry. Co., 51 S. E. 1029, 139 N. C. 427, 2 L. R. A. (N. S.) 921; Fidelity Ins. Co. v. Atlantic Coast Line R. Co., 80 S. E. 1069, 165 N. C. 136; Powell & Powell v. Wake Water Co., 171 N. C. 290, 88 S. E. 426, Ann. Cas. 1917A, 1302; Fire Ass'n of Philadelphia v. La Grange & Lockhart Compress Co., 50 Tex. Civ. App. 172, 109 S. W. 1134; Ide v. Boston & M. R. R., 74 Atl. 401, 83 Vt. 66; Brown v. Vermont Mut. Fire Ins. Co., 74 Atl. 1061, 83 Vt. 161, 29 L. R. A. (N. S.) 698.

An insurance company which has paid for damages to an automobile injured through the negligence of a street car company is subrogated to all the rights of the owner of the automobile. *Allen & Ar-nink Auto Renting Co. v. United Traction Co.*, 154 N. Y. Supp. 934, 91 Misc. Rep. 531.

An insurance company, which has paid plaintiff for loss from theft of automobile, is subrogated to plaintiff's rights, and entitled to maintain action in name of plaintiff against bailee for negligence in permitting theft. *Stevens v. Stewart-Warner Speedometer Corp.*, 111 N. E. 771, 223 Mass. 44.

Subrogation as between insurers results by operation of law from the mere fact of payment of the loss, and does not depend on the voluntary act of the assured (*Brown v. Merchants' Marine Ins. Co.*, 152 Fed. 411, 81 C. C. A. 553).

Where a lease by a railroad company exempted it from liability to the lessee for fires, the lessee's insurer can obtain no rights against the lessee upon the principle of subrogation. *City of New York Ins. Co. v. Chicago, B. & Q. Ry. Co.*, 159 Iowa, 129, 140 N. W. 373.

3894 (a). If the owner of property may not recover for its destruction by fire, negligently set by a railroad company, the insurer of the property may not recover from the company (*Spring Gar-*
(1644))

den Ins. Co. v. International & G. N. R. Co. [Tex. Civ. App.] 131 S. W. 1147).

3898-3899. (b) Same—Assignment of rights to insurer

3898 (b). Where insurance policies provided for subrogation of the insurer to the rights of the insured in case of loss caused by the neglect of any person or corporation, and for assignment of the insured's claim against such person to the insurance company as its interest might appear, failure of the insurers to procure formal assignments of such rights did not deprive them of their right to compel payment of a judgment recovered by the insured against a railroad company for the negligent destruction of the insured property to them according to their interests (*Cary v. Phoenix Ins. Co.*, 83 Conn. 690, 78 Atl. 426). Under the terms of a fire policy requiring the insured, on payment of loss, to assign all rights to insurer, the insurer, on payment of loss, was subrogated to all rights of recovery by the insured against a railroad for loss (*J. Sidney Smith & Son v. Phoenix Ins. Co. of Hartford, Conn.*, 168 S. W. 831, 181 Mo. App. 455).

Where, upon payment of theft policy, the owner's interest, in a stolen automobile and a bill of sale of the car is assigned to the insurance company, the latter may maintain suit as claimant upon sequestration of the automobile. *Dawedoff v. Hooper* (Tex. Civ. App.) 190 S. W. 522.

An assignment of a claim for injuries to property by fire to the insurers of said property, who paid the loss, is not affected by any illegality that may have existed in the policy (*Babcock v. Canadian Northern Ry. Co.*, 117 Minn. 434, 136 N. W. 275, Ann. Cas. 1913D, 924; *Nilson v. Same*, 117 Minn. 528, 136 N. W. 280). A cargo insurer, under a policy which provides that the insurance shall not inure to the benefit of any carrier, and shall be null and void to the extent of any amount recoverable by the insured from any carrier, who has advanced to the insured the amount of a loss as a loan and taken an assignment of a claim for the loss against the carrier, may recover thereon, notwithstanding a provision of the bill of lading that the carrier shall have the benefit of any insurance effected by the owner (*Bradley v. Lehigh Valley R. Co.* (D. C.) 145 Fed. 569, affirmed 153 Fed. 350, 82 C. C. A. 426).

Under a tourist fire insurance policy providing that if the insured acquired any right of action he should assign it to the insurer upon payment of loss, the insurer, who did not show that a payment to insured by a hotel was for loss by fire, was not entitled to subroga-

tion. *Providence Washington Ins. Co. v. Youmans*, 143 N. Y. Supp. 941, 82 Misc. Rep. 433.

In *Freed v. American Fire Ins. Co.*, 90 Miss. 72, 43 South. 947, 11 L. R. A. (N. S.) 368, 122 Am. St. Rep. 307, the company, issuing a fire policy stipulating that it, in paying the loss caused by the act of another, should be subrogated to the rights of the insured, who should assign the rights, paid a loss caused by the wrongful destruction of the property, and the assured assigned his right of action against the wrongdoer. It was held that the company, under the subrogation agreement and assignment, was entitled to recover from the wrongdoer, though it was a member of an insurance trust, in violation of the anti-trust law of 1900 (Laws 1900, p. 125, c. 128); the subrogation agreement and assignment not relating to the business of the trust.

3899 (b). An insurer by paying the loss caused by the wrongful or negligent act of a third person thereby obtains an equitable assignment of insured's cause of action against such third person.

Gaugler v. Chicago, M. & P. S. Ry. Co. (D. C.) 197 Fed. 79; *New York, C. & St. L. Ry. Co. v. Roper*, 176 Ind. 497, 96 N. E. 468, 36 L. R. A. (N. S.) 952; *Pittsburgh, C., C. & St. L. Ry. Co. v. Home Ins. Co.*, 183 Ind. 355, 108 N. E. 525, Ann. Cas. 1918A, 828.

3899-3901. (c) Same—Effect of statutes fixing the liability of railroad companies

3899 (c). In Maine, Massachusetts, and New Hampshire it has been held that the statutes giving railroad companies the benefit of insurance on property destroyed by fire caused by such company take away the insurer's right of subrogation.

Farren v. Maine Cent. R. Co., 90 Atl. 497, 112 Me. 81, 52 L. R. A. (N. S.) 203; *New England Box Co. v. New York Cent. & H. R. R. Co.*, 97 N. E. 140, 210 Mass. 465; *Boston Ice Co. v. Boston & M. R. R.*, 77 N. H. 6, 86 Atl. 356, 45 L. R. A. (N. S.) 835, Ann. Cas. 1914A, 1090.

It has, however, been held in Indiana that the statute (*Burns' Ann. St.* 1914, § 5525a) making railroad companies liable for property destroyed by fires and giving them an insurable interest does not destroy the right of an insurer, who has paid for property destroyed, to subrogation (*Pittsburgh, C., C. & St. L. Ry. Co. v. Home Ins. Co.*, 183 Ind. 355, 108 N. E. 525, Ann. Cas. 1918a, 828).

It has been held in *British America Assur. Co. v. Colorado & Southern Ry. Co.*, 125 Pac. 508, 1135, 52 Colo. 589, 41 L. R. A. (N. S.) 1202, that the Colorado statute (*Sess. Laws* 1903, p. 404) providing that the liability imposed on every railroad company for

damages by fires set in the operation of its road shall not pass by assignment or subrogation to any insurance company issuing a policy on the property is inapplicable to a policy issued prior to the passage of the act; and if the policy stipulating for subrogation was issued prior to the statute, the mere fact that a loss occurred after the passage of the act did deprive insurer of the right to subrogation.

3901-3904. (d) Subrogation under marine policies

3901 (d). The right of a marine insurer to subrogation on payment of a loss through collision arises in equity from the nature of the contract, and no provision therefor in the policy is necessary (*Federal Ins. Co. v. Detroit Fire & Marine Ins. Co.*, 202 Fed. 648, 121 C. C. A. 58). The insurer of a cargo is not subrogated to the right of the owner to recover from the vessel for its loss unless it has paid the loss in full (*The Bodo* [D. C.] 156 Fed. 980). And the insurer of cargo who has taken an assignment of the claim of the assured against the vessel, must recover thereon, if at all, in the right of its assignor, and not by any contractual relation springing from the contract of insurance (*The Indrapura* [D. C.] 171 Fed. 929).

An insurer of freight advanced by a charterer, for which the premium was paid by the shipowner, is not entitled to recover from the shipowner the amount paid on a loss. *Fireman's Fund Ins. Co. v. Globe Nav. Co.*, 234 Fed. 273, 148 C. C. A. 175.

In *Merchants' & Miners' Transp. Co. v. Robinson-Baxter-Disosway Towing & Transp. Co.*, 191 Fed. 769, 113 C. C. A. 427, a towing company, owner of a tug and barges, procured an open policy of insurance "for the account of whom it may concern" on all lawful goods on board barges owned by it "against any and all risks and perils of fire and inland navigation and transportation, property of the assured or held by them in trust or custody as freighter, forwarder, bailee or common carrier." In accordance with the provisions of the policy, the company procured a certificate thereunder covering the cargo of one of its barges, "loss if any payable only to the order of" the owner of such cargo. Under an agreement between them, it paid the premium on the certificate, and added the amount to the freight. The certificate also contained the following: "It is agreed that upon the payment of any loss or damage the insurers are to be subrogated to all the rights of the assured under their bills of lading or transportation receipts to the

extent of such payments." While in tow of the company's tug the barge was sunk in a collision, and the cargo was a total loss; the tug and the second vessel both being held in fault for the collision. The insurer paid the loss to the cargo owner. It was held that with- in the meaning and intent of the certificate the cargo owner, which paid the premium, was the "assured," and that the insurer was entitled to be subrogated to its right of recovery as against both vessels.

3904-3905. (e) Subrogation in life and accident insurance

3904 (e). An accident insurance company is not entitled to sub- rogation to the claim for damages against the person or corporation negligently causing the injury.

Suttles v. Railway Mail Ass'n, 141 N. Y. Supp. 1024, 156 App. Div. 435;
Gatzweiler v. Milwaukee Electric Ry. & Light Co., 136 Wis. 34, 116
N. W. 633, 18 L. R. A. (N. S.) 211, 128 Am. St. Rep. 1057, 16 Ann.
Cas. 633.

3905-3908. (f) Subrogation in guaranty and indemnity insurance

3906 (f). Although a surety issues a bond for the protection of an employer against the defalcation, etc., of an employé, and the signature of the employé does not appear thereon, the company is subrogated to all the rights of action against such employé which the employer would have, and any action against the defaulter would be as well founded as though brought on his express agree- ment to repay, so that his failure to sign cannot be relied upon as a defense to an action on the bond, as the company will lose only a technical defense, which, if allowed to prevail, would mean the lending of the aid of the court to the perpetration of a fraud (*General Ry. Signal Co. v. Title Guaranty & Surety Co.*, 96 N. E. 734, 203 N. Y. 407, affirming judgment 123 N. Y. Supp. 1117, 139 App. Div. 925). Where, after defalcation of the treasurer of a grand lodge, the surety company paid the amount of the defalcation and took an assignment of the lodge's claim to money held by a bank, the surety company became subrogated to the rights of the lodge against the bank, unaffected by any subsequent transaction be- tween the bank and the lodge (*Bateman v. Sarbach*, 132 Pac. 169, 89 Kan. 488). But where an employer has recovered on a fidelity bond by reason of his employé appropriating his money deposited in a bank by raising checks, the surety company is not entitled to subrogation to any right of action of the employer against the

bank (*American Bonding Co. of Baltimore v. First Nat. Bank*, 85 S. W. 190, 27 Ky. Law Rep. 393).

3907' (f). The doctrine of subrogation is applicable to cases of employers' liability insurance (*Travelers' Ins. Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426, 107 C. C. A. 20, 36 L. R. A. [N. S.] 60). Under an indemnity insurance policy, providing that the insurer should be liable only for actual payments by the assured, an injured person, who obtained an unpaid judgment against the assured, a bankrupt corporation was not entitled to be subrogated to any right of action against the insurer under the policy (*Pfeiler v. Penn Allen Portland Cement Co.*, 87 Atl. 623, 240 Pa. 468).

3908-3910. (g) Amount of recovery

3908 (g). Where an insurance company paid insurance on a house burned through the negligence of a railroad, and the insured assigned his cause of action to it, the measure of recovery in an action by the insurer is the full amount of the damage sustained, regardless of what might have been recovered under the policy (*Connecticut Fire Ins. Co. v. Chester, P. & Ste. G. R. Co.*, 171 Mo. App. 70, 153 S. W. 544). But the measure of a railroad company's liability to an insurance company, subrogated to the rights of the owners of the insured property, which was destroyed by fire from the railroad engines, was the actual value of the destroyed property at the time of the fire and not the value stated in the insurance policy (*Globe & Rutgers Fire Ins. Co. v. Chicago & A. R. Co.*, 174 Mo. App. 542, 160 S. W. 907). Where an insurance company has paid the loss, the insured, who had recovered from the railroad, the negligence of which caused the loss was liable only for the surplus remaining in his hands after satisfying his loss and reasonable expenses in prosecuting an action against the railroad (*Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry. Co. of Texas* [Tex. Civ. App.] 175 S. W. 816).

The insurers of a cargo can only claim as subrogees of the insured interest, and have no greater right than their principal. *The Rensselaer*, 49 Ct. Cl. 1.

3910-3913. (h) Effect of right of subrogation of wrongdoers' payment to or release by insured

3911 (h). A railroad company's settlement of an action against it by insured does not preclude a subsequent recovery by the insurer which had paid part of fire loss suffered by the insured from

the company's negligence (*Martin v. Lehigh Valley R. Co.* [N. J.] 100 Atl. 345). And especially will the claim to subrogation not be barred by settlement between the tort-feasor and the owner for less than the liability, such settlement being only a defense pro tanto to the extent of the amount paid (*Fire Ass'n of Philadelphia v. Wells*, 84 N. J. Eq. 484, 94 Atl. 619, L. R. A. 1916A, 1280, Ann. Cas. 1917A, 1296, reversing decree 90 Atl. 244, 83 N. J. Eq. 140).

In an action by an express company on a policy of burglary or larceny insurance, insurer could not show plaintiff's settlement with the consignors whose property was stolen, since the benefit of any arrangement between the express company and the consignors whereby the company's liability was limited would not accrue to insurer (*Monahan v. Metropolitan Surety Co.* [Sup.] 114 N. Y. Supp. 862). Where one insured against damage to his automobile offered to assign his claim against the wrongdoer to an attorney for insurer, who refused for want of authority to act and because reasonable time had not elapsed to make investigations, and immediately afterwards insured filed a claim with the wrongdoer and settled, insurer did not waive his right to subrogation stipulated for in the policy (*Maryland Motor Car Ins. Co. v. Haggard* [Tex. Civ. App.] 168 S. W. 1011). If when plaintiff, the owner of buildings destroyed by fire from a railroad locomotive, executed a release to the railroad company, the company knew that plaintiff had received insurance thereon, which constituted an equitable assignment to that extent, and authorized the insurer to sue in the name of the plaintiff for its own benefit, the release did not bar the action (*Cushman & Rankin Co. v. Boston & M. R. R.*, 73 Atl. 1073, 82 Vt. 390, 18 Ann. Cas. 708).

3913-3914. (i) Enforcement of right against insured who has recovered from wrongdoer or released one primarily liable

3913 (i). An insurer is entitled to recover only the excess which insured has received from wrongdoer who caused the loss, after insured is fully compensated (*Shawnee Fire Ins. Co. v. Cosgrove*, 121 Pac. 488, 86 Kan. 374, affirming judgment on rehearing 116 Pac. 819; 85 Kan. 296, 41 L. R. A. [N. S.] 719). Where an insurer indemnifies insured, with full knowledge of an antecedent settlement between him and a third person causing the injury, the insurer cannot recover of the insured under the subrogation clause of the contract (*Weaver v. New Jersey Fidelity & Plate Glass Ins. Co.*, 56 Colo. 112, 136 Pac. 1180, 51 L. R. A. [N. S.] 414).

3915-3919. (j) Subrogation to rights of lienholders and mortgagees

3915 (j). When the mortgagee's interest is insured, the insurer on paying his claim is entitled to subrogation to the mortgagee's rights under the mortgage.

Hackett v. Cash, 196 Ala. 403, 72 South. 52; Leyden v. Lawrence, 85 Atl. 1134, 80 N. J. Eq. 550, affirming decree 81 Atl. 121, 79 N. J. Eq. 113; Stuyvesant Ins. Co. v. Reid, 88 S. E. 779, 171 N. C. 513; Milwaukee Mechanics' Ins. Co. v. Ramsey, 76 Or. 570, 149 Pac. 542, L. R. A. 1916A, 556, Ann. Cas. 1917B, 1132; Rawls v. American Central Ins. Co., 97 S. C. 189, 81 S. E. 505.

But the insurer is not entitled to be subrogated to the insured mortgagee's security, unless it pays him the whole of the mortgage debt (Carroll v. Hartford Fire Ins. Co., 154 Pac. 985, 28 Idaho, 466).

If the mortgage clause of a fire policy provides that, if any loss should be paid to the mortgagee, and if the insurer should claim that no liability existed as to the mortgagor, it should upon such payment be subrogated to the rights of the mortgagee to the extent of the payment and receive an assignment pro tanto of the mortgage security, to entitle the insurer to subrogation and relieve it from the obligation of applying the payment of the loss towards the satisfaction of the mortgage, it must prove facts which under the policy would entitle it to exemption from liability to the mortgagor.

Sun Ins. Office v. Heiderer, 44 Colo. 293, 99 Pac. 39; Ft. Scott Building & Loan Ass'n v. Palatine Ins. Co., 86 Pac. 142, 74 Kan. 272; Loewenstein v. Queen Ins. Co., 227 Mo. 100, 127 S. W. 72; Aetna Life Ins. Co. v. National Union Fire Ins. Co., 98 Neb. 446, 153 N. W. 553, L. R. A. 1916A, 784; O'Neil v. Franklin Fire Ins. Co. of Philadelphia, Pa., 145 N. Y. Supp. 432, 159 App. Div. 313; Molaka v. American Fire Ins. Co., 29 Pa. Super. Ct. 149; Gillespie v. Scottish Union & National Ins. Co., 61 W. Va. 169, 56 S. E. 213, 11 L. R. A. (N. S.) 143.

Where a fire policy on property of a mortgagor was made payable to the mortgagee as his interest might appear, and the insurer by separate agreement with the mortgagee agreed to pay the mortgagee notwithstanding it might deny liability to the assured, with the right under such agreement to be subrogated to the rights of the mortgagee against the assured, and pays the mortgagee, with a denial of liability to the assured, where it was in fact at the time liable to the insured, the payment to the mortgagee operated, and it was made, to extinguish pro tanto the debt of the assured to the

mortgagee, and in an action against assured on the note, transferred by the mortgagee to the insurance company in consideration of its payment, the assured may plead payment, notwithstanding a failure to furnish proofs of loss, or to commence suit on the policy within the time prescribed therein; the payment to the mortgagee having been made before expiration of such time (*Scottish Union & National Ins. Co. v. Colvard*, 135 Ga. 188, 68 S. E. 1097). If a house on land covered by security deed was insured, loss payable to the creditor, under a policy providing for subrogation pro tanto, insurer, paying creditor the amount of the debt and taking transfer and security deed, was subrogated to the creditor's rights to extent of the debt paid (*People's Bank of Mansfield v. Insurance Co. of North America*, 146 Ga. 514, 91 S. E. 684, L. R. A. 1917D, 868).

3919 (j). If a life insurance company pays the full amount of the policy to one holding an assignment of the same as security only, it is subrogated to all the rights of such assignee on the insurance money as against any claim therefor by a subsequent assignee of the policy, and is entitled to have the amount due the first assignee deducted from the claim of the assignee, which right exists without any formal assignment of his claims by the first assignee to the insurance company (*Ætna Life Ins. Co. v. Tremblay*, 65 Atl. 22, 101 Me. 585). The payment by an insurance company of a fire loss to one who took an assignment of the policy as security for the payment of a mechanic's lien on the property insured discharges the lien debt, and does not create an assignment of the creditor's debt to the insurance company; the policy having been taken out and paid for by the owner (*Fire Ass'n v. Patton*, 15 N. M. 304, 107 Pac. 679, 27 L. R. A. [N. S.] 420). If the parties to a fire policy understood that a provision that whenever the company paid the "mortgagee" any sum for loss and claimed that as to the mortgagor or owner, no liability existed, the company should be subrogated to the rights of the party receiving payment as to all collateral securities was intended to cover a mechanic's lien on the premises, the insurance company, upon paying such lienor's claim, became subrogated to her rights as against the owner (*Washington Fire Ins. Co. v. Cobb* [Tex. Civ. App.] 163 S. W. 608).

Where an owner of real estate subject to a deed of trust to secure a debt by his vendor sells the same reserving his vendor's lien, such conveyance being subject to such deed of trust, and the trust creditor purchases insurance in the owner's name without notice that he has conveyed his title, and the property is destroyed by

fire and the insurance company pays the whole trust debt, it is entitled to an assignment thereof and to be subrogated to the rights of the trust creditor (*Baker v. Monumental Savings & Loan Ass'n*, 52 S. E. 403, 58 W. Va. 408, 3 L. R. A. [N. S.] 79, 112 Am. St. Rep. 996).

3922-3926. (m) Action to enforce rights

3923 (m). In an action by an insurer against a railroad company to recover the amount of a fire loss paid by plaintiff, who took a subrogation contract from insured under the insurance policy, caused by fire negligently set by the railroad company, allegations in the petition that defendant had settled with the insured for the damages over and above the amount of the insurance policy, are not subject to exceptions, where the petition did not show that the settlement was made in compromise of the loss sustained (*Texas & N. O. R. Co. v. Commercial Union Assur. Co. of London, Eng.* [Tex. Civ. App.] 137 S. W. 401). In *Phoenix Ins. Co. v. Pacific Lumber Co.*, 1 Cal. App. 156, 81 Pac. 976, it appeared that after payment of a loss by a fire insurance company, the assured executed an assignment of the right of action against the person who originated the fire for damages, and the insurance company sued seeking, under the assignment and under the doctrine of subrogation, to recover a certain sum as actual damages. Pol. Code, § 3344, provides that every person negligently suffering any fire to extend beyond his own land is liable for treble damages. Code Civ. Proc. § 338, declares that an action upon a liability created by statute other than a penalty or forfeiture must be brought within three years, and that all actions upon a liability not founded upon an instrument in writing must be brought within two years. It was held that, as the insurance company was limited by the assignment, the doctrine of subrogation, and its complaint, to the recovery of actual damages, the action was one upon a liability not founded upon an instrument in writing within section 338, so that it was barred after two years.

Where insured instituted suit in her own behalf against a railroad company to recover damages for fire in so far as such damages exceeded the amount of insurance collected by her on the property destroyed, the insurer being entitled to subrogation to her claim against the railroad to the extent of the insurance paid, was bound to assert such claim by motion to be made a party to the suit, and to compel the amendment of the complaint so as to plead

the facts on which its equity of subrogation depended (*Ex parte Phoenix Ins. Co.*, 68 S. E. 21, 86 S. C. 52, reversing judgment on rehearing, 67 S. E. 134).

3926-3931. (n) Same—Parties

3927 (n). It was held in *Powell & Powell v. Wake Water Co.*, 88 S. E. 426, 171 N. C. 290, Ann. Cas. 1917A, 1302, that if the insurance paid equals or exceeds the loss, a subrogated insurer may in his own name sue the wrongdoer; but, if it is less than the loss, in the name of the insured; while, if the insured has settled with the wrongdoer for the difference between the insurance and the total loss, the insurer may then sue in his own name. So it was held in Oklahoma that, where the value of property wrongfully destroyed by fire exceeds the amount paid by the insurance company, an action against the wrongdoer must be brought by the owner, in his own name, to recover the full amount of the loss such owner acting as trustee for the insurance company (*Kansas City, M. & O. Ry. Co. v. Shutt*, 24 Okl. 96, 104 Pac. 51, 138 Am. St. Rep. 870, 20 Ann. Cas. 255); and in Louisiana it is said that, where the owner has been paid part of his loss by an insurer, an action against the wrongdoer for the value of the property is properly brought in the name of insured, and the insurer is not a necessary party; the wrongful act being indivisible and giving rise to but one cause of action (*Hanton v. New Orleans & C. R., Light & Power Co.*, 50 South. 544, 124 La. 562). The same rule has been asserted in Kansas (*Shawnee Fire Ins. Co. v. Cosgrove*, 85 Kan. 296, 116 Pac. 819, 41 L. R. A. [N. S.] 719); but it is also held that the rule does not apply where assured, after settling with the wrongdoer out of court, arbitrarily refuses to sue (*Grain Dealers' Nat. Mut. Fire Ins. Co. v. Missouri, K. & T. Ry. Co.*, 157 Pac. 1187, 98 Kan. 344).

An insured, receiving the amount of loss, would hold his claim against the third party liable therefor for the insurer, and might sue therefor in his own name for the insurer's use, or the insurer might sue in its name for its own use (*Ætna Ins. Co. v. Hann*, 196 Ala. 234, 72 South. 48).

Under the New York Code (Code Civ. Proc. § 446), authorizing all persons having an interest in the subject of an action to be joined as plaintiffs, a property owner and insurance companies which have paid their proportions of the loss on the property and have taken assignments of the property owner's cause of action up to the amount paid by them, are properly joined as plaintiffs in

an action against the wrongdoer for negligently setting fire to the property (*Jacobs v. New York Cent. & H. R. R. Co.*, 94 N. Y. Supp. 954, 107 App. Div. 134, affirmed 79 N. E. 1108, 186 N. Y. 586).

It seems to be the rule in Illinois that suit must be brought in the name of the insured for the use of the insurer (*Pontiac Mut. County Fire & Lightning Ins. Co. v. Sheibley*, 279 Ill. 118, 116 N. E. 644)

(1655)

XXIX. REINSURANCE

1. SPECIAL MATTERS RELATING TO REINSURANCE CONTRACTS

3932-3934. (a) Risks covered

3932 (a). The term "double insurance" means an insurance of the same interest, and is entirely different from "reinsurance," which is a contract of indemnity to the person or corporation reinsured for the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured (*Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co.* [C. C.] 166 Fed. 548). In *Firemen's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co.*, 2 Cal. App. 690, 84 Pac. 253, a reinsurance policy insured plaintiffs "against all direct loss or damage by fire * * * to the following described property, while located and contained as described herein, and not elsewhere," followed by a clause, "two thousand dollars on their interest as insurers under their policy," issued to K., covering "\$7,000 on 14,000 bushels of wheat while contained in warehouse of Salem Flouring Mills Company, at Salem, Marion county, Oregon. Property known and marked as bulk wheat." It was held that such policy was on the wheat described, and not on the risk assumed by the reinsured.

Under contract by defendant insuring for five years two-tenths of plaintiff's risk under reinsurance of excess of loss by theft above 250,000 francs, defendant held not liable where at the end of three years, when its reinsurance was canceled by consent, embezzlements did not aggregate 250,000 francs, though they subsequently exceeded that amount (*United States Fidelity & Guaranty Co. v. French Mut. Gen. Society of Mut. Ins. against Theft*, 212 Fed. 620, 129 C. C. A. 156, reversing judgment [D. C.] 203 Fed. 558).

In an action by one fire insurance company against another to recover a fire loss, under a contract of reinsurance giving to the defendant the right to cancel "any individual risk for cause," an affidavit of defense is insufficient which merely avers that the defendant had canceled the individual risk in question "for cause." *Delaware Underwriters of West Chester Fire Ins. Co. v. National Union Fire Ins. Co.*, 60 Pa. Super. Ct. 325.

3934-3941. (b) Extent of liability

3934 (b). Though the liability of a reinsurer depends on the terms of the policy of reinsurance, and not on the question of

whether insured suffered a legal loss on the original policy (*Fireman's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co.*, 84 Pac. 253, 2 Cal. App. 690). The original insurer cannot generally, by adjusting a loss for which it was not liable, subject the reinsurer to its share of such loss (*Royal Ins. Co. of Liverpool, Eng., v. Caledonian Ins. Co. of Edinburgh, Scotland*, 20 Cal. App. 504, 129 Pac. 597). If the insurer be not liable, he cannot recover of the reinsurer (*Exchange Mut. Fire Ins. Co. v. Consolidated Mut. Fire Ins. Co.*, 46 Pa. Super. Ct. 601). The liability of a reinsurer must be determined by the law of the state wherein the contract of reinsurance upon which the beneficiary relies, was made (*Garretson v. Western Life Indemnity Co.*, 175 Iowa, 172, 157 N. W. 160).

A company is liable on a contract taking over the business of another company and assuming its debts for a loss which accrued shortly before the reinsurance. *Runbeck v. Farmers' & Bankers' Life Ins. Co.*, 150 Pac. 586, 96 Kan. 186.

Under an agreement for reinsurance, defendant must pay default in guardianship bond issued by surety company, for which no notice of claim had been filed before date named in contract of reinsurance, and which had not accrued before contract was entered into. *Turner v. National Surety Co.*, 163 N. Y. Supp. 1, 176 App. Div. 219.

3935 (b). Where a contract of reinsurance provided that the loss, if any, should be payable "pro rata" at the same time and in the same manner as by said companies, means according to that proportion which the amount of the reinsurance bears to the original insurance; and where the amount of original insurance is \$10,000 and the reinsurance is \$5,000 the insurer is liable for one-half of the loss, and where the original insurance is subsequently reduced to \$2,000 the insurer does not thereby become liable for the whole amount of any loss (*Home Ins. Co. v. Continental Ins. Co.*, 73 N. E. 65, 180 N. Y. 389, 105 Am. St. Rep. 772, affirming 89 App. Div. 1, 85 N. Y. Supp. 262).

The liability of the reinsurer to pay the amount of the loss to the extent of the reinsurance is not affected by the insolvency of the insurer.

Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co. (C. C.) 166 Fed. 548; *Allemania Fire Ins. Co. of Pittsburg v. Fireman's Ins. Co. of Baltimore*, 28 App. D. C. 330, 14 L. R. A. (N. S.) 1049.

3937 (b). It is not a condition precedent to the right to proceed against the reinsurer that the reinsured should have paid the loss to the original insured.

Allemannia Fire Ins. Co. of Pittsburg v. Fireman's Ins. Co. of Baltimore, 28 App. D. C. 330, 14 L. R. A. (N. S.) 1049, affirmed in 28 Sup. Ct. 544, 209 U. S. 326, 52 L. Ed. 815, 14 Ann. Cas. 948; *French Mut. General Society of Mutual Insurance Against Theft v. United States Fidelity & Guaranty Co. of Baltimore City* (D. C.) 203 Fed. 558.

3941-3942. (c) Defenses open to reinsurer

3941 (c). The insurer may make the same defenses as are open to the original insurer. Thus, where the rights of the insured have been forfeited by reason of an alienation of the property, such defense is open to the reinsurer (*Flint v. Westchester Fire Ins. Co.*, 207 Mass. 337, 93 N. E. 646). But an answer by reinsurer alleging adjustment of loss by original insurer without notice to it is insufficient, where injury therefrom was not shown (*Royal Ins. Co. of Liverpool, Eng., v. Caledonian Ins. Co. of Edinburgh, Scotland*, 20 Cal. App. 504, 129 Pac. 597).

In an action on a life policy against a reinsurer, defendant could not assert a defense which did not exist in favor of the original insurer (*Federal Life Ins. Co. v. Kerr* [Ind. App.] 85 N. E. 796, denying rehearing in 82 N. E. 943). In this case the liability of the original insurer upon its contract with insured became absolute after the expiration of two years. It was held that the original insurer could not deprive insured of his vested contract interest by contracting to reinsure his risk with the provision that the liability of the reinsurer should be conditioned upon the truth of every statement, representation, and warranty contained in the application.

Where defendant insurance company assumed obligations of beneficial society in which decedent was member, it succeeded to its rights and privileges under contract, and was liable only to extent that society would have been liable. *Jones v. Commonwealth Casualty Co.*, 255 Pa. 566, 100 Atl. 450.

Where, in a contract of an association assuming liability of a fraternal organization on an insurance certificate, the association agreed to pay the full benefit of the amount provided for in the certificate at assured's death, whether such benefit was provided for under its own laws or not, in an action to recover on the certificate, the association could not claim the benefit of a provision in its by-

laws providing for a deduction in the final payment in case of death within a certain time, where it was not shown that the constitution or by-laws of the original insurer contained any such provision (*National Annuity Ass'n v. Carter*, 132 S. W. 633, 96 Ark. 495).

3942-3943. (d) Rights of original insured

3942 (d). Reinsurance is a contract by which one insurer agrees to protect another from a risk already assumed, and the contract, unless it so provides, creates no privity between the reinsurer and the original insured.

North British & Mercantile Ins. Co. v. Speer, 66 S. E. 815, 7 Ga. App. 330; *Vial v. Norwich Union Fire Ins. Society*, 100 N. E. 929, 257 Ill. 355, 44 L. R. A. (N. S.) 317, Ann. Cas. 1914A, 1141, affirming 172 Ill. App. 134; *Moseley v. Liverpool & London & Globe Ins. Co.*, 104 Miss. 326, 61 South. 428; *Southwestern Surety Ins. Co. v. Stein Double Cushion Tire Co.* (Tex. Civ. App.) 180 S. W. 1165. But see *Cass County v. Mercantile Town Mut. Ins. Co.*, 188 Mo. 1, 86 S. W. 237, holding that where a mutual insurance company reinsured in another company, and the contracts were independent, when a loss occurred which was covered by both policies, suits could be instituted at once on both policies by the holders, unless otherwise provided by the policies, and the liability of the company issuing the reinsurance was not restricted to a pro rata of the amount paid by the other company.

A reinsurer is liable either under its reinsurance contract or a subsequent agreement with the assured, who may accept the reinsurance, or sue the original company for damages. *Garretson v. Western Life Indemnity Co.*, 175 Iowa, 172, 157 N. W. 160.

3943 (d). A not uncommon form of contract is where a life insurance company takes over and assumes the contracts of another life insurance company. This sort of contract is generally called a contract of reinsurance, though it is not strictly reinsurance. However, if the reinsurer has assumed and guaranteed the policies of the other company, the contract is an undertaking to discharge the obligations of the reinsured company to its policy holders under which the original insured may sue the reinsurer.

Weil v. Federal Life Ins. Co., 106 N. E. 246, 264 Ill. 425, Ann. Cas. 1915D, 974, affirming 182 Ill. App. 322; *Federal Life Ins. Co. v. Risinger*, 46 Ind. App. 146, 91 N. E. 533; *Wall v. Continental Casualty Co.*, 86 S. W. 491, 111 Mo. App. 504; *Cosmopolitan Life Ins. Co. v. Koegel*, 52 S. E. 166, 104 Va. 619. See, also, *Bolles v. Mutual Reserve Fund Life Ass'n*, 77 N. E. 198, 220 Ill. 400, reversing judgment *Mutual Reserve Fund Life Ass'n v. Bolles*, 120 Ill. App. 242; *Mischler v. Mutual Reserve Fund Life Ass'n*, 77 N. E. 202, 220

Ill. 451, reversing judgment **Mutual Reserve Fund Life Ass'n v. Mischler**, 120 Ill. App. 251.

Where one insurance company assigns a policy to another, the reinsurance contract operates only between the insurer and reinsurer, and creates no privity of contract between the reinsurer and the person insured, unless there is a provision in the contract whereby the reinsuring company assumes and agrees to perform the contracts of the insuring company. **Bradley v. Federal Life Ins. Co.**, 178 Ill. App. 524.

An offer of an insurance company to issue new policies to policy holders of an insolvent company is limited to such holders personally, and could not be accepted for an insane policy holder by his guardian. **Robinson v. Postal Life Ins. Co.**, 218 Fed. 347, 134 C. C. A. 155.

A surety company entering into reinsurance agreement with surety company which had issued maintenance bond and assuming liabilities of such company became directly liable to policy holder, as it was competent for it to do (**Meyer v. National Surety Co.** [N. J.] 100 Atl. 164). A contract whereby an insurance company assumed to pay an employer's liability policy issued by another company is a contract for insured's benefit, rendering it liable to insured (**Southern States Fire Ins. Co. v. Hand-Jordan Co.**, 112 Miss. 565, 73 South. 578).

(1660)

XXX. SPECIAL MATTERS RELATING TO THE REMEDY**1. JURISDICTION AND VENUE****3944-3946. (a) Jurisdiction in general**

3945 (a). Under the Indiana statute (Burns' Ann. St. 1901, § 4918a), the circuit court has jurisdiction of actions on an insurance policy, although the policy was executed in another state (United States Health & Accident Ins. Co. v. Clark, 41 Ind. App. 345, 83 N. E. 760). So, too, a nonresident may sue a foreign casualty company legally doing business in the state on a policy written outside the state, though the accident and death both occurred outside the state, if proper service is had (Patton v. Continental Casualty Co., 119 Tenn. 364, 104 S. W. 305).

A foreign insurance company is doing business within the state, so far as the question of the power of a federal court, sitting in that state, to obtain jurisdiction over such corporation, is concerned, where, under the terms of its policies covering property in that state, it sends its agents there to adjust losses (Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 25 Sup. Ct. 483, 197 U. S. 407, 49 L. Ed. 810). Under the Indiana statute (Burns' Ann. St. 1908, § 4798), making foreign insurance companies, doing business in the state, subject to the process of the courts of the state in any action founded on any claim by any citizen, the courts have jurisdiction of an action on an account stated by a citizen against a foreign insurance company doing business in the state (United States Health & Accident Ins. Co. v. Batt, 49 Ind. App. 277, 97 N. E. 195). And where a life insurance company incorporated under the laws of one state has subjected itself to suit in another state in which it does business, has agreed in accordance with its laws that service of process may be made upon the insurance commissioner of such state, and has issued policies to its citizens, such a policy holder has the right to maintain a suit against it in his own state in either the state or federal courts for a construction of his policy and a determination of his rights thereunder and the legality of acts of the company as bearing thereon, and such right may not be denied on the ground that such a suit is an interference with the internal management of a foreign corporation (Castagnino v. Mutual Reserve Fund Life Ass'n, 157 Fed. 29, 84

C. C. A. 533). So, too, in Missouri, an action on a life policy is transitory, and may be instituted anywhere that service can be had on insurer; and under Rev. St. 1909, § 7043, an action against a foreign insurance company doing business in the state may be brought in any court of the state (*Hartung v. Northwestern Mut. Life Ins. Co.*, 174 Mo. App. 289, 156 S. W. 980).

Where a mortgagor is a resident of the state, he can maintain an action on an insurance policy on the property, though the mortgagee, whom he makes a party defendant, and the insurance company are nonresidents, and the insurance policy was taken out without the state (*Lewis v. Guardian Fire & Life Assur. Co., Limited*, 74 N. E. 224, 181 N. Y. 392, 106 Am. St. Rep. 557, affirming 93 App. Div. 157, 87 N. Y. Supp. 525).

Since an action on a mutual benefit certificate is one in personam, and not in rem, the location of the beneficiary fund is immaterial on the question of the court's jurisdiction. *Hindorff v. Sovereign Camp of Woodmen of the World*, 150 Iowa, 185, 129 N. W. 831.

3946 (a). The fact that a life insurance policy gives the beneficiaries the option to receive payment in bonds or in cash does not give them the right to a decree for specific performance by delivery of the bonds, so as to render a suit on the policy one of equitable cognizance, nor give the insurer the right to sue in equity for cancellation of the policy after the death of the insured (*Mutual Life Ins. Co. of New York v. Griesa* [C. C.] 156 Fed. 398).

Sums paid out to avert a loss, which, if it had occurred, would have fallen upon the underwriter, may fairly be regarded as in the nature of salvage expenses, and may be brought within the meaning of the sue and labor clause of a marine policy; and the fact that there were expenses incurred to save the cargo alone, and that these expenses were incurred on land, cannot defeat the jurisdiction of a court of admiralty of a suit for their recovery under the policy (*St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co.*, 157 Fed. 625, 87 C. C. A. 14, 14 L. R. A. [N. S.] 1161).

A federal court sitting in Ohio would not take jurisdiction of a bill by residents of that state against a Wisconsin life insurance company to compel an accounting of the corporation's semitontine funds, and for other relief involving an interference with the internal management of the corporation, but complainants would be required to institute such suit in the state of the corporation's domicile (*Eberhard v. Northwestern Mut. Life Ins. Co.* [D. C.] 210 Fed. 520).

3949-3954. (d) Venue

3949 (d). In several cases it has been held that an action may be brought in the county where the company is domiciled.

Porter v. State Mut. Life Ins. Co., 89 S. E. 609, 145 Ga. 543; *Nixon & Danforth v. Piedmont Mut. Ins. Co.*, 54 S. E. 657, 74 S. C. 438; *McGrath v. Piedmont Mut. Ins. Co.*, 54 S. E. 218, 74 S. C. 69.

The Louisiana statute (Act No. 22 of 1894), providing that on policies of "life, fire, and marine insurance" suit may be brought either at the domicile of the insurance company or where the loss occurred, does not include accident policies, and a suit thereon must be brought at the domicile of the defendant, and not where the loss occurred (*Nolan v. New Orleans Casualty Co.*, 61 South. 386, 132 La. 315). However, a provision in an underwriters' policy, that a judgment against any one of the underwriters should be decisive as to the claims against all, does not subject the several underwriters to the jurisdiction of courts other than those of their domiciles, or to obligate them to subject themselves to the jurisdiction of such courts (*Reynolds v. Globe Fire Underwriters of St. Louis, Mo.*, 64 South. 396, 134 La. 515).

Under the Missouri statute (Rev. St. 1909, § 7042), providing for service on foreign insurance corporations, it has been held that for the purpose of venue a foreign insurance corporation authorized to do business in the state was a resident of each county thereof, and service of summons, in an action brought in one county, on the superintendent of insurance at his official residence in another county was good.

Curfman v. Fidelity & Deposit Co. of Maryland, 167 Mo. App. 507, 152 S. W. 126; *Renshaw v. Same*, 152 S. W. 129.

In Oklahoma, an action against a nonresident insurance company is properly brought in the county of the plaintiff's residence (*Haynes v. City Nat. Bank of Lawton*, 121 Pac. 182, 30 Okl. 614); or in the county where the cause of action or some part thereof arose (*Oklahoma Fire Ins. Co. v. Kimple* [Okl.] 156 Pac. 300).

In view of Rev. St. Tex. art. 4744, action is properly brought in county of policy holder's residence, notwithstanding contrary provision of certificate. *International Travelers' Ass'n v. Powell* (Tex. Civ. App.) 196 S. W. 957. Under the provisions of *Vernon's Sayles' Ann. Civ. St. 1914*, art. 4798, article 4744 does not apply to mutual accident insurance companies, so that such company could agree to be sued only in county named in certificate. *International Travelers' Ass'n v. Votaw* (Tex. Civ. App.) 197 S. W. 237.

Under the Georgia statute (Civ. Code 1910, § 2563), a nonresident insurance company may be sued in the county where it had an agency when contract was made, though it was abandoned at time of suit.

Jefferson Fire Ins. Co. v. Brackin, 79 S. E. 467, 140 Ga. 637; *Peters v. Queen Ins. Co.*, 137 Ga. 440, 73 S. E. 664.

Since the passage of Civ. Code 1910, § 2563, the venue of a suit against an insurance company is determined by the fact of the company having an "agent" or place of business in the county. *Great Eastern Casualty Co. v. Haynie*, 16 Ga. App. 643, 85 S. E. 938.

The Michigan statute (Comp. Laws 1897, § 10015 et seq.), requiring a foreign insurance company, as a condition to doing business in the state, to file a stipulation agreeing that any legal process affecting it may be served on the insurance commissioner, does not change the rule requiring suit to be brought in the county where one of the parties resides, so as to authorize suit against a company in a county of which plaintiff is a nonresident though service is made on the commissioner (*Smith v. Provident Sav. Life Assur. Society*, 123 N. W. 588, 159 Mich. 167). The Washington statute (Laws 1901, p. 360, c. 174, § 6) provides that foreign beneficiary societies shall appoint the commissioner of insurance their lawful attorney, upon whom all process in actions against them must be served. It was held that an action against such a society need not be brought in the county where the commissioner of insurance resides; *Ballinger's Ann. Codes & St. § 4854*, requiring an action against a corporation to be brought in any county where the corporation has an office for business, or any person resides on whom process may be served, not being applicable (*Butler v. Supreme Court I. O. F.*, 48 Wash. 147, 93 Pac. 66).

Under Insurance Code, § 131½, an action on a policy for loss of personal property must be brought in the county in which the policy was delivered and the property was located. *Davis-Kaser Co. v. Colonial Fire Underwriters' Ins. Co. (Agency) of Hartford, Conn.*, 157 Pac. 870, 91 Wash. 383.

3951 (d). In Iowa the company may be sued in the county where the contract was made, but the rule does not apply to a contract of reinsurance between two insurance companies (*Petite v. Atlas Ins. Co.*, 142 Iowa, 265, 120 N. W. 642).

3952 (d). In some states the company may be sued in the county where the cause of action arose. A surety company is within the Nebraska statute (*Sullivan v. Radjuweit*, 82 Neb. 657, 118 N.

W. 571). It has also been held in Nebraska that an action against a company may be brought in any county where the cause of action arose and summons issued to and served in any other county, though it is but the single defendant (*Carter v. Bankers' Life Ins. Co.*, 120 N. W. 455, 83 Neb. 810).

In the case of life or accident insurance the cause of action is held to arise in the county where the insured died or was injured.

Jenkins v. Hawkeye Commercial Men's Ass'n, 147 Iowa, 113, 124 N. W. 199, 30 L. R. A. (N. S.) 1181; *Cole v. Mutual Life Ins. Co. of New York*, 56 South. 645, 129 La. 704, Ann. Cas. 1913B, 748; *Hildebrand v. United Artisans*, 79 Pac. 347, 46 Or. 134, 114 Am. St. Rep. 852; *Eaton v. International Travelers' Ass'n* (Tex. Civ. App.) 136 S. W. 817; *International Travelers' Ass'n v. Branum* (Tex. Civ. App.) 169 S. W. 389.

Under Kirby's Dig. Ark. § 4377, action on an insurance certificate issued by a fraternal order and against sureties on order's bond may be maintained in county where member died, though it was not the county of residence of sureties or home office of order. *Mutual Aid Union v. Blacknall*, 123 Ark. 377, 185 S. W. 465.

Under the Wisconsin statute (St. 1915, § 2619, subd. 5), fixing venue of actions against domestic corporation, a cause of action against an insurance company on a life policy does not arise in county from which proofs of death were mailed and in which administratrix was appointed. *State ex rel. Northwestern Mut. Life Ins. Co. v. Circuit Court of Waushara County*, 165 Wis. 387, 162 N. W. 436.

Under Code Miss. 1906, § 2598, a fraternal benefit association is a life insurance company, which may be sued in the county of beneficiary's residence, under sections 687 and 709. *Masonic Benefit Ass'n of Stringer Grand Lodge of Mississippi v. Dotson*, 111 Miss. 60, 71 South. 266.

The Louisiana statute (Act No. 44 of 1910) providing that an insurance company may be sued in the parish "where the loss occurred," applies only to "life, fire, or marine" policies, and not to a policy indemnifying an employer for damages recovered by an employé (*Smythe v. Home Life & Accident Ins. Co.*, 64 South. 142, 134 La. 368). It has been held in Missouri that under Rev. St. 1899, § 8092 (Ann. St. 1906, p. 3843), providing that a suit on a town mutual insurance policy may be brought in the county where the cause originated, or where the company has its principal office, an action on such a policy is properly brought in the county where the property insured was located (*Wicecarver v. Mercantile Town Mut. Ins. Co.*, 137 Mo. App. 247, 117 S. W. 698). Under the Iowa statute (Code 1897, § 3499) providing that insurance companies

may be sued in the county in which a loss occurred, an action against a county mutual fire insurance company consenting to the removal of property insured to another county where it accepted assessments on the policy, and where a loss occurred, may be brought therein (*Kesler v. Farmers' Mut. Fire & Lightning Ins. Ass'n*, 160 Iowa, 374, 141 N. W. 954). The Arkansas statute (*Kirby's Dig. § 4376*) provides that the sureties on the bond of an insurance company may be made parties defendant, and final judgment rendered against them at the same time, and in like manner, as against the company. Section 4377 authorizes a suit on a fire insurance policy to be brought in the county where the loss occurred. It was held that sureties on an insurance company's bond, joined with the company in a suit on the policy, may be sued in the county in which the loss occurred; section 6072, requiring actions not specified in the foregoing sections to be brought in the county in which defendant, or one of several defendants, resides or is summoned, not applying (*Neimeyer v. Claiborne*, 87 Ark. 72, 112 S. W. 387).

Code Civ. Proc. S. D. § 99, subd. 5, re-enacted in 1903, as to venue of actions on insurance, is not inapplicable to a policy against dishonesty of employes, because, when first enacted in 1887, such companies were not doing business in the state. *Farmers' State Bank of Reliance v. Equitable Fidelity & Title Guaranty Co.*, 152 N. W. 512, 35 S. D. 385.

2. LIMITATION OF ACTIONS

3954-3959. (a) Premature action

3955 (a). Where the policy contains a provision that no action at law should be maintainable before the expiration of a designated period after the date on which the policy requires proof of loss to be filed, the insured is bound thereby, and an action brought before such period has expired is premature.

St. Paul Fire & Marine Ins. Co. v. Womack, 122 Ark. 396, 183 S. W. 203; *Borger v. Connecticut Fire Ins. Co.*, 142 Pac. 115, 24 Cal. App. 696; *Lagudis v. London Assur. Corp.*, 156 Pac. 68, 29 Cal. App. 482; *Styles v. American Home Ins. Co.*, 146 Ga. 92, 90 S. E. 718; *Arrison v. Supreme Council of Mystic Toilers*, 105 N. W. 580, 129 Iowa, 303; *Salmon v. Farm Property Mut. Ins. Ass'n of Iowa*, 168 Iowa, 521, 150 N. W. 680; *Thomson v. American Fidelity Co.*, 102 N. E. 699, 215 Mass. 460; *Williams v. Western Travelers' Accident Ass'n*, 97 Neb. 352, 149 N. W. 822; *Davis v. United States Health*

& Accident Ins. Co., 73 N. H. 425, 62 Atl. 728; *Dixon v. State Mut. Ins. Co.*, 34 Okl. 624, 126 Pac. 794, L. R. A. 1915F, 1210.

In an action on a policy providing that the insurer shall not be liable until 60 days after notice and proof of loss, where a suit is brought within 60 days after such proof, and after the 60 days plaintiff amends his petition, and the insurer files an answer, the action is maintainable on the amended petition. *Oklahoma Fire Ins. Co. v. Mundel*, 141 Pac. 415, 42 Okl. 270. And to the same effect, see *Western & Reciprocal Underwriters' Exchange v. Coon*, 38 Okl. 453, 134 Pac. 22.

The waiver of proofs of loss has the same effect as the filing of proofs of loss, and a suit commenced more than 60 days after such waiver is not premature, although proofs of loss were made as a matter of precaution less than 60 days before suit. *Young v. Pennsylvania Fire Ins. Co.*, 269 Mo. 1, 187 S. W. 856.

Where burglary policy provided no suit should be brought until three months after particulars of loss had been furnished, particulars were furnished January 9th, and company notified disclaimed liability, making no objection to proofs, action was not prematurely commenced March 9th. *Horwitz v. United States Fidelity & Guaranty Co.*, 95 Wash. 455, 164 Pac. 77.

Where the policy provided that the loss should not be payable until 60 days after satisfactory proofs of loss were received, and the company objected to proofs of loss for specific valid reasons, and the insured furnished supplemental proofs, a suit brought 49 days after the supplemental proofs were furnished was premature (*Marino v. Hartford Fire Ins. Co.*, 75 Atl. 1037, 227 Pa. 120). Where a fire policy provided that insured should furnish proofs of loss and the certificate of a magistrate or notary to the effect that the loss was honestly sustained, if required, and that the loss should be payable 60 days after satisfactory proofs, and insured furnished proper proofs of loss, and thereafter the certificate was demanded and furnished, insured might maintain an action 60 days after the furnishing of the proofs of loss, although 60 days had not elapsed from the furnishing of the certificate (*Egan v. Merchants' Fire Ass'n*, 82 Pac. 898, 40 Wash. 513).

3956 (a). Where the laws of a beneficial association provided for payment by the association within 90 days after the furnishing of proofs of death, and proofs of death, furnished 7 months before the commencement of an action on the certificate, stated that the member committed suicide, the fact that an amendment to the proofs, to the effect that the beneficiary made the original proofs

without fully comprehending the import of the same, was received by the company less than 90 days prior to the commencement of the action, was no ground for an abatement of the same (*Rohloff v. Aid Ass'n for Lutherans in Wisconsin and Other States*, 109 N. W. 989, 130 Wis. 61).

The provision of an accident certificate that no benefits shall be due till disability ceases or the right to benefits has terminated does not apply to a permanent total disability, for which payment of a sum certain is provided, and action for such sum at the end of either 60 or 90 days after presentation of complete and satisfactory proofs is authorized, by implication at least, by the provisions that no benefits shall be due till 90 days after receipt of such proofs, and no suit shall be brought on any claim against the association before 60 days after the presentation of such proofs (*Binder v. National Masonic Acc. Ass'n*, 102 N. W. 190, 127 Iowa, 25). But under a disability policy, providing for payment of one-half the principal sum or continuance of paralysis for one year, such benefit cannot be recovered in a suit brought before expiration of that time (*Miles v. Casualty Co. of America*, 96 N. E. 744, 203 N. Y. 453, modifying judgment 120 N. Y. Supp. 1135, 136 App. Div. 908, which affirms [Sup.] 115 N. Y. Supp. 1).

Where an indemnity policy provided that no action should lie against the company, unless brought by insured to recover for loss actually sustained and paid in satisfaction of a judgment within 60 days from the judgment, an action brought two days before such satisfaction was premature (*United States Tube & Iron Co. v. Maryland Casualty Co.*, 68 Atl. 1026, 220 Pa. 42).

Where a policy of life insurance provides that the insured shall belong to a named division of policy holders, and the insurance company promises, within a designated time after the death of the insured, to pay to the beneficiary, out of the mortuary fund on hand in the division to which the member belongs, an amount not exceeding a certain sum, or the full amount raised by one mortuary assessment upon all members in good standing in the division at the time of assured's death, not in excess of the sum named, after the designated time has elapsed the beneficiary may maintain an action at law against the company upon the policy. *Southern Life Ins. Co. v. Logan*, 9 Ga. App. 503, 71 S. E. 742.

3959-3961. (b) Same—Waiver

3959 (b). An absolute denial of liability precludes the insurer from insisting on a stipulation in the policy that suit shall not be
(1668)

brought until after the expiration of a time named, and the assured may sue at once.

Depue v. Travelers' Ins. Co. (C. C.) 166 Fed. 183; Jennings v. Brotherhood Acc. Co., 44 Colo. 68, 96 Pac. 982, 18 L. R. A. (N. S.) 109, 130 Am. St. Rep. 109; Potomac Ins. Co. v. Atwood, 118 Ill. App. 349; American Home Circle v. Eggers, 137 Ill. App. 595; National Live Stock Ins. Co. v. Wolfe, 59 Ind. App. 418, 106 N. E. 390; New Amsterdam Casualty Co. v. New Palestine Bank, 59 Ind. App. 69, 107 N. E. 554; Binder v. National Masonic Acc. Ass'n, 102 N. W. 190, 127 Iowa, 25; Werner v. Fraternal Bankers' Reserve Society, 172 Iowa, 504, 154 N. W. 773, Ann. Cas. 1918A, 1005; Ætna Life Ins. Co. v. Howell, 107 S. W. 294, 32 Ky. Law Rep. 935; Phoenix Ins. Co. of Hartford v. Flowers (Ky.) 124 S. W. 403; Continental Casualty Co. v. Matthis, 150 S. W. 507, 150 Ky. 477; Popa v. Northern Ins. Co. of New York, 192 Mich. 237, 158 N. W. 945; Zeitler v. National Casualty Co., 145 N. W. 395, 124 Minn. 478; Wondra v. National Life Ins. Co., 147 N. W. 961, 126 Minn. 136; Atlantic Horse Ins. Co. v. Nero, 108 Miss. 321, 66 South. 780; Miles v. Casualty Co. of America (Sup.) 115 N. Y. Supp. 1, affirmed in 136 App. Div. 908, 120 N. Y. Supp. 1135; Darling v. Protective Assur. Society of Buffalo, 127 N. Y. Supp. 486, 71 Misc. Rep. 113; Reese v. Fidelity & Deposit Co. of Maryland, 156 N. Y. Supp. 408, 93 Misc. Rep. 31; Callahan v. London & Lancashire Fire Ins. Co., 98 Misc. Rep. 589, 163 N. Y. Supp. 322; Clark Millinery Co. v. National Union Fire Ins. Co., 160 N. C. 130, 75 S. E. 944, Ann. Cas. 1914C, 367; Moore v. General Accident, Fire & Life Assur. Corp., 173 N. C. 532, 92 S. E. 362; Curran v. National Life Ins. Co. of United States, 96 Atl. 1041, 251 Pa. 420; Fass v. Liverpool, London & Globe Fire Ins. Co., 105 S. C. 364, 89 S. E. 1040; Thompson v. Interstate Life & Accident Co., 128 Tenn. 526, 162 S. W. 39; Northern Assur. Co., Limited, of London, v. Morrison (Tex. Civ. App.) 162 S. W. 411; Oklahoma Fire Ins. Co. v. McKey (Tex. Civ. App.) 152 S. W. 440; Western Indemnity Co. v. MacKechnie (Tex. Civ. App.) 185 S. W. 615; French v. Fidelity & Casualty Co. of New York, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011. But see Salmon v. Farm Property Mut. Ins. Ass'n of Iowa, 168 Iowa, 521, 150 N. W. 680. And see Borger v. Connecticut Fire Ins. Co., 29 Cal. App. 476, 156 Pac. 70, holding that where the policy allowed 90 days for payment in case of dispute as to extent of liability, the insured's suit within 90 days was premature, although the insurer immediately denied liability.

Acceptance of proof of disability and treatment of such proof as final, with an offer to pay a certain amount thereon, but less than the amount claimed, constitutes a rejection of the claim by the company, and suit instituted thereon after such rejection is not prematurely brought. American Assurance Co. v. Dickson, 34 Ohio Cir. Ct. R. 313.

3960 (b). And generally, where the company by acts and conduct shows lack of good faith and frank dealing, misleading insured or the beneficiary, it will be deemed to have waived the restriction.

Continental Ins. Co. v. Reynolds, 107 Md. 96, 68 Atl. 277; *Springfield Fire & Marine Ins. Co. v. Reynolds*, 107 Md. 107, 68 Atl. 281, 126 Am. St. Rep. 379.

So, where an insurer refused the preliminary proofs of death of insured and demanded proof which the policy did not call for, it waived the right to insist on the expiration of the period provided for in the policy, after furnishing preliminary proofs of death, before an action could be maintained on the policy (*Preferred Acc. Ins. Co. v. Fielding*, 83 Pac. 1013, 35 Colo. 19, 9 Ann. Cas. 916).

The defense of premature suit is not available where proofs of loss were waived by submitting to arbitration, and such arbitration was pleaded as a defense (*Young v. Pennsylvania Fire Ins. Co.*, 269 Mo. 1, 187 S. W. 856). Where a beneficiary certificate provided that no action should be brought until filing of proofs of death, or unless brought within one year after the proofs were passed on by a committee, and where defendant's wrongful act dispensed with such proofs, and there is no action by the committee, the contract provision did not apply (*Dechter v. National Council of Knights and Ladies of Security*, 153 N. W. 742, 130 Minn. 329, Ann. Cas. 1917C, 142). And where insured filed a claim for injury occasioned by a hernia, the result of an accident, the company by refusing to treat the hernia as an accident, but insisting that it should be treated as a disease, and made subject to the limitation attached by the policy to disability arising from that cause, waived the provision as to the time before bringing suit (*Dulany v. Fidelity & Casualty Co.*, 106 Md. 17, 66 Atl. 614).

However, it has been held that the restriction is not waived by insurer refusing payment on the ground that plaintiff was not the owner of the premises and possessed no insurable interest (*Irwin v. Insurance Co. of North America*, 16 Cal. App. 143, 116 Pac. 294). Nor is there a waiver where insurer wrote a letter to the beneficiary in a life policy stating that the same had been forfeited for nonpayment of premiums, but that if the beneficiary persisted in making a claim the insurer would require the performance of all conditions precedent (*Kiisel v. Mutual Reserve Life Ins. Co.*, 107 N. W. 1027, 131 Iowa, 54). An insurer, indemnifying

an employer against damage for injuries to its employés, does not, by denying liability prior to the procurement of a judgment against the employer for injuries received by an employé, waive the stipulation in the policy that no action shall lie against the insurer, except for loss sustained by payment of a judgment against the employer for injuries received by an employé, nor subject itself to a proper demand for the payment of the policy before that time (*Texas Short Line Ry. Co. v. Waymire* [Tex. Civ. App.] 89 S. W. 452).

Where a policy provided that no action should be maintainable before three months from the day on which the policy required proof of loss to be filed, a waiver of the provision requiring formal proof of loss did not constitute a waiver of the provision as to time of bringing the action (*Davis v. United States Health & Accident Ins. Co.*, 62 Atl. 728, 73 N. H. 425). Delay of an insurer in acknowledging receipt of proof of loss, or rejecting it for defects therein, is not evidence of denial of liability on grounds other than noncompliance with proof of loss clause, or of waiver of the restriction (*Seyler v. British America Assur. Co.*, 72 W. Va. 120, 77 S. E. 555).

3961 (b). Where an insurance policy provided for the appointment of appraisers of the amount of loss in the event of disagreement, and provided that the loss should not become payable until 60 days after the proof of loss had been received by the insurer, including an award by appraisers when appraisal had been required, and that no suit on the policy should be sustainable till after full compliance by the insured with the foregoing requirements, an action on the policy brought a year after a fire loss cannot be defeated by showing that, although there had been a disagreement, no arbitration had been had, and that plaintiff had made no effort to bring one about, where it appeared that the defendant had likewise been inactive (*Amusement Syndicate Co. v. Prussian Nat. Ins. Co.*, 116 Pac. 620, 85 Kan. 367, rehearing denied 85 Kan. 616, 118 Pac. 76).

3961-3963. (c) Same—Pleading and practice

3961 (c). Where the policy stipulates that the amount of the loss shall be due 60 days after the ascertainment thereof, the complaint must state facts showing a determination of the character and extent of the loss 60 days before the institution of the suit (*Wicecarver v. Mercantile Town Mut. Ins. Co.*, 137 Mo. App. 247, 117 S. W. 698).

A general averment of performance of all conditions to be performed is sufficient as an averment that action has not been brought within the restrictive period.

United States Fidelity & Guaranty Co. v. Newton, 115 Pac. 897, 50 Colo. 379; Phoenix Accident & Sick Ben. Ass'n v. Lathrop, 41 Ind. App. 141, 81 N. E. 227.

That a suit on a fidelity indemnity bond is prematurely brought, contrary to a provision in the bond, must be taken advantage of by defendant by a special plea (United States Fidelity & Guaranty Co. v. Newton, 115 Pac. 897, 50 Colo. 379).

3963-3964. (d) Statute of limitations

3963 (d). A provision in a standard fire policy that no suit or action should be maintainable thereon unless commenced within 12 months next after the fire, which provision was specially authorized by Laws 1886, p. 721, c. 488, §§ 2, 3, and Laws 1892, p. 1980, c. 690, § 121, prescribing a standard form of policy and forbidding the issuance of any other constituted a limitation "specially prescribed by law," and not by a contract between the parties, within Code Civ. Proc. § 414, declaring that the provisions of the chapter shall constitute the only rules of limitation applicable to a civil action or special proceeding, except in the case where a different limitation is specially prescribed by law or a shorter limitation is prescribed by the written contract of the parties (Bellinger v. German Ins. Co., 100 N. Y. Supp. 424, 113 App. Div. 917, 51 Misc. Rep. 463, affirmed in 189 N. Y. 533, 82 N. E. 1124). The New Hampshire statute (Pub. St. 1901, c. 170, §§ 10, 11), requiring suit to be brought on policy within six months after adjustment, applies only where more than the adjustment is demanded, and not to cases where no adjustment has been made (Flynn v. Orient Ins. Co., 77 N. H. 431, 92 Atl. 737).

3964 (d). In Kelly v. Ancient Order of Hibernians Life Ins. Fund of Minnesota, 113 Minn. 355, 129 N. W. 846, it appeared that the constitution and by-laws of the association contained no express provision that the beneficiary should give notice of death or make proofs thereof. It was held that, while the beneficiary might have sued on the policy within a reasonable time after making demand on the division secretary, her cause of action was not barred by limitations because of her failure to make demand, to furnish proofs of death, or to commence the action within six years from the time it might have been commenced, since the association can-

not be heard to take advantage of its own negligence in failing to make up proofs of death as required by the by-laws, or, if it repudiates the claim, in failing to notify the beneficiary to that effect.

A policy providing for payment of a specified sum in the event of assured's death as the result of an accident, is a life policy within a statute as to the time of actions on policies, and an action is not limited to time specified in policy. *Johnson v. Fidelity & Casualty Co. of New York*, 184 Mich. 406, 151 N. W. 593, L. R. A. 1916A, 475.

In *Hart v. Life & Annuity Ass'n*, 86 Kan. 318, 120 Pac. 363, Ann. Cas. 1913C, 672, the facts were these: Before the passage of the act relating to fraternal beneficiary societies (Gen. St. 1909, §§ 4303-4318), an association of that character in accordance with its by-laws issued a beneficiary certificate. The by-laws were amended two years afterwards providing for the issuance of certificates upon a plan less favorable to members and beneficiaries, but making no reference to, or provision for, certificates then outstanding, and the association continued after such amendments, as it had done before, to accept payments upon one of the old certificates, according to its terms, without objection or condition, until it became fully paid up, and the holder became entitled according to its provisions to a new paid-up certificate. Eighteen months after the payments had been so completed, the association for the first time adopted a by-law providing a new plan for the old outstanding certificates placing them in a separate class, and materially reducing the benefits stipulated therein. The holder of the certificate commenced an action thereon four years after completing the payments and 18 months after the final action of the supreme council covering certificates of that class. It was held that he is not precluded from maintaining an action because of delay in commencing it.

Construction of the New York statute (Laws 1897, c. 218, § 92) relating to actions on forfeited policies, see *Adam v. Manhattan Life Ins. Co. of New York*, 97 N. E. 740, 204 N. Y. 357, affirming judgment 125 N. Y. Supp. 1111, 140 App. Div. 922; *Davis v. Northwestern Mut. Life Ins. Co.*, 163 N. Y. Supp. 56, 98 Misc. Rep. 456.

Under Insurance Law, § 92, an action on policy forfeited for nonpayment of premium is barred, where no action to reinstate was brought within two years. *Thompson v. Postal Life Ins. Co.*, 178 App. Div. 490, 165 N. Y. Supp. 500.

3964-3968. (e) Validity of provision in policy

3964 (e). The general rule is that, unless forbidden by statute, a condition in a policy of insurance providing that there shall be

(1673)

no recovery thereon unless suit is brought within a given time is valid.

Spinks v. Mutual Reserve Fund Life Ass'n (C. C.) 137 Fed. 169; Luckenbach v. Home Ins. Co. of City of New York (D. C.) 142 Fed. 1023; Goddard v. Casualty Co. of America, 167 Fed. 750, 93 C. C. A. 212; Harvey v. Fidelity & Casualty Co., 119 C. C. A. 221, 200 Fed. 925; MacDonald v. Aetna Indemnity Co., 96 Atl. 926, 90 Conn. 226; Metropolitan Life Ins. Co. v. Caudle, 50 S. E. 337, 122 Ga. 608; Maxwell Bros. v. Liverpool & London & Globe Ins. Co., 12 Ga. App. 127, 76 S. E. 1036; Timmerhoff v. Supreme Tent of Knights of Maccabees of the World, 155 Ill. App. 395; Kiisel v. Mutual Reserve Life Ins. Co., 107 N. W. 1027, 131 Iowa, 54; Williams v. Western Travelers' Accident Ass'n, 97 Neb. 352, 149 N. W. 822; Maynard v. United States Health & Accident Co., 81 Atl. 1077, 76 N. H. 275; Heilig v. Aetna Life Ins. Co., 152 N. C. 358, 67 S. E. 927, 20 Ann. Cas. 1290; Holly v. London Assur. Corporation, 170 N. C. 4, 86 S. E. 694; Faulk v. Fraternal Mystic Circle, 88 S. E. 431, 171 N. C. 301; Bates v. German Commercial Accident Co., 87 Vt. 128, 88 Atl. 532, Ann. Cas. 1916C, 447; Staats v. Pioneer Ins. Ass'n, 55 Wash. 51, 104 Pac. 185.

3965 (e). This is true, even though the period is less than that prescribed by the statute of limitations.

Gill v. Manhattan Life Ins. Co., 11 Ariz. 232, 95 Pac. 89; Maxwell Bros. v. Liverpool & London & Globe Ins. Co., 12 Ga. App. 127, 76 S. E. 1036; Caywood v. Supreme Lodge, Knights and Ladies of Honor, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253, 17 Ann. Cas. 503; Williams v. Fire Ass'n of Philadelphia, 104 N. Y. Supp. 100, 119 App. Div. 573; Creem v. Fidelity & Casualty Co., 132 App. Div. 241, 116 N. Y. Supp. 1042.

But the time fixed must be reasonable, and not show imposition or undue advantage in any way.

Harvey v. Fidelity & Casualty Co., 200 Fed. 925, 119 C. C. A. 221; Tebbets v. Fidelity & Casualty Co. of New York, 155 Cal. 137, 99 Pac. 501 (holding six months not unreasonable); Ulman v. Supreme Commandery of United Order of Golden Cross of the World, 220 Mass. 422, 107 N. E. 960 (holding one year not unreasonable); Appel v. Cooper Ins. Co., 80 N. E. 955, 76 Ohio St. 52, 10 L. R. A. (N. S.) 674, 10 Ann. Cas. 821.

The Mississippi statute (Code 1906, § 2575), providing that stipulations in insurance contracts, limiting the time within which to sue thereon to less than one year after loss or injury, shall be void, permits such limitation to not less than one year (Taylor v. Farmers' Fire Ins. Co., 101 Miss. 480, 58 South. 353). And to the same

effect, construing the North Carolina statute, is *Heilig v. Ætna Life Ins. Co.*, 152 N. C. 358, 67 S. E. 927, 20 Ann. Cas. 1290.

3966 (e). Stipulations of this character are by some courts held void as contrary to public policy.

Travelers' Ins. Co. v. Henderson Cotton Mills, 85 S. W. 1090, 120 Ky. 218, 27 Ky. Law Rep. 653, 117 Am. St. Rep. 585, 9 Ann. Cas. 162; *Continental Casualty Co. v. Harrod*, 100 S. W. 262, 30 Ky. Law Rep. 1117.

The condition is held to be void when the statute declares that the time within which suit shall be brought shall not be limited by contract.

Douville v. Pacific Coast Casualty Co., 138 Pac. 506, 25 Idaho, 396, Ann. Cas. 1917A, 112; *Rutherford v. Prudential Ins. Co.*, 73 N. E. 202, 34 Ind. App. 531; *Phoenix Accident & Sick Ben. Ass'n v. Lathrop*, 41 Ind. App. 141, 81 N. E. 227; *General Accident Fire & Life Assur. Co. v. Walker*, 99 Miss. 404, 55 South. 51; *Roberts v. Modern Woodmen of America*, 113 S. W. 726, 133 Mo. App. 207; *Flynn v. Orient Ins. Co.*, 77 N. H. 431, 92 Atl. 737; *Kephart v. Continental Casualty Co.*, 17 N. D. 380, 116 N. W. 349; *Keys & Keys v. Williamsburg City Fire Ins. Co. of Brooklyn, N. Y.*, 132 Pac. 818, 37 Okl. 482; *Keys & Keys v. Mechanics' & Traders' Ins. Co. of New Orleans, La.*, 132 Pac. 819, 37 Okl. 480; *Keys v. Phoenix Ins. Co.*, 132 Pac. 820, 37 Okl. 514; *Oklahoma Fire Ins. Co. v. Wagester*, 38 Okl. 291, 132 Pac. 1071; *Seay v. Commercial Union Assur. Co., Limited, of London, England*, 42 Okl. 83, 140 Pac. 1164; *Sternheimer v. Order of United Commercial Travelers of America (S. C.)* 93 S. E. 8; *Phenix Ins. Co. of Brooklyn, N. Y., v. Perkins*, 101 N. W. 1110, 19 S. D. 59; *Fire Ass'n of Philadelphia v. Richards (Tex. Civ. App.)* 179 S. W. 926.

Under Rev. Civ. St. 1911, art. 4830, exempting fraternal benefit associations from the insurance law, and Rev. St. 1895, art. 3378, prohibiting any person from fixing a shorter time than two years in which to bring action upon any contract, the holder of a certificate of such an association has full two years in which to bring action thereon, notwithstanding a stipulation in the certificate fixing a less time. *International Travelers' Ass'n v. Bosworth (Tex. Civ. App.)* 156 S. W. 346.

The Virginia statute (Acts 1906, c. 112), providing that no provision in any policy of insurance limiting the time within which a suit or action may be brought to less than one year after loss shall be valid, applies to policies issued before its passage, and is not wholly prospective in its operation (*Smith & Marsh v. Northern Neck Mut. Fire Ass'n of Virginia*, 112 Va. 192, 70 S. E. 482, 38 L. R. A. [N. S.] 1016). On the other hand, it has been held in Arkan-

sas that Acts Ark. 1901, p. 93, providing that "hereafter an action" may be maintained on a policy at any time within the period prescribed by law for bringing actions on promises in writing, notwithstanding any stipulations in the policy requiring an action to be brought within a shorter period, is prospective, and does not apply to an action on a life policy barred by the stipulations therein prior to the passage of the act (*Wells v. Union Cent. Life Ins. Co.*, 81 Ark. 145, 98 S. W. 697).

3967 (e). In *Dolan v. Royal Neighbors of America*, 123 Mo. App. 147, 100 S. W. 498, it was held that since the provision, in a contract of insurance with a beneficial association, that no action shall be maintained on the contract, unless brought within one year after the death of the insured, is a qualification of the rights created under the contract, entirely independent of the limitation statutes, the defense that the time provided by the contract in which suit might be brought had expired does not pertain to the remedy, and, being good under the law of Illinois where the contract was made, is good in Missouri. And to the same effect is *Roberts v. Modern Woodmen of America*, 113 S. W. 726, 133 Mo. App. 207. So, where the policy was made in a state where the limitation was valid, the limitation will be enforced in Kentucky, although plaintiff beneficiary resided here when cause of action accrued and such contract, if made and to be performed within that state, would be void as against public policy (*Union Cent. Life Ins. Co. v. Barnes*, 175 Ky. 364, 194 S. W. 339). In *Clarey v. Union Cent. Life Ins. Co.*, 143 Ky. 540, 136 S. W. 1014, 33 L. R. A. (N. S.) 881, the policy which provided that no action might be brought upon it more than one year after the death of the insured was issued by an Ohio corporation to a resident of Wisconsin. After the contract was made, the insured removed to Kentucky, where he lived for some years before his death. In a suit on the policy, brought more than a year after the death of insured, the plaintiff in her pleadings admitted that the condition, as to the bringing of the suit, was valid both in Ohio and Wisconsin. It was held that the law of one of those two states governed the construction of the contract, and the condition as to the time of suit being valid in those states it will be recognized as valid in Kentucky, though such condition is regarded as contrary to the public policy of Kentucky.

Provisions of certificate limiting time to sue are governed by laws of state where member resided and local lodge of which he was a member was situated when the certificate was issued. *Simmons v. Modern Woodmen of America*, 185 Mo. App. 483, 172 S. W. 492.

On the other hand, it has been held in North Dakota that the defense that an accident policy is the contract of another state than that in which sued on, and that under the statute of that state the limitations therein of the time within which proof of claim must be made and suit must be brought are valid, is not available where there is no allegation or proof of such statute, and the law of the forum controls (*Kephart v. Continental Casualty Co.*, 17 N. D. 380, 116 N. W. 349). So it has been held in Indiana that, if a mutual benefit certificate holder desired to show herself within Burns' Ann. St. 1908, § 4803 (Burns' Ann. St. 1901, § 4923), invalidating any condition in the policy of a foreign insurance company not to sue for a period of less than three years, she must allege and prove facts sufficient to bring the certificate on which she sues within the statute, as, that the company was a foreign corporation, etc. (*Caywood v. Supreme Lodge, Knights & Ladies of Honor*, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. [N. S.] 304, 131 Am. St. Rep. 253, 17 Ann. Cas. 503).

Provision in indemnity insurance policy limiting time within which suits may be brought thereon is in derogation of common-law right, and not entitled to a broad construction. *Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 240 Fed. 573, 153 C. C. A. 377.

3968-3972. (f) Operation and effect of provision

3968 (f). Unless the provision has been waived, or there is other valid excuse for non-performance, no recovery can be had if action is not brought within the time specified in the policy.

Fitzpatrick v. North American Accident Ins. Co., 18 Cal. App. 264, 123 Pac. 209; *Downs v. German Alliance Ins. Co.*, 6 Pennewill (Del.) 166, 67 Atl. 146; *Emory v. Glenn Falls Ins. Co.*, 7 Pennewill (Del.) 101, 76 Atl. 230; *Metropolitan Life Ins. Co. v. Caudle*, 50 S. E. 337, 122 Ga. 608; *Watson v. Mutual Life Ins. Co. of New York*, 139 La. 737, 72 South. 189; *Williams v. Fire Ass'n of Philadelphia*, 104 N. Y. Supp. 100, 119 App. Div. 573; *Creem v. Fidelity & Casualty Co.*, 132 App. Div. 241, 116 N. Y. Supp. 1042; *Kelly v. Prudential Ins. Co. of America (Sup.)* 119 N. Y. Supp. 154; *Automatic Sprinkler Co. of America v. Employers' Liability Assur. Corporation, Limited, of London*, 148 N. Y. Supp. 1013, 163 App. Div. 671; *Appel v. Cooper Ins. Co.*, 80 N. E. 955, 76 Ohio St. 52, 10 L. R. A. (N. S.) 674, 10 Ann. Cas. 821; *Mooney v. Supreme Council of Royal Arcanum*, 90 Atl. 132, 243 Pa. 463.

Under the insurance benefit provisions of a cigar makers' union, an unincorporated association, a claim to benefits, not made by the member's heirs until four years after his death, was barred, not-

(1677)

withstanding that they did not sooner know of his death. *Born v. Perkins*, 158 N. Y. Supp. 673, 173 App. Div. 214.

A payment for entry of satisfaction of judgment made to the attorney of the original plaintiff under an indemnity insurance policy is not sufficient, under 3 Comp. St. 1910, p. 2960, pl. 22 (2), to remove the bar of the time limit in the policy for bringing suit. *Philadelphia Pickling Co. v. Maryland Casualty Co.* [N. J. Sup.] 94 Atl. 889.

A limitation on the right to sue, in a surety bond furnished for compensation and in form selected by the surety, will be construed strictly against a claim which impairs the suretyship (*Fitger Brewing Co. v. American Bonding Co. of Baltimore*, 115 Minn. 78, 131 N. W. 1067).

The limitation clause of an insurance policy issued in the Indian Territory is not a condition precedent to liability on the policy, but to merely fix a limitation of time within which suit could be commenced after death of insured, which could be waived by the insurer or pleaded as a defense. *Northwestern Nat. Life Ins. Co. v. Ward (Okla.)* 155 Pac. 524.

Where an accident insurance policy provided that no action should be brought to recover for any benefit, other than the weekly benefit, unless commenced within nine months of the date of the accidental injury, an action for the death benefit, commenced more than nine months after the death of insured, was barred; the provision relating to losses by death, and not alone to losses from injuries not resulting in death (*Moest v. Continental Casualty Co.*, 104 N. Y. Supp. 553, 55 Misc. Rep. 128, affirmed in 122 App. Div. 897, 106 N. Y. Supp. 1138). Where indemnity bond limited time for actions to 6 months after time for filing claim, and gave the employé 30 days in which to make good any loss, the employer could sue within one year and 30 days after discovery of a default, under Revisal 1905, § 4809, prohibiting insurance companies from limiting the time for suing to less than one year (*Dixie Fire Ins. Co. v. American Bonding Co.*, 162 N. C. 384, 78 S. E. 430). In *Pacific Mut. Life Ins. Co. v. Adams*, 27 Okl. 496, 112 Pac. 1026, Ann. Cas. 1912B, 704, the policy provided that suits thereon could not be brought before expiration of three months from the filing of proofs at the insurer's home office and could not be brought at all unless begun within six months from time of the insured's death. It was held that the six months' limitation applies only where, after furnishing the proofs within a reasonable time after insured's death, and after expiration of the three months, suf-

ficient time remains in which to sue within six months from the death.

3969 (f). The purpose of a stipulation, in a policy to indemnify a subcontractor against loss for injuries to his employes and the public, that no action shall lie against insurer after the expiration of the period within which an action for damages on account of injuries may be brought by a claimant against the subcontractor unless at the expiration of the period there is a suit arising out of such accident pending against insured, in which case the action may be brought within 30 days after rendition of final judgment, is to require an action to be brought within the time during which an action on account of an accident may be brought against the subcontractor or within 30 days after the rendition of judgment in such action, and no action may be brought on the policy after the expiration of three years from the happening of an accident unless a suit is then pending against the subcontractor (*Creem v. Fidelity & Casualty Co. of New York*, 126 N. Y. Supp. 555, 141 App. Div. 493). Where a carrier's marine policy contained a contract limitation of actions thereon of one year, and suit was not brought by the carrier for the loss sustained until after the year had expired, the action was barred, though defendant had agreed to bear part of the loss and had not refused to pay under such clause, and the amount of the carrier's liability to the owner of the property was not adjudicated until after the year expired (*Lehigh Valley R. Co. v. Providence-Washington Ins. Co.* [D. C.] 167 Fed. 223, decree affirmed 172 Fed. 364, 97 C. C. A. 62).

In an action on a policy on an icehouse erected by a tenant on plaintiff's land, where an agent took a draft for the amount of the loss to plaintiff and asked him to indorse it, stating that he would also get the tenant to indorse it, and that the amount of the draft would be divided between them, and the plaintiff refused so to do, claiming the total amount of the draft, a contention that by the issuance of the draft the insurance company created a fund for the payment of the loss and created a new liability, excusing plaintiff for failing to sue on the policy within one year from the loss, as provided by the terms, is not well founded (*McArdle v. German Alliance Ins. Co.*, 76 N. E. 337, 183 N. Y. 368, reversing 98 App. Div. 594, 90 N. Y. Supp. 485).

The limitation in a fraternal insurance certificate that no action could be maintained on it unless brought within one year after death of the member did not apply to an action by the member's

(1679)

children to recover the insurance fund from the deceased member's sisters, who had gained possession of it through fraud (*Munroe v. Beggs*, 139 Pac. 422, 91 Kan. 701). But it has been held that an action on a bond executed by an insurance company, to the state, conditioned for the payment of claims due on policies issued to citizens of the state, based on the failure of the company to pay a policy cannot be maintained where an action on the policy cannot be maintained by reason of the stipulation limiting the time for suing thereon to one year after insured's death, as the company owes nothing on the policy if suit be not brought thereon within one year, and, as the statute requiring the bond is designed to protect policy holders only (*McCulloch v. Mutual Reserve Fund Life Ass'n*, 93 S. W. 62, 78 Ark. 32).

The Mississippi Constitution, section 97, declaring that the Legislature shall have no power to revive any remedy which may have been barred by lapse of time or by any statute of limitations, relates alone either to an express statute of limitations, or to a lapse of time dealt with either under the statute or the general law, as a limitation of time; and Rev. Code 1892, § 3401, providing that no action could be maintained on any contract in a business when the privilege license had not been paid, did not provide any statute of limitations within which the remedy must be pursued, but set up an absolute bar, while the statute was in force, and hence the amnesty act (Acts 1904, p. 57, c. 75), which simply removes the bar of such action as to the right of recovery, does not violate the Constitution by allowing recovery to be had on a fire insurance policy containing a limitation which expired before the bar of the statute was removed, and when suit could not be brought thereon; that limitation neither existing under the statute nor under the general law (*North British & Mercantile Ins. Co. v. Edwards*, 37 South. 748, 85 Miss. 322).

A mutual benefit association's by-law, limiting the time for bringing an action under a beneficiary certificate, was invalid as against certificates issued before it was promulgated.

Attorney General v. Supreme Council A. L. H., 196 Mass. 151, 81 N. E. 966; *Rosenstein v. Court of Honor*, 142 N. W. 331, 122 Minn. 310; *Butler v. Supreme Council, A. L. H.*, 93 N. Y. Supp. 1012, 105 App. Div. 164. But see *McCloskey v. Supreme Council, A. L. H.*, 96 N. Y. Supp. 347, 109 App. Div. 309.

In *Seay v. Commercial Union Assur. Co., Limited*, of London, England, 140 Pac. 1164, 42 Okl. 83, it was held that the act of March (1680).

25, 1909 (Laws 1909, c. 21, art. 2), prescribing the standard form of an insurance policy in which a limitation of one year after loss is provided for actions thereon, held not to validate a limitation provision in a tornado insurance policy, where the policy was executed and a claim for loss arose prior to the adoption of such statute.

3972 (f). The provision prescribing a short limitation does not apply to a mortgagee entitled to payment as his interest may appear.

Salomon v. North British & Mercantile Ins. Co. of New York, 135 N. Y. Supp. 806, 150 App. Div. 728; *Heilbrunn v. German Alliance Ins. Co. of New York*, 202 N. Y. 610, 95 N. E. 823, affirming order *Heilbrunn v. Same*, 125 N. Y. Supp. 374, 140 App. Div. 557; *O'Neil v. Franklin Fire Ins. Co. of Philadelphia*, 145 N. Y. Supp. 432, 159 App. Div. 313.

3972-3980. (g) Computation of time

3972 (g). It is held in some cases that the limitation begins to run from the time the right of action accrues and not necessarily from the time when the loss occurs (*Stinchcombe v. New York Life Ins. Co.*, 46 Or. 316, 80 Pac. 213). So, though a life policy forbade an action thereon unless commenced within one year from the date of insured's death, the limitation period did not commence to run until a suit might properly be brought on the policy (*Kiisel v. Mutual Reserve Life Ins. Co.*, 107 N. W. 1027, 131 Iowa, 54). And under a provision of a fire policy that the time during which a test case against an underwriter is pending shall not be considered a part of the 12 months within which an action on the policy must be brought, the time during which a test case brought in another state against an underwriter and dismissed was pending should be deducted (*South Bay Co. v. Merrill*, 77 N. H. 1, 86 Atl. 351). But if, under the terms of a benefit certificate, beneficiary had no right to sue until advised that insurer rejected her demand, the period limited by certificate within which she must bring suit did not begin to run until so advised (*Simmons v. Modern Woodmen of America*, 194 Mo. App. 29, 188 S. W. 932).

It is generally held that the time begins to run from the close of the period allowed after proofs are furnished for payment of the claim and not from the date of loss.

Kiisel v. Mutual Reserve Life Ins. Co., 107 N. W. 1027, 131 Iowa, 54; *Stinchcombe v. New York Life Ins. Co.*, 80 Pac. 213, 46 Or. 316; *Wilkinson v. John Hancock Mut. Life Ins. Co.*, 61 Atl. 43, 27 R. I. 146, 8 Ann. Cas. 1063; *Hogl v. Aachen & Munich Ins. Co.*, 65 W. Va. 437, 64 S. E. 441, 131 Am. St. Rep. 972.

In action on credit indemnity policy, where time for determining loss was extended by agreement, and suit was begun within six years after agreement, etc., limitations cannot be deemed to have begun to run within 50 days after proof of loss, at which time payment was provided for. *Philadelphia Casualty Co. v. Thacher*, 236 Fed. 869, 150 C. C. A. 131.

Thus a provision in a policy requiring suit to be brought thereon within one year from the death of insured will not be enforced where the constitution provides that no action shall be brought until the proofs of loss have been presented to and passed upon by the company; it appearing that proofs of loss were presented to the company within three months after the death of insured, and not passed upon within such period of limitation (*McEvoy v. Court of Honor*, 163 Ill. App. 556). Where the by-laws of an insurance association provide that an action to recover on disputed claims must be commenced within six months from the date of disallowance thereof, and that the amount due on a policy shall become payable 90 days after receipt of satisfactory proofs of death, the denial of the claim before the filing of proofs of death does not start the running of the six-months limitation, but the beneficiary has a reasonable time within which to file proofs of death, and may bring his action within six months after the association has acted in rejection of the claim upon the proofs presented (*Munn v. Masonic Life Ass'n of Western New York*, 82 N. E. 724, 189 N. Y. 486, affirming 115 App. Div. 855, 101 N. Y. Supp. 91).

It was held in *Heilig v. Aetna Life Ins. Co.*, 67 S. E. 927, 152 N. C. 358, 20 Ann. Cas. 1290, that under Revisal 1905, § 4809, providing that no insurance company shall limit the time in which suit shall be brought on a policy to less than one year, a stipulation in an accident policy that no legal proceeding shall be brought to recover any sum hereby insured within 90 days after receipts of proof, nor at all unless commenced within one year after date of alleged accident, will be construed to give an assured 12 months after his right of action accrued, which would be a year after time for filing proof of loss, plus 90 days. And in *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605, it was held that an action on a policy stipulating that the loss should not become payable until 60 days after notice, ascertainment, and proof of loss, and that no action should be sustainable unless commenced within 12 months next after the fire is not barred by limitations, where the fire occurred May 24th, the amount of damages was ascertained May 29th, proofs of loss were filed and accepted June 6th, and the summons

was issued on June 22d of the year following. Where a policy provided for payment upon "receipt and approval of proofs of death," statute of limitations did not commence running until refusal of company to concede death (*Bonslett v. New York Life Ins. Co.* [Mo.] 190 S. W. 870). Where fact of death of insured who disappeared was disputed by the company, the cause of action on his policy did not accrue so as to be affected by the six-year statute of limitation (Code 1906, § 3097) until the expiration of seven years from disappearance raising presumption of death under section 1914 (*New York Life Ins. Co. v. Brame*, 112 Miss. 828, 73 South. 806).

3974 (g). Where a stipulation in an insurance contract limiting the time to sue is coupled with a provision suspending the right to sue for an indefinite period after the loss, depending on some action of the insurance company over which insured has no control, the contract limitation period commences to run from the time the suspension of the right to sue terminates (*Stewart v. National Council of Knights and Ladies of Security*, 147 N. W. 651, 125 Minn. 512). But where a policy provided for determining the amount of loss by appraisers on disagreement, and that, after the amount of loss was so determined, the amount should be payable 60 days after notice, ascertainment, and proof of loss were received, the 60 days allowed for settlement before suit must be computed from the date proofs of loss are furnished, and not from that of the attempted arbitration (*Globe & Rutgers Ins. Co. v. Johnson* [Ky.] 127 S. W. 765).

3975 (g). In many cases, however, the limitation is construed as beginning to run from the date of the loss.

McDaniel v. German-American Ins. Co., 134 Ga. 189, 67 S. E. 668; *Maxwell Bros. v. Liverpool & London & Globe Ins. Co.*, 12 Ga. App. 127, 76 S. E. 1036; *Dahrooge v. Rochester-German Ins. Co.*, 177 Mich. 442, 143 N. W. 608; *Simmons v. Modern Woodmen of America*, 185 Mo. App. 483, 172 S. W. 492; *Appel v. Cooper Ins. Co.*, 80 N. E. 955, 76 Ohio St. 52, 10 L. R. A. (N. S.) 674, 10 Ann. Cas. 821; *Weyer v. Pioneer Fire Ins. Co.*, 49 Okl. 546, 153 Pac. 1146.

So it was held in *Tebbetts v. Fidelity & Casualty Co. of New York*, 99 Pac. 501, 155 Cal. 137, that the time to sue on a policy stipulating that proof of death of insured must be furnished within two months, and that legal proceedings thereunder may not be brought before three months from the filing of proofs, nor after six months from time of death, begins to run from the date of the death, and is not affected by the provision that legal proceedings

cannot be brought before three months from the filing of proof. Where a policy provides that action thereon must be brought within a specified period "next after the fire," the time begins to run from the day the fire broke out, and not from the date of its extinguishment (*Western Coal & Dock Co. v. Traders' Ins. Co.*, 122 Ill. App. 138).

3977 (g). In *Kenny v. Bankers' Acc. Ins. Co. of Des Moines*, 136 Iowa, 140, 113 N. W. 566, accident policy provided for the payment of \$25 weekly for nonfatal injuries for a time not exceeding 52 weeks. Plaintiff was totally disabled from injuries which were received July 30, 1902. It was held that his cause of action did not accrue until July 30, 1903, and an action brought within six months from such date was in time, within the provisions of the policy that an action should be commenced within six months after disability terminates or assumes a permanent character. Where an action on an accident policy, stipulating that no suit should be maintained unless commenced within six months next after the disability terminated or assumed a permanent character, was brought more than six months after the injury, and insured and his wife testified that he was gradually improving in health and a physician expressed the opinion that in time he would recover, the jury could find that the injury had not assumed a permanent character, though the petition, prior to its amendment, asserted the permanent character of the injury (*McClure v. Great Western Acc. Ass'n*, 141 Iowa, 350, 118 N. W. 269). A clause in a health policy that payment for disability shall be limited to 26 consecutive weeks for any one disease or illness, and that legal proceedings shall not be brought after 6 months from the termination of the disability, must be construed to mean that limitations shall begin to run from the actual termination of the disability, and not from the expiration of 26 weeks, where the disability continues beyond that period (*Porter v. Casualty Co. of America*, 126 N. Y. Supp. 669, 70 Misc. Rep. 246).

3978 (g). In a marine insurance policy, insuring a tug against liability for injuries to tows or other vessels, a provision that no suit or action should be maintained thereon unless commenced within 12 months next after the disaster causing the loss should occur and that, should any suit or action be commenced after the expiration of said 12 months, the lapse of time should be taken as conclusive evidence against the validity of the claim, is valid and enforceable, and its effect is not avoided by the fact that a suit was necessary to determine the legal liability of the tug for an injury to

a tow, where the commencement of such suit was controlled by the insured and there was unnecessary and unreasonable delay in its commencement and prosecution, so that a suit on the policy was not instituted until more than five years after the loss occurred (*Luckenbach v. Home Ins. Co. of City of New York* [D. C.] 142 Fed. 1023).

Under a liability insurance policy requiring action thereon within 30 days after final judgment in a suit against the insured, where a judgment against the insured was affirmed by the Court of Appeals June 25, 1906, an action begun July 3, 1906, was brought in time. *Creem v. Fidelity & Casualty Co. of New York*, 100 N. E. 454, 206 N. Y. 733, modifying judgment 126 N. Y. Supp. 555, 141 App. Div. 493.

3979 (g). A condition in a life policy limiting the time within which an action thereon may be brought is a matter of contract, and applies to an infant as effectually as to one having attained his majority (*Gill v. Manhattan Life Ins. Co.*, 11 Ariz. 232, 95 Pac. 89).

3981-3984. (h) Commencement of action

3982 (h). Under the Oklahoma statute (Mansf. Dig. § 4967), the filing of a suit and issuance of summons, to be served on defendant if found, was the "commencement of an action" within an insurance policy limiting the time within which an action could be commenced thereon to one year after death of the insured (*Supreme Lodge of Heralds of Liberty v. Herrod*, 141 Pac. 269, 42 Okl. 308). And the same rule seems to prevail in Illinois (*Torpedo Top Co. v. Royal Ins. Co.*, 162 Ill. App. 338). It has been held in Louisiana that citing the defendant is sufficient, even in a suit before a court without competent jurisdiction (*Tracy v. Queen City Fire Ins. Co.*, 61 South. 687, 132 La. 610, Ann. Cas. 1914D, 1145). But the contrary seems to be the rule in Illinois (*Hartzell v. Maryland Casualty Co.*, 163 Ill. App. 221).

That a receiver of insured having sued on the policy within the time limited in the contract in the name of the insured corporation joined himself in his official capacity after the time had expired did not render the action subject to the objection that it was too late. *Clark Millinery Co. v. National Union Fire Ins. Co.*, 160 N. C. 130, 75 S. E. 944, Ann. Cas. 1914C, 367.

The commencement of an action by a declaration counting not on the policy, but consisting merely of the common counts, does not arrest the running of the limitation fixed by the policy for the commencement of action thereon (*Western Coal & Dock Co. v. Trad-*

ers' Ins. Co., 122 Ill. App. 138). An action on a policy of indemnity insurance, which provides that action thereon shall be brought within 90 days after the payment of loss or expense by the insured, is not barred where the original declaration is filed within the 90 day period, though an amended declaration is filed after the period has elapsed, where the two declarations set up the same cause of action (*Columbian Three Color Co. v. Ætna Life Ins. Co.*, 183 Ill. App. 384).

3984-3986. (i) Same—Discontinuance of action, dismissal, or nonsuit

3984 (i). Code Civ. Proc. N. Y. § 405, providing that if an action is commenced within the time limited therefor, and the same is terminated except for certain reasons, a new action for the same cause after the expiration of the time so limited may be begun within one year after such termination, applies to a special limitation of actions on a standard fire insurance policy, declaring that no suit shall be brought thereon unless commenced within 12 months next after the fire, as authorized by Laws 1886, p. 721, c. 488, §§ 2, 3, and Laws 1892, p. 1980, c. 690, § 121 (*Bellinger v. German Ins. Co.*, 100 N. Y. Supp. 424, 51 Misc. Rep. 463, 113 App. Div. 917, affirmed in 189 N. Y. 533, 82 N. E. 1124). In an action on a life policy containing a one-year limitation of action thereon, where the insured died in April, 1903, the fact that an action was brought on the policy in December, 1903, in the County Court, and in the same month the defendant objected to the jurisdiction of the County Court, and in September, 1904, the plaintiff took an order discontinuing that action and soon after commenced an action in the Supreme Court, does not show that the discontinuance was not voluntary, so as to remove the bar of limitations, under Code Civ. Proc. § 405, providing that if an action is commenced within the time limited therefor, and is terminated in any other manner than by voluntary discontinuance, the plaintiff may commence a new action within one year after such termination (*Bannister v. Michigan Mut. Life Ins. Co.*, 97 N. Y. Supp. 843, 111 App. Div. 765). In *Creem v. Fidelity & Casualty Co. of New York*, 116 N. Y. Supp. 1042, 132 App. Div. 241, it appeared that a contractor's liability policy provided that no action should be brought thereon after the expiration of the period within which an action for damages on account of the injuries might be brought by the claimant against the insured, unless at the expiration of such period there should be a suit pending, arising out of the accident against the insured, in

which case an action might be brought within 30 days after final judgment therein. An action brought against insured was discontinued with the consent of insurer, who undertook to defend the action, and an action on the policy was brought by the insured more than 30 days thereafter, and after limitations had run against the injured person. It was held that the action on the policy was barred, as plaintiff in the injury action had an absolute right to discontinue on payment of costs.

Where a policy provides that no suit shall be brought thereon after 12 months from the fire, an action after that time is barred, though purporting to be a renewal of a prior action in another court, which was dismissed and renewed after payment of all costs within 6 months from the dismissal (*Gross v. Globe & Rutgers Fire Ins. Co.*, 79 S. E. 138, 140 Ga. 531). Where a fire policy stipulates that no suit shall be brought thereon unless commenced within 12 months next after the fire, an action brought after that time would be barred, though it purported on its face to be a renewal of a previous action, instituted in a state court within the time limited, and removed to the federal court, and there dismissed, and renewed in the state court within 6 months from such dismissal, after payment of all costs (*McDaniel v. German-American Ins. Co.*, 134 Ga. 189, 67 S. E. 668). And to the same effect is *Dalzell v. London & Lancashire Fire Ins. Co. of Liverpool, England*, 97 Atl. 452, 252 Pa. 265.

Under the express provisions of Kirby's Dig. Ark. § 4381, if plaintiff in an action on an insurance policy suffers nonsuit he may commence a new action within one year after such nonsuit, notwithstanding stipulations in the policy of insurance to the contrary (*American Cent. Ins. Co. v. Noe*, 88 S. W. 572, 75 Ark. 406).

3986-3989. (j) Same—Nature of proceedings

3986 (j). An attachment execution against a fire insurance company to attach a fund due to the defendant in the execution for a loss by fire is a suit or action on the policy, and, where such action is brought within the time limited by the policy for bringing suit thereon, the company cannot escape liability on the ground that no suit was brought within the time limited (*First Nat. Bank v. Maikranz*, 44 Pa. Super. Ct. 225).

Where a loss under an insurance policy is adjusted, and a fixed sum agreed to be paid by a day certain, a complaint alleging these

(1687)

facts bases the action on the adjustment, and the limitation of time for bringing the action contained in the policy does not apply.

Strampe v. Minnesota Farmers' Mut. Ins. Co., 123 N. W. 1083, 109 Minn. 364, 26 L. R. A. (N. S.) 999, 134 Am. St. Rep. 781.

If the policy gives the insurer the option either to pay the loss occasioned by fire, or to replace the insured building, and the insurer elects to repair or replace, an action by the insured for breach of its contract to do so is not an action on the policy so as to bring it within a clause of the policy providing that no action shall be maintainable on the policy unless commenced within 12 months after the loss (*Winston v. Arlington Fire Ins. Co. for District of Columbia*, 32 App. D. C. 61, 20 L. R. A. [N. S.] 960, 16 Ann. Cas. 104).

A provision in a fire insurance policy that no suit thereon can be maintained unless commenced within a year next after the fire relates to an original suit, and does not require that writs of error to review the proceedings in the original suit must also be sued out within the same time, though a writ of error is a new suit on the record. *Helbig v. Citizens' Ins. Co.*, 84 N. E. 897, 234 Ill. 251, affirming judgment *Citizens' Ins. Co. v. Helbig* (1907) 138 Ill. App. 115.

The provision of indemnity insurance policy limiting time within which insured might bring suit upon policy does not apply to suit by insured in tort to recover damages for negligent defense by company of action against insured (*Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 240 Fed. 573, 153 C. C. A. 377). And, too, an action against a liability insurer for breach of contract to defend claim against insured, is not governed by a provision of the policy limiting time of action within 90 days after payment of loss or expense (*Lawrence v. Massachusetts Bonding & Ins. Co.* [Sup.] 160 N. Y. Supp. 883).

3989-3997. (k) Waiver and estoppel

3989 (k). A stipulation in the policy limiting the time within which action may be brought thereon is for the benefit of the company, and may be waived by it.

Fellman v. Royal Ins. Co., 184 Fed. 577, 106 C. C. A. 557, rehearing denied 185 Fed. 689, 107 C. C. A. 637; *Philadelphia Casualty Co. v. Thacher*, 236 Fed. 869, 150 C. C. A. 131; *Caywood v. Supreme Lodge of Knights & Ladies of Honor*, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253, 17 Ann. Cas. 503; *Phoenix Ins. Co. v. Smith*, 95 Miss. 347, 48 South. 1020; *Northwestern Nat. Life Ins. Co. v. Ward* (Okla.) 155 Pac. 524; *Bates v. German Commercial Accident Co.*, 87 Vt. 128, 88 Atl. 532, Ann. Cas. 1916C, 447.

(1688)

Generally any acts or conduct of the insurer misleading the assured and causing a postponement of action beyond the stipulated time will amount to a waiver or estop the insurer to insist on the condition.

Prudential Ins. Co. v. Hummer, 84 Pac. 61, 36 Colo. 208; American Ins. Co. v. McVickers Bros., 135 Ga. 118, 68 S. E. 1026; Williams v. Bankers' Union of Chicago, 166 Ill. App. 495; Hansell-Elcock Co. v. Frankfort Marine Accident & Plate Glass Ins. Co., 177 Ill. App. 500; Clark v. Pacific Mut. Life Ins. Co. of California, 185 Ill. App. 580; Dolsen v. Phoenix Preferred Acc. Ins. Co., 115 N. W. 50, 151 Mich. 228; Mastenbrook v. United States Acc. Ass'n, 117 N. W. 543, 154 Mich. 16; Staats v. Pioneer Ins. Ass'n, 55 Wash. 51, 104 Pac. 185.

A condition of an indemnity bond that no proceedings shall be instituted later than four months after the completion of the contract was waived by not being pleaded. Helmer v. Title Guaranty & Surety Co. of Scranton, Pa., 55 Wash. 558, 104 Pac. 783.

Thus, where the general attorney of a mutual benefit society, knowing that plaintiff, a beneficiary, depended on showing death by evidence of absence for seven years, and that plaintiff's time allowed by the policy for bringing suit was passing, insisted repeatedly upon more information from plaintiff as to the disappearance and search, and postponed final decision from time to time up to and beyond the expiration of the year, and then placed refusal to pay the claim on the ground that the society was not satisfied that insured was dead, its letters indicating to a reasonable mind a desire that plaintiff postpone bringing suit until the society completed its investigations, a finding of a waiver of limitation was justified (*Martin v. Modern Woodmen of America*, 158 Mo. App. 468, 139 S. W. 231). So where, when an action on a policy instituted in a state court and removed to the federal court was there dismissed, plaintiff, who was misled and induced to consent to the dismissal by the statement of defendant's attorney that plaintiff could renew her suits on the policies in the state court, such statements of defendant's attorney amounted to an estoppel of defendant's right to plead the contractual limitation in the policy that no suit should be brought thereon unless commenced within 12 months next after the fire (*McDaniel v. German-American Ins. Co.*, 134 Ga. 189, 67 S. E. 668). But, of course, the company, by insisting on strict compliance with requirements of policy as to proofs of death, is not thereby estopped from claiming benefit of provision limiting time within which to bring action (*Fitzpatrick*

v. North American Accident Ins. Co., 18 Cal. App. 264, 123 Pac. 209). And the insurer does not waive the provision by merely writing several letters to the claimant, notifying her of another's claim and the payment of the fund to him (*Pate v. Prudential Ins. Co. of America* [Sup.] 138 N. Y. Supp. 249).

3990 (k). In *White v. Maryland Casualty Co.*, 139 App. Div. 179, 123 N. Y. Supp. 840, the indemnity insurance policy upon which plaintiff sued to recover money paid in settlement of an action against plaintiff for personal injuries received in its yards against which the policy was issued, provided that no action should lie thereon for loss unless brought by insured himself to reimburse himself for loss actually sustained and paid in satisfaction of a judgment after trial of the issues and within sixty days from the date of the judgment, and also limiting the time for such action to be brought to that in which the injured party might begin an action against insured for damages, or, if an action was pending against insured at the end of such time, within 60 days after entry and satisfaction of judgment therein. It was held that the insurance company could not be compelled to defend an action against insured, unless the latter were legally liable to the plaintiff therein, so that its refusal to defend an action against insured by one injured in its yards upon the grounds that any damages recovered in the action should be first paid by insured did not waive the provision requiring a judgment to have been recovered against insured and paid within 60 days of its entry, and limiting the time within which the action should be commenced against defendant.

That the beneficiary in a policy of insurance on the life of her husband was advised by a representative of the insurance company, two months after his death and after she had furnished proofs of loss, to take the policy with her to Mississippi, and that when it was approved she would receive her money, and that the company had three months to approve the policy, is not a waiver of the condition requiring action to be brought within six months after the death of the insured, where after the three months the company notified the beneficiary that the claim had not been approved and within five months disclaimed its liability (*Curry v. Empire Life Ins. Co.*, 98 N. Y. Supp. 6, 49 Misc. Rep. 65).

3991 (k). *Negotiations regarding a settlement of the claim carried on by the company in such manner as to throw their conclusion after or unreasonably near to the time fixed by the policy for the commencement of the action will amount to a waiver.

Thus, where an employer's liability policy provided that an action thereon should be barred unless commenced within 30 days after the right of action accrued, but the insurer participated in negotiations for a settlement for a period of more than 90 days after the 30-day limitation had expired, the contract limitation was absolutely waived, so that on the termination of the negotiations for settlement the insured was only required to proceed within the statutory period to enforce its claim (*Lynchburg Cotton Mill Co. v. Travelers' Ins. Co. of Hartford, Conn.*, 149 Fed. 954, 79 C. C. A. 464, 9 L. R. A. [N. S.] 654, reversing [C. C.] 140 Fed. 718). But where the insurer in a sick benefit policy immediately denied liability on January 7, 1902, on receipt of proofs, but later, on July 15th, offered to pay \$30 "for the sole purpose of avoiding litigation and the attendant expenses thereof," which offer was renewed on July 18th, such offers were not negotiations calculated to prevent plaintiff from bringing suit, and therefore did not amount to a waiver of a policy provision providing that no suit should be brought thereon unless commenced within three months after the right of action accrued (*Cooper v. Phoenix Accident & Sick Benefit Ass'n*, 104 N. W. 734, 141 Mich. 478). In *Maynard v. United States Health & Accident Ins. Co.*, 76 N. H. 275, 81 Atl. 1077, an accident insurance policy provided that proof of injuries must be furnished the insurer within 30 days from the termination of disability, and that no action upon the policy should be maintained after six months from the date when proof of injury must be filed. Proof of injury was filed and accepted after it was due, and the insurer admitted a partial liability and continued a correspondence with the insured in an attempt to settle the claim; but no suit was brought within the time limited by the policy, and it was not shown that the insurer was induced by correspondence to believe that the insurer would not insist on the limitation for bringing action. It was held that there had been no waiver as to time for bringing the action and that the insured could not recover.

In *Harris v. Phoenix Accident & Sick Benefit Ass'n*, 149 Mich. 285, 112 N. W. 935, where a sick benefit was involved, the certificate required proofs of loss within 30 days from the date of the termination of the disability, and provided that no action should be maintained after six months from the date on which proof of loss was required to be filed. An insured filed proofs of loss December 14th, though the last day for filing was January 11th following. An action on the policy was commenced July 21st following. In

(1691)

May the attorney of the insurer wrote to the attorney of the insured, stating that the claim was invalid, but suggesting a doubt as to the first month of disability. On June 9th the attorney of the insurer wrote that he would hold the matter in abeyance for a few days awaiting further communication from the attorney of the insured, and declared that it was to be understood that the proposition of one month's indemnity was a compromise and not a waiver of any of the conditions of the certificate. It was held that the failure of the insured to sue within six months was not waived.

A delay beyond the stipulated time, induced by the reliance of the insured or beneficiary on a promise by the company to pay the claim, will not defeat the action.

Prudential Ins. Co. v. Hummer, 84 Pac. 61, 36 Colo. 208; *Stanley v. Sterling Mut. Life Ins. Co.*, 12 Ga. App. 475, 77 S. E. 664; *Continental Casualty Co. v. Hunt*, 53 Ind. App. 657, 101 N. E. 519; *Monahan v. Metropolitan Surety Co.* (Sup.) 114 N. Y. Supp. 862.

In an action on a fire insurance policy begun after the expiration of the period prescribed in the policy, the jury may consider in connection with the other facts in the case as bearing on the question of waiver offers of compromise made by the company after the expiration of a year from the date of the fire. *Eberly v. Springfield Fire & Marine Ins. Co.*, 51 Pa. Super. Ct. 474.

3997-4000. (1) Pleading and practice

3997 (1). The application for a life insurance policy, which was expressly made a part of the policy, contained a stipulation limiting the time within which any action should be brought. A complaint in an action on the policy alleged that insurer "purposely and willfully concealed" from plaintiff the contents of the application to induce her to delay the bringing of the suit until after the expiration of the time limited, and purposely, willfully, and with intent to defraud induced her to delay the bringing of the action until the time limited had elapsed, and that she was never able to obtain an inspection of the application, and that the copy attached to the complaint was a copy of the application as furnished by insurer after repeated demands therefor, and that the application was not furnished until after the expiration of the time limited. It was held, in *Gill v. Manhattan Life Ins. Co.*, 11 Ariz. 232, 95 Pac. 89, that the complaint was insufficient for failing to aver facts on which to predicate relief from the consequences of the delay; the words "purposely" and "willfully" adding nothing to the charge that the insurer concealed the contents of the application, for "to

conceal" means purposely to keep from discovery. In *Creem v. Fidelity & Casualty Co.*, 132 App. Div. 241, 116 N. Y. Supp. 1042, the defendant had issued to plaintiff contractor for the erection of a bridge, a liability policy, and also insured the bridge company, and when a pedestrian who was injured, incidental to the construction of the bridge, brought an action against the bridge company, insurer's attorneys assumed the defense and notified plaintiff that it would be liable to the bridge company in case of a recovery. In an action on the policy by plaintiff, the complaint alleged that in response to such notice, and at insurer's request, and upon its promise that every opportunity would be afforded plaintiff to protect his interest, plaintiff assisted in the defense of such action. It was held that such allegation was not sufficient to admit proof of waiver or estoppel precluding insurer from defending on the ground that the action was barred under limitations prescribed by the policy.

3998 (1). Where a complaint alleges facts sufficient to excuse plaintiff's delay in not instituting the action within the time specified in the contract sued on for instituting the same, an answer alleging that the action was not commenced within the time so limited is demurrable (*Ausplund v. Aetna Indemnity Co.*, 81 Pac. 577, 47 Or. 10, rehearing denied 82 Pac. 12, 47 Or. 10). A plea alleging that insured voluntarily directed the cancellation of his policy, and suffered it to lapse, and that the causes of action alleged in the declaration were discovered by the plaintiff more than three years before the suit, was a sufficient plea of limitations (*Price v. Mutual Reserve Life Ins. Co.*, 107 Md. 374, 68 Atl. 689). Where the laws of a fraternal order provide that suits on beneficiary certificates shall be barred unless begun within six months after final rejection of the claim of a member, a plea, in an action on a certificate, which alleged that the member's claim was rejected prior to March, and the suit, not having been commenced until November 17th following, was barred, was bad for failing to aver that the member had notice of the rejection of the claim more than six months before suit (*Switchmen's Union of North America v. Colehouse*, 81 N. E. 696, 227 Ill. 561).

Proof of waiver of the 12-month limitation within which the policy required action to be brought was permissible without the waiver having been specially pleaded; such proof being permissible under the allegation of full performance of the conditions. *Martin v. Modern Woodmen of America*, 158 Mo. App. 468, 139 S. W. 231.

3999 (1). In an action on a fire insurance policy, where plaintiff does not produce the policy and defendant denies its existence, defendant cannot set up as a defense that the suit had not been brought within 12 months from the date of the fire, where there is no proof whatever of the existence in the policy of any provision that suit should be brought within that time (*Comer v. Patrons' Mut. Fire Ins. Co.*, 53 Pa. Super. Ct. 516).

Slight evidence is sufficient to establish a waiver of a condition in a policy as to the time suit must be brought on policy.

North American Acc. Ins. Co. v. Williamson, 118 Ill. App. 670; *Clark v. Pacific Mut. Life Ins. Co. of California*, 185 Ill. App. 580.

The sufficiency of the evidence to show waiver is considered in *North American Acc. Ins. Co. v. Williamson*, 118 Ill. App. 670; *Thomson v. American Fidelity Co.*, 102 N. E. 699, 215 Mass. 460; *Berger v. Aetna Life Ins. Co.*, 95 N. Y. Supp. 541, 48 Misc. Rep. 385; *McArdle v. German Alliance Ins. Co.*, 76 N. E. 337, 183 N. Y. 368, reversing 98 App. Div. 594, 90 N. Y. Supp. 485.

Whether the defendant was estopped from asserting that the action was not commenced within the time provided by the policy was a question for the jury (*Walsh v. Metropolitan Life Ins. Co.*, 93 N. Y. Supp. 445, 105 App. Div. 186).

3. PROCESS

4000-4001. (a) Place of service

4001 (a). Under the Missouri statute (Rev. St. 1899, § 8092 [Ann. St. 1906, p. 3843]), providing that in suits against mutual companies process shall be served on the president, secretary, or chief officer in charge of the "principal office" of such company, a return of service, reciting that it was served on the secretary of the company, he being in said defendant's "usual business office" and in charge thereof, is insufficient to confer jurisdiction, since it does not show that such office was the company's principal office.

Wicecarver v. Mercantile Town Mut. Ins. Co., 137 Mo. App. 247, 117 S. W. 698; *Thomasson v. Mercantile Town Mut. Ins. Co.*, 217 Mo. 485, 116 S. W. 1092; *Lohoeffner v. Mercantile Town Mut. Ins. Co.*, 118 S. W. 515, 136 Mo. App. 540.

In an action against a fraternal insurer, local lodge which admitted members, collected fees, etc., is an office and place of business in the county of the insurer, so that service on the chief executive officer of such lodge was a service upon the insurer itself (Supreme (1694))

Circle of Benevolence v. Beall, 89 S. E. 630, 18 Ga. App. 425). Where it did not appear that the defendant lodge, if conceded to be an insurance company, had a place of business in the county or that its "district grand master," who resided in the county and on whom service was had was defendant's agent, the court was without jurisdiction (District Grand Lodge No. 18, etc., v. Hall, 17 Ga. App. 589, 87 S. E. 845).

4001-4003. (b) Persons on whom service may be made

4001 (b). Where no particular person has been designated as the one upon whom service of process shall be made, service may be made on any officer or agent of the company within the state.

On agent: Commercial Mut. Accident Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782; *Heralds of Liberty v. Bowen*, 8 Ga. App. 325, 68 S. E. 1008; *Great Eastern Casualty Co. v. Haynie*, 16 Ga. App. 643, 85 S. E. 938; *Girard Fire & Marine Ins. Co. of Philadelphia v. Bankard*, 107 Md. 538, 69 Atl. 415; *Fraternal Bankers of America v. Wire*, 150 Mo. App. 765, 129 S. W. 765; *Juckett v. Brennaman*, 157 N. W. 925, 99 Neb. 755; *Continental Ins. Co. v. Hull*, 38 Okl. 307, 132 Pac. 657; *Delaware Ins. Co. v. Hutto* (Tex. Civ. App.) 159 S. W. 73.

On secretary of local lodge: *Dale v. Modern Woodmen of America*, 140 Ill. App. 16; *Luckey v. Yeomen of America*, 141 Ill. App. 332; *Hildebrand v. United Artisans*, 79 Pac. 347, 46 Or. 134, 114 Am. St. Rep. 852. But see *Jones v. District Grand Lodge, No. 18, G. U. O. O. F.*, 12 Ga. App. 273, 76 S. E. 279, holding that, where defendant grand lodge of a mutual benefit association had no office and transacted no business in C. county, and was not represented there by the officers of the local lodge, who were in no sense the defendant's agents, the city court of Savannah, located in C. county, could acquire no jurisdiction of defendant by service on the officers of the local lodge.

Service of summons within the state on a resident director of a foreign insurance company, as provided by Code Civ. Proc. N. Y. § 432, subd. 3, when the cause of action arises therein, is a valid service if the company is doing business in the state, and confers jurisdiction on a federal court sitting in that state. *Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 25 Sup. Ct. 483, 197 U. S. 407, 49 L. Ed. 810.

An insurance broker who sends applications for insurance to a foreign company, delivers policies issued thereon and sent to him for delivery, collects and remits premiums, retaining a commission which is allowed, is an "agent," so that process against the company may be served on him. *McCord v. Illinois Nat. Fire Ins. Co. of Springfield*, 47 Ind. App. 602, 94 N. E. 1053.

The medical representative of a foreign company who comes into the state clothed with full authority to adjust a claim is one "who adjusts or settles a loss" within Rev. St. Mo. 1899, § 7992 (Ann. St. 1906, p. 3801), providing for service of process on local agents, although in fact such loss is not actually settled. *Commercial Mut. Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782.

Service cannot be made on a foreign accident insurance company by leaving a copy of the summons and complaint with a physician whose only connection with the company was that he was from time to time employed in isolated cases to report on the physical condition of injured policy holders within a specified district for which he was paid a physician's fee, being without any authority or duty to make any contract or pay losses or indemnities allowed. *Higham v. Iowa State Travelers' Ass'n* (C. C.) 183 Fed. 845.

Under Kirby's Dig. § 4378, relating to service of process against fraternal orders, service of summons upon the reporter or collector of the defendant, while the chief officer of the lodge was not out of the county, was not valid. *Knights of Honor of the World v. Epps*, 123 Ark. 371, 185 S. W. 470.

Rev. St. Mo. 1909, § 7042, is not invalid because construed to permit personal service on foreign insurance agent on causes of action arising in other states. *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill. Co.*, 37 Sup. Ct. 344, 243 U. S. 93, 61 L. Ed. 610.

4003-4004. (c) Solicitors of insurance

4004 (c). Under the Iowa statute (Code, § 3532), and in view of sections 1749, 1750, 3499, 3530, 3531, service of process upon a soliciting agent of an insurance company is good service on the company (*Bradshaw v. Des Moines Ins. Co.* [Iowa] 134 N. W. 628). But a solicitor who had been, but at the time of service of process upon him had ceased to be a solicitor of applications in a company which sold sick, accident, and funeral benefits, was not "a managing agent" of such company, within the meaning of the Ohio statute authorizing service of process upon the managing agent of a foreign corporation (*Spiker v. American Relief Soc.*, 103 N. W. 611, 140 Mich. 225).

4004-4005. (d) Reception of premiums as affecting character of agency

4005 (d). In Nebraska it has been held that a foreign fraternal accident company may select its agents upon whom process may be served as prescribed by Comp. St. 1909, c. 16, § 5, but if it fails to do so, a member of such association receiving a blank application for membership with a request to obtain new members and solic-

iting a person to become a member, collecting his membership fee and remitting it with the application to the company in another state which accepted it, was an agent of the company upon whom service of summons could be made under section 8, providing that any person in the state receiving money on account of any contract of insurance made by him to be transmitted to such company shall be deemed an agent thereof, where the performance and fruits of such acts are accepted by the company (*Tomson v. Iowa State Traveling Men's Ass'n* [Neb.] 129 N. W. 529).

4005-4006. (e) Service after cessation of agency

4006 (e). Where a nonresident insurance company has abandoned its agency in an action against it service may be had, under Civ. Code 1910, § 2564, by leaving a copy of suit and process at the place where the agent was located when the contract was executed (*Peters v. Queen Ins. Co.*, 73 S. E. 664, 137 Ga. 440). Service of process in an action against an insurance company, which has ceased to do business in the county where the policy was written, may be obtained by serving a second original process upon the company at its office in another county, where it had an agent to receive service of process (*Jefferson Fire Ins. Co. of Philadelphia v. Brackin*, 79 S. E. 467, 140 Ga. 637).

As to the method of service against nonresident insurance company, on abandonment of agency, see also, *United States Casualty Co. v. Newman*, 73 S. E. 667, 137 Ga. 447.

4006-4009. (f) Service on state auditor, insurance commissioner, etc.

4006 (f). The Alabama statute (Code 1907, § 4560), requiring insurance companies to designate commissioner of insurance as agent to accept process while any liability remains outstanding in the state, is valid (*Lewis v. International Ins. Co.* [Ala.] 73 South. 629).

4007 (f). In *Birch v. Mutual Reserve Life Ins. Co.*, 91 App. Div. 384, 86 N. Y. Supp. 872, affirmed in 181 N. Y. 583, 74 N. E. 1115, the facts were these: The North Carolina statute (Laws N. C. 1899, p. 175, c. 54, § 62) prohibits any foreign insurance company from doing business within the state until it has appointed the insurance commissioner or his successor its attorney to receive service of process, and that his authority shall continue in force and irrevocable so long as any liability of the company remains outstanding within the state. Defendant complied with such act, but thereafter attempted to cancel the insurance commissioner's au-

thority to accept service by notice, etc., and, though it thereafter accepted no new business within the state, it continued to receive premiums on outstanding business, and settle claims thereon. It was held that such attempted cancellation of the insurance commissioner's power to accept service was invalid, and that judgments recovered against defendant in North Carolina on policies in force prior to defendant's compliance with such act, on process served on the insurance commissioner, were valid. The judgment in this case was subsequently affirmed by the Supreme Court of the United States in *Mutual Reserve Life Ins. Co. v. Birch*, 200 U. S. 612, 26 Sup. Ct. 752, 50 L. Ed. 620. In *Williams v. Mutual Reserve Fund Life Ass'n*, 145 N. C. 128, 58 S. E. 802, it was held that neither a resident of Virginia who is an assignee of a policy issued by a New York corporation to a citizen of North Carolina, which stipulates that it is a New York contract, nor his cause of action thereon, is within Revisal 1905, § 4747, providing that the appointment by a foreign insurance corporation of the insurance commissioner as attorney shall be irrevocable as long as any liability of the corporation remains outstanding in the state, notwithstanding the right secured to every citizen of any of the states to sue in the courts of another state.

As against a foreign fraternal insurance order doing business within the state, service of summons on the insurance commissioner conferred jurisdiction of the society (*Brenizer v. Supreme Council, Royal Arcanum*, 53 S. E. 835, 141 N. C. 409, 6 L. R. A. [N. S.] 235). So, under a statute of Pennsylvania requiring foreign insurance companies doing business in the state to file with the insurance commissioner a stipulation that legal process may be served on such commissioner, or a person designated by him, a company so served, and which is shown to have done business in that state, is presumed to have complied with such requirement, in the absence of pleading and proof to the contrary, and a judgment taken on such service is valid (*Old Wayne Mut. Life Ass'n v. McDonough*, 73 N. E. 703, 164 Ind. 321). But the judgment in this case was reversed by the Supreme Court of the United States in 27 Sup. Ct. 236, 204 U. S. 8, 51 L. Ed. 345. And it has been held in Mississippi that before a judgment by default can be rendered against a foreign insurance company, the record must show service upon the company or its attorney in fact, and such service is not shown where there is nothing to show that the company had ever appointed the insurance commissioner, upon whom the summons

was served, as its attorney in fact for that purpose as required by statute (*Globe & Rutgers Fire Ins. Co. v. Sayle*, 107 Miss. 169, 65 South. 125). To bind a foreign insurance company by service of process on the state superintendent of insurance under Rev. St. Mo. 1899, § 7991 (Ann. St. 1906, p. 3799), it must appear that the company is within such statute by doing business in the state, or that it has been doing business in the state and still has policies or liabilities outstanding therein (*Webster v. Iowa State Traveling Men's Ass'n* [C. C.] 165 Fed. 367).

▲ foreign insurance company, having filed its consent that service on the insurance commissioner shall constitute service on it, cannot revoke the same so long as it has liabilities within the state. *Commonwealth v. Provident Savings Life Assur. Society*, 159 S. W. 698, 155 Ky. 197, opinion modified on rehearing 160 S. W. 476, 155 Ky. 771.

An insurance company doing business in California where it is a foreign corporation may be served with process under Code Civ. Proc. § 411, subd. 2, which provides generally for serving foreign corporations having "a managing or business agent, cashier or secretary within the state" by delivering a copy of the process to such person, or service may be made under Pol. Code, § 616, which requires such companies to file in the office of the state insurance commissioner the name of an agent on whom service may be made, and also an agreement that, should it at any time be without such agent, process against it may be served on the commissioner; but such substituted service on the commissioner is authorized only when the company is, by resignation, revocation, or otherwise, without the agent specified in the latter section (*Buckingham & Hecht v. North German Fire Ins. Co.* [C. C.] 149 Fed. 622).

Service on the insurance commissioner has been upheld in the following cases: *Lewis v. International Ins. Co.* (Ala.) 73 South. 629; *Mutual Benefit Life Ins. Co. v. First Nat. Bank*, 169 S. W. 1028, 160 Ky. 538; *Braunstein v. Fraternal Union of America*, 133 Minn. 8, 157 N. W. 721; *Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co. of Philadelphia*, 184 S. W. 999, 267 Mo. 524; *International Order of Twelve, Knights and Daughters of Tabor, v. Brown* (Tex. Civ. App.) 190 S. W. 251.

It has been held in Oklahoma that where a suit was brought in the Indian Territory against a foreign life insurance company which after statehood appointed the insurance commissioner as its agent for service, and where an alias summons, issued out of the state court to which the suit was transferred, was served on the in-

insurance commissioner, the court had jurisdiction of defendant (Supreme Lodge of Herald of Liberty v. Herrod, 141 Pac. 269, 42 Okl. 308). Defendant, a Colorado beneficiary association, consolidated with a like association of Nebraska, is estopped to set up its failure to comply with Gen. St. 1913, § 3555, or to allege that service on the insurance commissioner was insufficient to give jurisdiction, where it had collected and received premiums in Minnesota (Kulberg v. Fraternal Union of America, 154 N. W. 748, 131 Minn. 131).

In suit upon a judgment rendered against a mutual insurance association of Minnesota by a circuit court of Wisconsin, evidence sufficient to show that it was doing business in Wisconsin, so that service on Wisconsin insurance commissioner was effective. Wold v. Minnesota Commercial Men's Ass'n, 136 Minn. 380, 162 N. W. 461.

The Kentucky statute relating to service on the insurance commissioner does not apply to fraternal benefit societies (American Patriots v. Kinkead, 144 Ky. 662, 139 S. W. 834).

4009-4010. (g) What constitutes "doing business" in the state, so as to justify substituted service

4009 (g). Under the Colorado statute (Laws 1907, p. 447, § 22), the execution outside of the state of a contractor's bond, delivered within the state, is a transaction of business by a foreign surety company which had withdrawn from the state, authorizing service on the insurance commissioner (Bankers' Surety Co. v. Town of Holly, 219 Fed. 96, 134 C. C. A. 536).

4010-4014. (h) Effect of withdrawal from state

4011 (h). The withdrawal of a foreign insurance company doing business in the state will not deprive the courts of jurisdiction of actions subsequently brought for liability incurred before such withdrawal (S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co. [W. Va.] 71 S. E. 194). And consequently the appointment of the state insurance commissioner as an attorney upon whom service may be made by a foreign insurance company is not revocable on the withdrawal of the company from the state, leaving contracts made therein outstanding.

Mutual Reserve Fund Life Ass'n v. Tuchfeld, 159 Fed. 833, 86 C. C. A. 657 (construing Tennessee statute); Chehalis River Lumber & Shingle Co. v. Empire State Surety Co. (D. C.) 206 Fed. 559 (construing Washington statute).

The revocation of a power of attorney appointing the state superintendent of insurance attorney to receive process of a foreign insurance company, which had for more than five years ceased to do business in the state, was effective, so that service of the summons upon the superintendent thereafter was a nullity.

Badger v. Helvetia-Swiss Fire Ins. Co. of St. Gall, Switzerland, 120 N. Y. Supp. 161, 136 App. Div. 31; *Tierney v. Helvetia-Swiss Fire Ins. Co.*, 138 App. Div. 469, 122 N. Y. Supp. 869.

The receipt by a foreign insurance company at its home office of premiums upon policies theretofore issued, together with four isolated acts extending over a period of three years, consisting in rewriting an existing policy, sending a check in payment of a policy, to be delivered upon receipt of certain unpaid assessments, and two adjustments within the state of claims which have accrued, do not constitute doing business within the state after the company's asserted withdrawal therefrom in good faith, so as to preclude it from revoking its designation of the state insurance commissioner as its agent to receive service of process (*Hunter v. Mutual Reserve Life Ins. Co.*, 31 S. Ct. 127, 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. [N. S.] 686, affirming judgment 76 N. E. 1072, 184 N. Y. 136, 30 L. R. A. [N. S.] 677, 6 Ann. Cas. 291).

4014-4017. (i) Mode of service

4016 (i). It has been held in Delaware that under the Delaware statute (23 Del. Laws, c. 71, §§ 1, 3), service of process upon a foreign insurance company must be personally made upon the insurance commissioner or the person designated to act in his absence, and service by leaving a copy with an adult in the commissioner's office is unavailing (*Horrigan Contracting Co. v. Columbia Ins. Co.*, 4 Boyce [Del.] 454, 89 Atl. 210). So, too, it has been held in Washington that the insurance commissioner derives his authority, not from the statute, but from the power of appointment; and hence service cannot be made on his deputy (*Bennett v. Supreme Tent of Knights of Maccabees of the World*, 82 Pac. 744, 40 Wash. 431, 2 L. R. A. [N. S.] 389). But the doctrine that service cannot be made on the deputy has been questioned in *Bankers' Surety Co. v. Town of Holly*, 219 Fed. 96, 134 C. C. A. 536.

The *Bennett Case*, above referred to, also held that the Washington statute does not authorize the commissioner to accept service or waive personal service of summons and that, if summons was not legally served, it was immaterial that the company had

actual notice of the commencement of the action. While it may be conceded that actual notice would not be equivalent to proper service of process, yet the weight of authority is undoubtedly that the commissioner may accept service.

Mutual Reserve Fund Life Ass'n v. Tuchfeld, 159 Fed. 833, 86 C. C. A. 657; State v. Brotherhood of American Yeomen, 111 Minn. 39, 126 N. W. 404; Appelbaum v. Star Fire Ins. Co., 100 N. Y. Supp. 747, 115 App. Div. 117; Patton v. Continental Casualty Co., 119 Tenn. 364, 104 S. W. 305.

Under Ky. St. § 631, service on commissioner of insurance in an action against a foreign insurance company is not completed until he had forwarded summons to the company (Chicago Life Ins. Co. v. Robertson, 143 S. W. 740, 147 Ky. 61).

Construction of statutes as to service of process on insurance companies is considered in the following cases: Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 25 Sup. Ct. 483, 197 U. S. 407, 49 L. Ed. 810; Mitchell v. Supreme Lodge M. A. F. O., 155 Ill. App. 183; Supreme Hive of Ladies of Maccabees of the World v. Harrington, 81 N. E. 533, 227 Ill. 511; Bruning v. Brotherhood Acc. Co., 77 N. E. 710, 191 Mass. 115; Spencer v. Court of Honor, 139 N. W. 815, 120 Minn. 422; State ex rel. Pacific Mut. Life Ins. Co. v. Grimm, 143 S. W. 483, 239 Mo. 135; Montgomery v. United States Fidelity & Guaranty Co., 90 S. C. 283, 71 S. E. 1084; American Nat. Ins. Co. v. Rodriguez (Tex. Civ. App.) 152 S. W. 871; Modern Woodmen of America v. Metcalfe (Tex. Civ. App.) 154 S. W. 662.

(1702)

TABLE OF CASES CITED

[The Roman numerals refer to the number of the volume; the Arabic figures immediately following refer to the black-letter paging at the beginning of the text paragraphs.]

A

- Aachen & Munich Fire Ins. Co. v. Arabian Toilet Goods Co., 10 Ala. App. 395, 64 South. 635—vi. 751(h); vii. 3038(b), 3040(b), 3355(d), 3487(a).
- A. A. Rake & Son v. Century Fire Ins. Co., 148 Iowa, 170, 125 N. W. 207—vi. 616(f).
- Aaronson v. New York Life Ins. Co., 142 N. Y. Supp. 568, 81 Misc. Rep. 228—vi. 1952(c), 1953(c), 2159(c).
- Abbott v. Supreme Colony, United Order of Pilgrim Fathers, 190 Mass. 67, 76 N. E. 234—vii. 3767(s).
- Abbott Lumber Co. v. Home Ins. Co., 72 South. 841, 140 La. 130—vii. 3889(c).
- Abell v. Modern Woodmen, 96 Minn. 494, 105 N. W. 65, 906—vi. 2212(e), 2242(f); vii. 2688(b).
- Ables v. Ackley, 133 Mo. App. 594, 113 S. W. 698—vi. 792(f); vii. 3756(q), 3770(s), 3772(s).
- Abrahamson v. Hartford Fire Ins. Co., 181 Ill. App. 254—vi. 507(f); vii. 2521(c), 2622(a), 2777(e).
- Abramovitz v. National Council of Knights and Ladies of Security, 134 Minn. 302, 159 N. W. 624—vii. 3543(e).
- A. B. Tegley Hardware Co. v. Continental Ins. Co., 154 Pac. 229, 97 Kan. 127—vii. 3008(a).
- Acton v. Farmers' Home Ins. Co., 124 Ky. 677, 99 S. W. 955, 30 Ky. Law Rep. 919—vi. 970(t), 982(f).
- Adam v. Columbian Nat. Life Ins. Co., 191 Ill. App. 378—vi. 509(g).
- v. Manhattan Life Ins. Co., 125 N. Y. Supp. 1111, 140 App. Div. 922—vi. 2286(b); vii. 3964(d).
- 97 N. E. 740, 204 N. Y. 357—vi. 2286(b); vii. 3964(d).
- Adams v. American Patriots, 141 S. W. 21, 159 Mo. App. 340—vi. 2142(h).
- v. Atlas Mut. Ins. Co., 135 Iowa, 299, 112 N. W. 651—vi. 1623(n), 1893(i).
- v. Farmers' Mut. Fire Ins. Co., 90 S. W. 747, 115 Mo. App. 21—vi. 346(b), 619(b); vii. 2800(g), 3373(a), 3710(j).
- Adams v. Modern Woodmen of America, 145 Mo. App. 207, 130 S. W. 113—vi. 1969(f), 2064(l), 2144(j).
- v. North American Ins. Co., 210 Mass. 550, 96 N. E. 1094—vi. 188(a).
- Adams Co. v. Nesbit, 38 S. D. 6, 159 N. W. 869—vi. 2448(b), 2449(c), 2451(c).
- v. Western Surety Co., 35 S. D. 194, 151 N. W. 890—vi. 783(a).
- Adolph G. Huppel & Sons v. Boston Fire Ins. Co., 104 N. Y. Supp. 659, 55 Misc. Rep. 125—vi. 1528(e).
- Ætna Accident & Liability Co. v. White (Tex. Civ. App.) 177 S. W. 162—vi. 1199(c), 1437(h); vii. 2742(c), 3886(b).
- Ætna Fire Ins. Co. v. Kennedy, 50 South. 73, 161 Ala. 600, 135 Am. St. Rep. 160—vii. 2479(e), 3121(c).
- Ætna Indemnity Co. v. Farmers' Nat. Bank, 169 Fed. 737, 95 C. C. A. 169—vi. 2435(a), 2437(b), 2451(c).
- v. George A. Fuller Co., 111 Md. 321, 73 Atl. 738; 111 Md. 321, 74 Atl. 369—vi. 13(k).
- v. J. R. Crowe Coal & Mining Co., 154 Fed. 545, 83 C. C. A. 431—vi. 8(e), 88(c), 415(c), 632(c), 2448(b), 2451(c); vii. 2649(p), 2683(b), 2767(d), 3579(e).
- v. Ryan, 53 Misc. Rep. 614, 103 N. Y. Supp. 756—vi. 409(a), 914(a).
- Ætna Ins. Co. v. Brannon, 89 S. W. 1057, 99 Tex. 391, 2 L. R. A. (N. S.) 548, 13 Ann. Cas. 1020—vi. 732(b), 884(u).
- (Tex. Civ. App.) 91 S. W. 614—vii. 2481(f), 2555(a), 2558(a).
- v. Cowan, 111 Miss. 453, 71 South. 746—vii. 3673(m), 3700(g).
- v. Dancer (Tex. Civ. App.) 181 S. W. 772—vi. 1903(j).
- v. Hann, 196 Ala. 234, 72 So. 48—vii. 3893(a), 3927(n).
- v. Heidelberg, 112 Miss. 46, 72 South. 852, L. R. A. 1917B, 253—vi. 547(d), 730(a); vii. 3089(g).
- (Miss.) 72 South. 470—vi. 547(d), 730(a); vii. 3089(g).

- Ætna Ins. Co. v. Holmes*, 59 Fla. 116, 52 South. 801—vii. 3497(e).
- v. Jester*, 37 Okl. 413, 132 Pac. 130, 47 L. R. A. (N. S.) 1191—vii. 3648(l), 3673(l).
- v. Johnson*, 56 S. E. 643, 127 Ga. 491, 9 L. R. A. (N. S.) 667, 9 Ann. Cas. 461—vi. 1815(b), 1818 (c), 1823 (e), 1824(e); vii. 2781 (f).
- v. Jones (Ind. App.)* 115 N. E. 697—vii. 3477(a), 3516(b), 3561(d).
- v. Kennedy*, 161 Ala. 600, 50 South. 73, 135 Am. St. Rep. 160—vi. 176(h), 233(l); vii. 2526(d).
- v. Lipsitz*, 130 Ga. 170, 60 S. E. 531, 14 Ann. Cas. 1070—vi. 1821(d), 1822(e).
- v. Mount*, 90 Miss. 642, 44 South. 162, 45 South. 835, 15 L. R. A. (N. S.) 471—vi. 563(f), 1542(g), 1827(f); vii. 2693(e).
- v. Pelham*, 115 Mass. 229, 76 South. 153—vii. 3631(b), 3640(h).
- v. Renno*, 93 Miss. 594, 46 So. 947—vi. 455(g); vii. 2792(c).
- 96 Miss. 172, 50 South. 563—vi. 450(d), 454(g); vii. 2796(f), 2807(k).
- v. Robards Tobacco Co.'s Trustee*, 109 S. W. 1185, 33 Ky. Law Rep. 257—vii. 2220(c).
- v. Short*, 124 Ark. 505, 187 S. W. 657—vi. 397(d), 398(f), 850(b); vii. 3884(a).
- v. Waco Co. (Tex. Civ. App.)* 189 S. W. 315—vi. 1502(k), 1855(q).
- Ætna Life Ins. Co. v. American Zinc, Lead & Smelting Co.*, 154 S. W. 827, 169 Mo. App. 550—vi. 993 (b); vii. 2827(g).
- v. Bethel*, 140 Ky. 609, 131 S. W. 523—vi. 632(c); vii. 3168(e), 3176(a), 3199(h), 3303(g), 3453 (i), 3454(j), 3458(b), 3461(c), 3534(b), 3559(c).
- v. Bocking*, 39 Ind. App. 586, 79 N. E. 524—vi. 1048(h), 1961(k); vii. 2625(a), 2633(e).
- v. Bowling Green Gaslight Co.*, 150 S. W. 994, 150 Ky. 732, 43 L. R. A. (N. S.) 1128—vi. 629(a); vii. 3331(a).
- v. Clark*, 62 Pa. Super. Ct. 528—vi. 1007(h).
- v. Claypool*, 128 Ky. 43, 107 S. W. 325, 32 Ky. Law Rep. 856—vi. 1990(g), 2092(b).
- v. Conway*, 75 S. E. 915, 11 Ga. App. 557—vi. 1953(c), 2007(a), 2015(i), 2096(a), 2183(b).
- v. Crabtree*, 142 S. W. 690, 146 Ky. 363—vi. 2096(a); vii. 3175(h).
- v. Davis*, 191 Fed. 343, 112 C. C. A. 87—vii. 3304(g).
- v. Doerr (Ind. App.)* 115 N. E. 700—vi. 1048(h).
- v. Dunn*, 138 Fed. 629, 71 C. C. A. 79—vi. 2207(b).
- Ætna Life Ins. Co. v. Du Parquet, Huot & Moneuse Co.*, 120 N. Y. Supp. 759, 65 Misc. Rep. 551—vi. 922(e).
- (Sup.) 122 N. Y. Supp. 688—vi. 922(e).
- v. El Paso Electric Ry. Co. (Tex. Civ. App.)* 184 S. W. 628—vi. 632(c); vii. 3316(a), 3841(b).
- v. Fitzgerald*, 75 N. E. 262, 165 Ind. 317, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232, 6 Ann. Cas. 551—vii. 3200(h), 3356(a), 3538 (d).
- v. Griffin*, 58 Tex. Civ. App. 198, 123 S. W. 432—vii. 3171(f), 3201(h), 3312(i), 3458(b).
- v. Hardison*, 199 Mass. 181, 85 N. E. 407—vi. 531(j); 576(f).
- v. Hocker*, 89 S. W. 26, 39 Tex. Civ. App. 330—vi. 460(j).
- v. Howell*, 107 S. W. 294, 32 Ky. Law Rep. 935—vi. 2096(a), 2105 (f); vii. 2521(c), 2537(k), 3959 (b).
- v. Kansas City Electric Light Co.*, 184 Mo. App. 718, 171 S. W. 530—vi. 922(e).
- v. Lasseter*, 153 Ala. 630, 45 South. 166, 15 L. R. A. (N. S.) 252—vii. 3289(b).
- v. Millar*, 113 Md. 686, 78 Atl. 483—vi. 1969(f), 1979(j), 1987(c), 2113(k), 2127(c), 2146(k); vii. 3169(e).
- v. Moore*, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356—vi. 1990(g), 2076(f); vii. 2537(k), 2653(t).
- v. National Union Fire Ins. Co.*, 98 Neb. 446, 153 N. W. 553, L. R. A. 1916A, 784—vii. 3892(d), 3915(j).
- v. North Star Mines Co.*, 107 N. Y. Supp. 140, 56 Misc. Rep. 164—vi. 935(o).
- v. Portland Gas & Coke Co.*, 229 Fed. 552, 144 C. C. A. 12, L. R. A. 1916D, 1027—vii. 3314(a).
- v. Ricks*, 94 S. W. 923, 79 Ark. 38—vi. 2302(a).
- v. Rustin*, 151 S. W. 366, 151 Ky. 103—vi. 643(j), 2002(b), 3213 (k).
- 153 S. W. 14, 152 Ky. 42—vi. 643(j), 2002(b), 3213(k).
- v. S. H. & S. Min. Co.*, 115 Pac. 540, 84 Kan. 826—vi. 934(o).
- v. Sugg*, 86 S. W. 967, 27 Ky. Law Rep. 846, 120 Ky. 449—vi. 2417 (i).
- v. Taylor*, 128 Ark. 155, 193 S. W. 540—vii. 3890(d).
- v. Tremblay*, 65 Atl. 22, 101 Me. 585—vii. 3919(j).
- v. Tyler Box & Lumber Co. (Tex. Civ. App.)* 149 S. W. 283—vii. 2767(d), 3319(a).
- v. Watkins*, 77 N. J. Law, 223, 71 Atl. 325—vi. 576(f).

- Ætna Life Ins. Co. v. Wicker*, 240 Fed. 398, 153 C. C. A. 324—vii. 3160 (a).
- v. Wimberly*, 112 S. W. 1038, 102 Tex. 46, 23 L. R. A. (N. S.) 759, 132 Am. St. Rep. 852—vi. 2259(a), 2302(a); vii. 3890 (c).
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- Afro-American Life Ins. Co. v. Adams*, 195 Ala. 147, 70 South. 119—vi. 253 (f), 2065(a), 2070(d).
- Agricultural Ins. Co. v. Owens*, 63 Tex. Civ. App. 354, 132 S. W. 828—vi. 1650 (a), 1675(i).
- Aiken v. Atlantic Life Ins. Co.*, 173 N. C. 400, 92 S. E. 184—vi. 2314(h), 2395 (b).
- Alabama Fidelity & Casualty Co. v. Alabama Penny Sav. Bank* (Ala.) 76 South. 103—vi. 1181(g), 2437(b); vii. 3320(b), 3577(e), 3581(e).
- Alaska Banking & Safe Deposit Co. of Nome, Alaska, v. Maritime Ins. Co. (D. C.)* 156 Fed. 710—vi. 841(f).
- Alba v. Provident Sav. Life Assur. Soc. of New York*, 43 South. 663, 118 La. 1021—vi. 1091(f); vii. 3775(t).
- Aldrich v. Brinker (D. C.)* 143 Fed. 563 —vii. 3805(i).
- Alexander v. Lane*, 157 Fed. 1002, 85 C. C. A. 677—vi. 271(j), 1118(k).
- v. Metropolitan Life Ins. Co.*, 150 N. C. 536, 64 S. E. 432—vi. 1990(g), 2096(a).
- v. Page (Sup.)* 150 N. Y. Supp. 104—vii. 3748(n).
- v. Sovereign Camp, W. O. W.*, 186 S. W. 2, 193 Mo. App. 411—vii. 3756(q).
- v. Woodmen of the World*, 161 Ala. 561, 49 South. 883—vi. 454(g); vii. 3129(a).
- Alex. Campbell Milk Co. v. United States Fidelity & Guaranty Co.*, 146 N. Y. Supp. 92, 161 App. Div. 738—vii. 3337 (d).
- Alezunas v. Granite State Fire Ins. Co.*, 111 Me. 171, 88 Atl. 413—vii. 3376(c), 3544(a).
- Alfred Hiller Co. v. Insurance Co. of North America*, 52 South. 104, 125 La. 938, 32 L. R. A. (N. S.) 453—vi. 1316 (f); vii. 2735(a).
- Alfisen v. Crouch*, 89 S. W. 329, 115 Tenn. 352—vi. 815(l); vii. 3756(q), 3775(t).
- Algate Co. v. Corporation of Royal Exchange Assur. of London, England*, 67 Wash. 173, 122 Pac. 986—vi. 1763(g).
- Algeo v. Fries*, 27 Pa. Super. Ct. 157—vii. 3790(b).
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- Allemannia Fire Ins. Co. v. Fireman's Ins. Co.*, 28 App. D. C. 330, 14 L. R. A. (N. S.) 1049—vi. 650(b); vii. 3935(b), 3937(b).
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- v. Fordtran (Tex. Civ. App.)* 128 S. W. 692—vi. 1832(a), 1837(b).
- v. Zweng*, 127 Ark. 141, 191 S. W. 903—vii. 2796(f), 2807(k).
- Allen v. Ætna Life Ins. Co.*, 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958—vii. 3335(c).
- v. Batz*, 116 Minn. 38, 133 N. W. 79 —vi. 1003(e).
- v. Gilman, McNeil & Co. (C. C.)* 137 Fed. 136—vii. 3335(c).
- v. Patrons' Mut. Fire Ins. Co.*, 165 Mich. 18, 130 N. W. 196—vi. 830 (a); vii. 3610(i).
- v. Phoenix Assur. Co.*, 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903, 10 Ann. Cas. 328—vi. 1349(c), 1373 (c), 1506(a), 1865 (c), 2555(a), 3560(c).
- 14 Idaho, 728, 95 Pac. 829—vi. 677(a); vii. 2531(i), 2555(a), 2580(h), 2604(e), 2621(a), 2634(f), 2650(q), 2658(a), 2690 (d).
- v. Smith*, 145 Ala. 657, 39 So. 615—vi. 935(o).
- 165 Ala. 247, 51 South. 724—vi. 1007(h); vii. 2853(k).
- v. Standard Ins. Co. (Ala.)* 73 South. 897—vii. 2690(d).
- v. Travelers' Protective Ass'n of America*, 163 Iowa, 217, 143 N. W. 574, 48 L. R. A. (N. S.) 600 —vii. 3159(a), 3184(b), 3212(k), 3213(k).
- Allen's Adm'r v. Pacific Mut. Life Ins. Co.*, 179 S. W. 581, 166 Ky. 605—vi. 253(f).
- Allen & Arnink Auto Renting Co. v. United Traction Co.*, 154 N. Y. Supp. 934, 91 Misc. Rep. 531—vii. 3893(a).
- Alliance Ins. Co. v. Producers' Cotton Oil Co.*, 108 Miss. 589, 67 South. 58—vii. 2955(e), 2958(f), 2960(h).
- Alligood v. Daniel & King*, 12 Ga. App. 220, 76 S. E. 1083—vi. 998(e).
- Allison v. Fidelity Mut. Fire Ins. Co.*, 81 Neb. 494, 116 N. W. 274, 129 Am. St. Rep. 694—vi. 572(b), 622(e).
- Allison's Ex'x v. Fidelity Life Ins. Co. of Philadelphia, Pa.*, 107 S. W. 730, 32 Ky. Law Rep. 1025—vi. 2293 (d).
- Alloway v. General Acc. Ins. Co.*, 35 Pa. Super. Ct. 371—vii. 3220(m).
- Almond v. Modern Woodmen of America*, 133 Mo. App. 382, 113 S. W. 695—vi. 61(h), 2254(b); vii. 3264(o), 3265 (o).
- Almy v. Commercial Travelers' Ass'n*, 59 Ind. App. 249, 106 N. E. 893—vi. 698 (f); vii. 3774(s).

- Alridge v. Brotherhood of American Yeomen*, 154 Mo. App. 700, 136 S. W. 31—vii. 3129(a).
- Alsop Process Co. v. Continental Ins. Co.*, 112 N. W. 132, 148 Mich. 566—vii. 3116(b).
- Althouse v. Roth*, 35 Pa. Super. Ct. 400—vii. 3741(k).
- Alvey v. Continental Ins. Co.*, 2 Cal. App. 253, 83 Pac. 285—vi. 906(f).
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- American Assur. Ass'n v. Hardiman*, 52 S. E. 536, 124 Ga. 379—vii. 2718(f).
- American Assur. Co. v. Dickson*, 34 Ohio Cir. Ct. R. 313—vii. 3294(c), 3959(b).
- American Automobile Ins. Co. v. Palmer*, 174 Mich. 295, 140 N. W. 557—vi. 568(a).
- v. Watts*, 12 Ala. App. 518, 67 South. 758—vi. 632(c); vii. 2793(d).
- American Bankers' Ins. Co. v. Thomas* (Okl.) 154 Pac. 44—vi. 451(f), 610(c).
- American Bonding Co. v. Ballard County Bank's Assignee*, 165 Ky. 63, 176 S. W. 368—vi. 635(d), 2439(c), 2449(c); vii. 3577(e).
- v. First Nat. Bank*, 85 S. W. 190, 27 Ky. Law Rep. 393—vii. 3906(f).
- v. Morrow*, 96 S. W. 613, 80 Ark. 49, 117 Am. St. Rep. 72—vi. 635(d), 2441(e), 2449(c), 2450(c); vii. 3337(d).
- American Bonding & Trust Co. v. Burke*, 85 Pac. 692, 36 Colo. 49—vi. 2435(a), 2439(c).
- American Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 106 Pac. 720—vi. 397(d), 405(l).
- 27 Cal. App. 647, 150 Pac. 996—vi. 848(a).
- American Candy Co. v. Aetna Life Ins. Co.*, 159 N. W. 917, 164 Wis. 266—vii. 3319(a).
- American Cent. Ins. Co. v. Antram*, 38 South. 626, 86 Misc. 224—vii. 2463(b), 2683(b), 2694(g), 3096(g).
- v. Chancey*, 60 Tex. Civ. App. 61, 127 S. W. 577—vi. 1699(f); vii. 2643(l), 2660(b), 2781(f).
- v. District Court of Ramsey County*, 147 N. W. 242, 125 Minn. 374, 52 L. R. A. (N. S.) 496—vii. 3642(i), 3656(p).
- v. Hardin*, 146 S. W. 418, 148 Ky. 246—vi. 398(f), 406(l).
- (Tex. Civ. App.) 151 S. W. 1152—vi. 1818(c); vii. 2614(j).
- v. Leake*, 104 S. W. 373, 31 Ky. Law Rep. 1016—vi. 166(j); vii. 3127(d).
- v. Noe*, 88 S. W. 572, 75 Ark. 406—vii. 3046(a), 3089(g), 3984(i).
- American Cent. Ins. Co. v. Stearns Lumber Co.*, 140 S. W. 143, 145 Ky. 255, 36 L. R. A. (N. S.) 566, Ann. Cas. 1913B, 628—vii. 3021(f).
- American Cent. Life Ins. Co. v. Rosenstein* (Ind. App.) 88 N. E. 97—vi. 1048(h), 2247(h), 2250(i); vii. 2463(b), 2665(c), 2831(b), 2861(n), 3755(g).
- 46 Ind. App. 537, 92 N. E. 380—vi. 1048(h), 2247(h), 2250(i); vii. 2463(b), 2665(c), 2831(b), 2861(n), 3755(g).
- American Cereal Co. v. London Guarantee & Acc. Co.*, 211 Fed. 96, 128 C. C. A. 24—vii. 3319(a).
- v. Western Assur. Co. (C. C.)* 148 Fed. 77—vi. 178(c), 182(c), 184(a), 793(g); vii. 3347(a), 3353(c), 3373(a), 3403(a).
- American Credit Indemnity Co. v. Hecht & Co.*, 137 Ky. 261, 125 S. W. 697—vi. 851(d); vii. 2766(b), 3326(c), 3532(f).
- 129 S. W. 340, 137 Ky. 261—vi. 851(d); vii. 2766(b), 3326(c), 3582(f).
- v. Henry A. Hitner's Sons Co.*, 228 Fed. 654, 143 C. C. A. 176—vi. 642(i).
- v. Jung (C. C.)* 195 Fed. 177, 115 C. C. A. 129—vii. 3338(e).
- American Fidelity Co. v. Bleakley*, 157 Iowa, 442, 138 N. W. 508—vi. 545(b).
- v. Echols* (Okl.) 155 Pac. 1160, L. R. A. 1916D, 1176—vii. 3163(c).
- v. R. L. Ginsburg Sons' Co.*, 187 Mich. 264, 153 N. W. 709—vi. 2439(c), 2813(p).
- American Fire Ins. Co. v. Haynie*, 91 Ark. 43, 120 S. W. 825—vii. 3367(h).
- v. Minsker Realty Co.*, 144 N. Y. Supp. 305, 83 Misc. Rep. 1—vi. 449(d), 913(a); vii. 2818(h).
- American Glove Co. v. Pennsylvania Fire Ins. Co.*, 15 Cal. App. 77, 113 Pac. 688—vii. 2791(b), 2793(d), 2794(d), 2808(l).
- American Guild v. Wyatt*, 125 Ky. 44, 100 S. W. 266, 30 Ky. Law Rep. 632—vi. 691(a), 700(f).
- American-Hawaiian S. S. Co. v. Bennett & Goodall*, 207 Fed. 510, 125 C. C. A. 172—vii. 2883(d), 2904(d).
- American Home Circle v. Eggers*, 137 Ill. App. 595—vii. 3677(b), 3959(b).
- v. Fromm*, 134 Ill. App. 605—vii. 3255(l), 3257(m).
- v. Schneider*, 134 Ill. App. 600, 604—vii. 3255(l), 3257(m).
- American Home Life Ins. Co. v. Melton* (Tex. Civ. App.) 144 S. W. 362—vi. 444(a).
- American Ins. Co. v. Bagley*, 65 S. E. 787, 6 Ga. App. 736—vi. 1382(j), 1814(a).

- American Ins. Co. v. Bailey & Musgrove*, 65 S. E. 160, 6 Ga. App. 424—vii. 3887(c).
- v. Crawford*, 110 Miss. 493, 70 South. 579—vi. 1837(b).
- v. Dannehower*, 115 S. W. 950, 89 Ark. 111—vi. 1388(g); vii. 3516(b), 3526(g).
- v. Dillahunt*, 89 Ark. 416, 117 S. W. 245—vi. 457(i), 459(j), 823(a).
- v. Egyptian Lodge No. 802, I. O. O. F.*, 128 Ill. App. 161—vi. 609(b), 730(a), 1506(a), 1717(b), 1966(b).
- v. Haynie*, 120 S. W. 825, 91 Ark. 43—vii. 3477(a), 3562(d).
- v. Hornbarger & Harris*, 85 Ark. 337, 108 S. W. 213—vi. 730(a), 1873(c), 1881(f), 1888(g).
- v. I. F. Peebles & Co.*, 64 S. E. 304, 5 Ga. App. 731—vi. 1387(e), 3410(e).
- v. McVickers Bros.*, 135 Ga. 118, 68 S. E. 1026—vii. 3989(k).
- v. Meyers*, 118 Ill. App. 484—vi. 734(b).
- v. Rodenhouse*, 36 Okl. 211, 128 Pac. 502—vii. 3616(m), 3617(m).
- American Liability Co. v. Bowman* (Ind. App.) 114 N. E. 992—vi. 632(c); vii. 3295(d), 3297(e).
- American Life & Acc. Ins. Co. v. Nirdlinger*, 113 Miss. 74, 73 South. 875—vi. 628(a), 3294(c).
- American Mut. Life Ins. Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526—vi. 247(b), 290(k), 1043(e), 1049(i).
- American Nat. Ins. Co. v. Anderson* (Tex. Civ. App.) 179 S. W. 66—vi. 1165(f), 1949(i).
- v. Bird* (Tex. Civ. App.) 174 S. W. 939—vii. 3533(b).
- v. Briggs* (Tex. Civ. App.) 156 S. W. 909—vii. 2755(b), 2757(k).
- v. Burnside* (Tex. Civ. App.) 175 S. W. 169—vii. 2757(b).
- v. Collins* (Tex. Civ. App.) 149 S. W. 554—vi. 2322(m); vii. 3890(c).
- v. Donahue* (Okl.) 153 Pac. 819—vii. 3537(d), 3561(d), 3886(a).
- v. Euce*, 2 Ohio App. 299, 35 Ohio Cir. Ct. R. 169—vii. 3477(a), 3514(b), 3559(c).
- v. Fawcett* (Tex. Civ. App.) 162 S. W. 10—vii. 2665(c).
- v. Gallimore* (Tex. Civ. App.) 166 S. W. 17—vi. 2398(c); vii. 3349(a).
- v. Hawkins* (Tex. Civ. App.) 189 S. W. 330—vi. 825(b).
- v. Hollingsworth* (Tex. Civ. App.) 189 S. W. 792—vii. 3890(c).
- v. Mooney*, 111 Ark. 514, 164 S. W. 276—vi. 2324(n).
- v. Nuckols* (Tex. Civ. App.) 187 S. W. 497—vii. 3450(g), 3490(c).
- American Nat. Ins. Co. v. Otis*, 122 Ark. 219, 183 S. W. 183, L. R. A. 1916E, 875—vi. 2395(b).
- v. Roberts* (Tex. Civ. App.) 146 S. W. 326—vii. 2697(h), 3298(e).
- v. Rodriguez* (Tex. Civ. App.) 152 S. W. 871—vii. 4016(i).
- v. Thompson* (Tex. Civ. App.) 186 S. W. 254—vii. 3240(e).
- v. White*, 126 Ark. 483, 191 S. W. 25—vii. 3134(b), 3143(f).
- v. Wilson* (Tex. Civ. App.) 176 S. W. 623—vii. 2847(h).
- American Nat. Life Ins. Co. v. Rowell* (Tex. Civ. App.) 175 S. W. 170—vii. 2757(b), 3349(a), 3556(a).
- v. White*, 126 Ark. 483, 191 S. W. 25—vii. 3143(f).
- American Patriots v. Cavanaugh*, 157 S. W. 1099, 154 Ky. 653—vi. 700(f); vii. 3872(d).
- v. Kinhead*, 144 Ky. 662, 139 S. W. 834—vii. 4007(f).
- American Sav. Bank & Trust Co. v. National Surety Co.*, 157 Pac. 877, 91 Wash. 307, L. R. A. 1916E, 435—vi. 783(a).
- American Steam Laundry Co. v. Hamburg Bremen Fire Ins. Co.*, 121 Tenn. 13, 113 S. W. 394, 21 L. R. A. (N. S.) 442—vi. 1065(b), 1720(b); vii. 2467(c), 2532(i), 2670(e).
- American Steel Co. v. German-American Fire Ins. Co.*, 187 Fed. 730, 109 C. C. A. 478—vii. 3630(a).
- American Surety Co. v. Cabell* (Okl.) 159 Pac. 352—vi. 914(a).
- v. Empson*, 39 Colo. 445, 89 Pac. 967—vi. 914(a).
- v. Musselman*, 90 Neb. 58, 132 N. W. 729—vi. 914(a), 935(o).
- v. Pangburn*, 182 Ind. 116, 105 N. E. 769, Ann. Cas. 1916E, 1126—vi. 635(d).
- American Temperance Life Ins. Ass'n v. Solomon*, 233 Fed. 213, 147 C. C. A. 219—vi. 1979(j), 2082(i).
- American Trust Co. v. Life Ins. Co.*, 173 N. C. 558, 92 S. E. 706—vi. 297(p); vii. 2755(b), 2830(b), 2846(h), 2860(m).
- A. M. Forbes Cartage Co. v. Frankfort Accident & Plate Glass Ins. Co.*, 195 Ill. App. 75—vii. 3582(g).
- Amory v. Reliance Ins. Co.*, 208 Mass. 378, 94 N. E. 677—vi. 1064(a); vii. 3375(c), 3708(i), 3712(k), 3839(b).
- Amos-Richia v. Northwestern Mut. Life Ins. Co.* (C. C.) 152 Fed. 192—vi. 456(h).
- 143 Mich. 684, 107 N. W. 707—vi. 456(h), 495(o).
- Ampersand Hotel Co. v. Home Ins. Co.*, 131 App. Div. 361, 115 N. Y. Supp. 480—vi. 1783(a); vii. 3016(d).
- 198 N. Y. 495, 91 N. E. 1099, 28 L. R. A. (N. S.) 218, 19 Ann. Cas. 839—vii. 3016(d).

- Amperсанд Hotel Co. v. Orient Ins. Co.**, 147 App. Div. 925, 131 N. Y. Supp. 1101—vii. 3037 (a).
 204 N. Y. 619, 97 N. E. 489—vii. 3037(a).
 97 N. E. 1101, 204 N. Y. 663—vii. 3037(a).
- Amusement Syndicate Co. v. Milwaukee Mechanics' Ins. Co.**, 136 Pac. 941, 91 Kan. 67—vii. 3071(h).
- v. Prussian Nat. Ins. Co.**, 85 Kan. 367, 116 Pac. 620—vii. 3071 (h), 3098(g), 3123(c), 3892(d), 3961(b).
 85 Kan. 616, 118 Pac. 76—vii. 3071(h), 3098(g), 3123(c), 3892 (d), 3961(b).
- Anable v. Fidelity & Casualty Co.**, 73 N. J. Law, 320, 63 Atl. 92—vii. 3304(g).
 74 N. J. Law, 686, 65 Atl. 1117—vii. 3304(g).
- Anchor Life Ins. Co. v. Meyer**, 61 Ind. App. 35, 111 N. E. 436—vi. 677(a), 1964(a); vii. 3138(d).
- Ancient Order of Gleaners v. Bury**, 165 Mich. 1, 130 N. W. 191, 34 L. R. A. (N. S.) 277—vii. 3772(s).
- Ancient Order of the Pyramids v. Dixon**, 45 Colo. 95, 100 Pac. 427—vi. 619(b).
- Ancient Order of United Workmen v. Mooney**, 79 Atl. 233, 230 Pa. 16—vii. 3776(u), 3878(f).
- Anderson v. Aetna Life Ins. Co.**, 75 N. H. 375, 74 Atl. 1051—vi. 629 (a), 636(e); vii. 3301(f), 3303(f), 3531(a).
- v. Fidelity & Casualty Co.**, 100 Misc. Rep. 411, 166 N. Y. Supp. 640—vii. 3304(g).
- v. Interstate Business Men's Acc. Ass'n**, 160 N. W. 522, 38 S. D. 105—vi. 2202(c).
- v. Life Ins. Co.**, 152 N. C. 1, 67 S. E. 53—vii. 3153(h), 3154(h).
- v. Mutual Life Ins. Co.**, 130 Pac. 726, 164 Cal. 712, Ann. Cas. 1914B, 903—vi. 632(c), 844(g).
- v. National Casualty Co.**, 135 N. Y. Supp. 889, 151 App. Div. 439—vii. 3294(c).
- v. Quick**, 126 Pac. 871, 163 Cal. 658—vii. 3690(b).
- v. Royal League**, 153 N. W. 853, 130 Minn. 416, L. R. A. 1916B, 901, Ann. Cas. 1917C, 691—vi. 559(a), 701(g), 807(g), 809(i); vii. 3772(s).
- v. Supreme Council Catholic Benev. Legion**, 60 Atl. 759, 69 N. J. Eq. 176—vii. 3781(u).
 67 Atl. 1103, 70 N. J. Eq. 810—vii. 3781(u).
- Anderson & Ireland Co. v. Maryland Casualty Co.**, 90 Atl. 780, 123 Md. 67—vii. 3331(a), 3343(g).
- Anderson & Son v. Shattuck**, 76 N. H. 240, 81 Atl. 781—vii. 3690(b).
- Andrews v. Dhrigo Mut. Fire Ins. Co.**, 91 Atl. 978, 112 Me. 258—vi. 1791(f); vii. 3409(d), 3531(a).
- v. Lavery**, 159 Mich. 26, 123 N. W. 543—vi. 1118(k).
- v. United States Casualty Co.**, 154 Wis. 82, 142 N. W. 487—vi. 636(e); vii. 3204(i), 3208(k), 3257(m).
- Ankele v. Workingmen's Relief Societies, A. U. V. O. of Illinois**, 182 Ill. App. 470—vi. 707(i).
- Anson v. New York Life Ins. Co.**, 252 Ill. 369, 96 N. E. 846, 37 L. R. A. (N. S.) 555—vi. 632(c); vii. 3287(f).
 162 Ill. App. 505—vi. 632(c); vii. 3287(f).
- Apietz v. Supreme Lodge Knights and Ladies of Honor**, 113 N. E. 63, 274 Ill. 196, L. R. A. 1917A, 183—vi. 698(e), 704(h), 711(i); vii. 2683(b).
 196 Ill. App. 278—vi. 698(e), 704(h), 711(i); vii. 2683(b).
- Appel v. Cooper Ins. Co.**, 80 N. E. 955, 76 Ohio St. 52, 10 L. R. A. (N. S.) 674, 10 Ann. Cas. 821—vii. 3965(e), 3968(f), 3975(g).
- v. People's Surety Co.**, 148 App. Div. 70, 132 N. Y. Supp. 200—vii. 2460(a), 3334(b).
- Appelbaum v. Star Fire Ins. Co.**, 100 N. Y. Supp. 747, 115 App. Div. 117—vii. 4016(i).
- Applebaum v. Order of United Commercial Travelers**, 88 S. E. 722, 171 N. C. 435—vi. 814(k).
- Applegate v. Travelers' Ins. Co.**, 153 Mo. App. 63, 132 S. W. 2—vii. 3237(d).
- Archer v. Equitable Life Assur. Soc.**, 154 N. Y. Supp. 519, 169 App. Div. 43—vi. 061(a), 1933(b), 1967(c), 1984(a).
 112 N. E. 433, 218 N. Y. 18—vi. 691(a), 1933(b), 1967(c), 1984(a).
- Arel v. First Nat. Fire Ins. Co.**, 190 S. W. 78, 195 Mo. App. 165—vii. 3432(m).
- v. Girard Fire & Marine Ins. Co. (Mo. App.)**, 190 S. W. 81—vii. 3432(m).
- Aris v. Mutual Life Ins. Co.**, 103 Pac. 50, 53, 54 Wash. 269, 695—vi. 2057(g).
- Arispe Merc. Co. v. Capital Ins. Co.**, 133 Iowa, 272, 110 N. W. 593, 9 L. R. A. (N. S.) 1084, 12 Ann. Cas. 93—vi. 352(f).
- v. Queen Ins. Co.**, 141 Iowa, 607, 120 N. W. 122, 133 Am. St. Rep. 180—vi. 351(e), 352(f); vii. 2742(c).
- Arkansas Ins. Co. v. Cox**, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808—vi. 1376(g), 1869(a), 1914(p); vii. 2621(a), 3544(a).

- Arkansas Ins. Co. v. Luther, 85 Ark. 579, 109 S. W. 1022—vi. 1828(f).
 v. McManus, 86 Ark. 115, 110 S. W. 797—vi. 632(c), 638(g), 1354(e), 1376(g), 1818(c), 1820(d), 1823(e); vii. 3884(a).
- Arkansas Mut. Fire Ins. Co. v. Claiborne, 82 Ark. 150, 100 S. W. 751—vi. 1295(e); vii. 2520(b), 2641(c), 2663(b), 3886(a).
- v. Clark, 105 S. W. 257, 84 Ark. 224—vii. 3367(b), 3378(e).
- v. Witham, 82 Ark. 226, 101 S. W. 721—vii. 3481(c), 3531(a), 3561(d).
- v. Woolverton, 82 Ark. 476, 102 S. W. 226—vi. 1433(f), 1821(d), 1823(e); vii. 3886(a).
- Arkansas Mut. Life Ins. Co. v. Stuckney, 106 S. W. 203, 85 Ark. 33—vi. 1511(e), 1818(c), 1823(e), 1828(f); vii. 3886(a).
- Arlington Co. v. Colonial Assur. Co., 87 App. Div. 617, 84 N. Y. Supp. 1117—vi. 744(f).
- 180 N. Y. 337, 73 N. E. 34—vi. 744(f).
- Arlington Co. v. Empire City Fire Ins. Co., 101 N. Y. Supp. 772, 116 App. Div. 458—vi. 744(f), 849(b).
- Armstrong v. Blanchard, 150 Wis. 31, 136 N. W. 145—vii. 3774(s).
- v. Equitable Life Assur. Society, 80 S. E. 694, 14 Ga. App. 353—vi. 2423(k).
- v. Modern Brotherhood of America, 245 Mo. 153, 149 S. W. 459—vi. 800(c); vii. 3238(d).
- 132 Mo. App. 171, 112 S. W. 24—vii. 3238(d).
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- v. West Coast Life Ins. Co., 41 Utah, 112, 124 Pac. 518—vii. 3174(g), 3200(h), 3201(h), 3296(e).
- Arnold v. American Ins. Co., 84 Pac. 182, 148 Cal. 660, 25 L. R. A. (N. S.) 6—vi. 762(p), 1699(f); vii. 2659(a), 2769(a).
- v. Empire Mut. Annuity & Life Ins. Co., 3 Ga. App. 685, 60 S. E. 470—vi. 492(m), 632(c), 633(c), 636(e), 998(e), 2259(a), 2267(e), 2271(g), 2277(k); vii. 2706(c), 3755(q).
- v. Equitable Life Assur. Soc. (D. C.) 228 Fed. 157—vii. 2755(b), 3774(s).
- v. Indemnity Fire Ins. Co., 67 S. E. 574, 152 N. C. 232—vi. 632(c), 1818(c), 1820(d), 1821(d), 1828(f).
- v. New York Life Ins. Co., 177 S. W. 78, 131 Tenn. 720—vi. 678(b), 1984(a).
- Arold v. Supreme Conclave, Improved Order of Heptasophs, 91 Atl. 829, 123 Md. 675—vi. 409(k).
- Aronson v. Frankfurt Accident & Plate Glass Ins. Co., 99 Pac. 537, 9 Cal. App. 473—vii. 3479(b), 3556(a), 3582(g).
- Arrison v. Supreme Council of Mystic Tilters, 129 Iowa, 303, 105 N. W. 580—vi. 434(l), 444(a), 2400(d), 2432(e), 3532(b), 3955(a).
- Arrowsmith v. Old Colony Life Ins. Co., 164 Ill. App. 44—vi. 632(c), 677(a); vii. 2757(b).
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- Astell v. American Cent. Ins. Co., 114 Minn. 206, 130 N. W. 1002—vii. 3636(e).
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- 136 Ga. 584, 71 S. E. 892—vi. 1743(b).
- v. O'Keefe, 133 Ga. 792, 66 S. E. 1093—vii. 2622(a), 2641(k).
- v. R. H. Ledford & Son, 134 Ga. 500, 68 S. E. 91—vii. 2524(d), 2621(a), 2622(a).
- v. Toney, 1 Ga. App. 492, 57 S. E. 1013—vi. 1673(h), 1680(k), 1884(b), 1886(d).
- Atkinson v. National Council, Knights and Ladies of Security, 193 Ill. App. 215—vii. 2561(b).
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- Atlantic Horse Ins. Co. v. Nero, 108 Miss. 321, 66 South. 780—vii. 3518(c), 3531(a), 3959(b).
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- Atlas Reduction Co. v. New Zealand Ins. Co. (C. C.) 121 Fed. 929—vi. 627(a), 641(i), 903(d), 1779(j); vii. 2653(t), 2679(g), 3712(k).
- 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433—vi. 627(a), 641(i), 903(d), 1779(j); vii. 2653(t), 2679(g), 3712(k).

- Attleboro Mfg. Co. v. Frankfort Marine, Acc. & Plate Glass Ins. Co., 240 Fed. 573, 153 C. C. A. 377—vii. 3319(a), 3332(a), 3967(e), 3986(j).
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- v. Commissioner of Insurance, 112 N. W. 132, 148 Mich. 566—vii. 3116(h).
- v. Supreme Council A. L. H., 196 Mass. 151, 81 N. E. 966—vi. 713(m), 717(n); vii. 3969(f).
- 206 Mass. 131, 92 N. E. 134—vii. 3278(d).
- 206 Mass. 158, 92 N. E. 136—vi. 65(k), 792(f); vii. 3758(q).
- 206 Mass. 168, 92 N. E. 140—vi. 707(i); vii. 3732(f).
- 206 Mass. 175, 92 N. E. 143—vi. 614(e).
- 206 Mass. 180, 92 N. E. 145—vi. 68(m), 614(e).
- 206 Mass. 183, 92 N. E. 147—vi. 614(e); vii. 2832(c).
- 206 Mass. 186, 92 N. E. 148—vii. 3271(a).
- 206 Mass. 190, 92 N. E. 150—vi. 614(e).
- 207 Mass. 586, 93 N. E. 797—vi. 614(e).
- Atwood v. Caledonian-American Ins. Co., 206 Mass. 96, 92 N. E. 32—vii. 2646(c), 2659(a).
- Ausplund v. Aetna Indemnity Co., 81 Pac. 577, 47 Or. 10—vii. 3998(l).
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- Austin Fire Ins. Co. v. Brown (Tex. Civ. App.) 160 S. W. 973—vi. 397(d); vii. 2622(a).
- v. Sayles (Tex. Civ. App.) 157 S. W. 272—vi. 347(b).
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- Ayers v. Grand Lodge A. O. U. W., 109 App. Div. 919, 95 N. Y. Supp. 1112—vi. 713(m), 717(n), 2215(g).
- 188 N. Y. 280, 80 N. E. 1020—vi. 713(m), 717(n), 2215(g).
- Bachman v. Travelers' Ins. Co., 78 N. H. 100, 97 Atl. 223—vii. 3288(b), 3514(b), 3532(b).
- Backenstoe v. Kline, 31 Pa. Super. Ct. 268—vi. 955(k), 968(s).
- Bacot v. Phoenix Ins. Co., 96 Miss. 223, 50 South. 729, 25 L. R. A. (N. S.) 1226, Ann. Cas. 1912B, 262—vi. 1228(b), 1369(a), 1371(c), 1382(j), 3710(j).
- Bacouby v. United States Fidelity & Guaranty Co., 113 N. Y. Supp. 20, 61 Misc. Rep. 75—vii. 2747(f).
- Bader v. New Amsterdam Casualty Co., 102 Minn. 186, 112 N. W. 1065, 120 Am. St. Rep. 613—vii. 3303(g).
- Badger v. Helvetia-Swiss Fire Ins. Co., 120 N. Y. Supp. 161, 136 App. Div. 31—vii. 4011(h).
- Baehr v. Union Casualty & Surety Co., 113 S. W. 689, 133 Mo. App. 541—vii. 3169(e).
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- Bagby v. Court of Honor, 151 Ill. App. 371—vi. 1953(c), 2174(b).
- Bailey v. First Nat. Fire Ins. Co., 18 Ga. App. 213, 89 S. E. 80—vii. 2605(e), 3347(a), 3404(a), 3514(b).
- v. Liverpool & London & Globe Ins. Co., 166 Mo. App. 593, 149 S. W. 1169—vi. 1297(g); vii. 2516(a), 2629(c).
- Bakalars v. Continental Casualty Co., 141 Wis. 43, 122 N. W. 721, 25 L. R. A. (N. S.) 1241, 18 Ann. Cas. 1123—vi. 632(c); vii. 3204(i), 3205(i), 3219(m), 3220(m), 3223(m).
- Baker v. Baker, 97 N. Y. Supp. 455, 110 App. Div. 660—vii. 3819(c).
- v. German-American Ins. Co., 133 App. Div. 496, 117 N. Y. Supp. 1104—vi. 1898(c), 1903(j).
- v. Hardy, 148 N. W. 80, 96 Neb. 377—vii. 3762(r).
- v. Massachusetts Mut. Life Ins. Co., 168 N. C. 87, 83 S. E. 16—vii. 3257(m).
- v. Metropolitan Life Ins. Co., 97 N. Supp. 1088, 111 App. Div. 500—vii. 3819(c).
- 80 N. E. 1105, 187 N. Y. 562—vii. 3819(c).
- 106 S. C. 419, 91 S. E. 324—vi. 1969(f), 2142(h).
- v. Modern Woodmen, 121 S. W. 794, 140 Mo. App. 619—vi. 2199(a).
- v. Monumental Sav. & Loan Ass'n, 58 W. Va. 408, 52 S. E. 403, 3 L. R. A. (N. S.) 79, 112 Am. St. Rep. 996—vi. 155(j), 188(a); vii. 3919(j).

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- Baker & Hamilton v. Williamsburgh City Fire Ins. Co. (C. C.)** 157 Fed. 280—vii. 3025(f).
- Bakhaus v. Caledonian Ins. Co.**, 112 Md. 676, 77 Atl. 310—vii. 2514(f), 2611(i), 2615(j), 3479(b), 3511(a).
- v. Germania Fire Ins. Co.**, 176 Fed. 879, 100 C. C. A. 349—vi. 1832(a); vii. 2740(b).
- Baldi v. Metropolitan Life Ins. Co.**, 30 Pa. Super. Ct. 213—vii. 3470(b).
- Baldinger v. Camden Fire Ins. Ass'n**, 121 Minn. 160, 141 N. W. 104—vii. 3651(m).
- Ball v. Royal Ins. Co.**, 107 S. W. 1097, 129 Mo. App. 34—vii. 2779(f), 3559(c), 3674(m).
- Ballagh v. Interstate Business Men's Acc. Ass'n**, 176 Iowa, 110, 155 N. W. 241, 157 N. W. 726, L. R. A. 1917A, 1050—vii. 3195(f).
- Ballah v. Peoria Life Ass'n**, 159 Ill. App. 222—vi. 2433(f); vii. 2659(a), 168 Ill. App. 603—vii. 2706(c), 2708(c).
- Ballance v. Woodmen's Casualty Co.**, 183 Ill. App. 625—vii. 3172(g).
- Ballard County Bank's Assignee v. United States Fidelity & Guaranty Co.**, 150 S. W. 1, 150 Ky. 236, Ann. Cas. 1914C, 1208—vii. 3321(b).
- Balliett v. Metropolitan Life Ins. Co.**, 110 N. Y. Supp. 77, 125 App. Div. 705—vi. 2433(f).
- Balthaser v. Illinois Life Ins. Co.**, 33 Ky. Law Rep. 283, 110 S. W. 258—vi. 2409(g).
- Baltimore Life Ins. Co. v. Floyd**, 5 Boyce (Del.) 201, 91 Atl. 653—vi. 15(a), 258(g), 279(a), 632(c), 1950(a), 1952(c), 1956(f), 1957(g), 2065(a).
- 5 Boyce (Del.)** 431, 94 Atl. 515 vi. 632(c), 1950(a), 1956(f).
- Baltimore & O. R. Co. v. Veltri**, 37 Pa. Super. Ct. 399—vii. 3735(g).
- Banes v. New Jersey Title Guarantee & Trust Co.**, 142 Fed. 957, 74 C. C. A. 127—vii. 3327(d).
- Bange v. Supreme Council Legion of Honor**, 105 S. W. 1092, 128 Mo. App. 461—vi. 2238(b), 2338(b), 2356(h), 2382(r), 2391(u), 2430(d), 2432(e).
- 153 Mo. App.** 154, 132 S. W. 276—vi. 2350(e), 2382(r), 2433(f).
- 179 Mo. App.** 21, 161 S. W. 652—vi. 2353(f), 2354(g), 2386(s), 2433(f).
- Banholzer v. Grand Lodge A. O. U. W.**, 119 Mo. App. 177, 95 S. W. 953—vi. 1099(a).
- Bankers' Casualty Co. v. Richland County Banking Co.**, 31 Ohio Cir. Ct. R. 428—vi. 586(d).
- Bankers' Fraternal Union v. Donahue**, 109 S. W. 878, 33 Ky. Law Rep. 196—vi. 700(f); vii. 3267(o), 3268(p).
- Bankers' Health & Life Ins. Co. v. Givins**, 12 Ga. App. 378, 77 S. E. 203—vii. 2706(c).
- Bankers' Mut. Casualty Co. v. First Nat. Bank**, 131 Iowa, 456, 108 N. W. 1046—vi. 568(a), 977(b).
- v. People's Bank of Talbottom**, 56 S. E. 429, 127 Ga. 326—vii. 2823(d).
- v. State Bank of Goffs**, 150 Fed. 78, 80 C. C. A. 32—vi. 1437(i); vii. 3825(a).
- Bankers' Reserve Life Co. v. Ellison (Tex. Civ. App.)** 135 S. W. 226—vii. 3890(c).
- Bankers' Surety Co. v. Town of Holly**, 219 Fed. 96, 134 C. C. A. 536—vii. 4009(g), 4016(i).
- Bankers' Union v. Mixon**, 103 N. W. 1049, 74 Neb. 36—vi. 1952(c); vii. 3137(c).
- Bank of Anderson v. Home Ins. Co.**, 14 Cal. App. 208, 111 Pac. 507—vi. 1505(a), 1506(a); vii. 2480(e), 2508(d), 2529(g), 2617(k), 2665(c), 2670(e), 3514(b), 3558(b), 3561(d), 3606(e).
- Bank of Brunson v. Aetna Ins. Co.**, 203 Fed. 810, 122 C. C. A. 128—vii. 2493(n), 3560(c).
- Bank of Commerce v. New York Life Ins. Co.**, 54 S. E. 643, 125 Ga. 552—vi. 2281(a), 2318(k), 2408(g), 2718(i), 2719(j).
- Bank of Ellensburg v. Palatine Ins. Co.**, 143 Pac. 447, 82 Wash. 660—vi. 1432(c), 1523(c).
- Bank of Hardinsburg & Trust Co. v. American Bonding Co.**, 156 S. W. 394, 153 Ky. 579—vi. 2437(b).
- Bank of Stewart County v. Mardre**, 142 Ga. 110, 82 S. E. 519—vii. 3786(v).
- Bannister v. Michigan Mut. Life Ins. Co.**, 97 N. Y. Supp. 843, 111 App. Div. 765—vii. 3984(i).
- v. Spring Garden Mut. Fire Ins. Co.**, 50 Pa. Super. Ct. 45—vi. 1869(a).
- Banta v. Continental Casualty Co.**, 113 S. W. 1140, 134 Mo. App. 222—vi. 632(c), 637(f); vii. 3214(l), 3304(g).
- Barber v. Hartford Life Ins. Co.**, 269 Mo. 21, 187 S. W. 867, 874—vi. 995(c), 1024(d), 2330(q), 2428(c); vii. 3884(a).
- v. Home Ins. Co. (D. C.)** 154 Fed. 87—vii. 3329(e).
- v. Travelers' Ins. Co.**, 165 Ill. App. 239—vii. 3304(g).
- Barbour v. Equitable Life Assur. Society**, 161 N. Y. Supp. 469, 174 App. Div. 759—vi. 906(g); vii. 3755(q).

- Barclay v. London Guarantee & Accident Co., Limited**, 105 Pac. 865, 46 Colo. 558—vi. 632(c); vii. 2768(a), 3582(g).
- Bard v. Fireman's Ins. Co.**, 108 Me. 506, 81 Atl. 870—vii. 2791(b), 2792(c), 2801(h), 2807(k), 3364(e).
- Barker v. Metropolitan Life Ins. Co.**, 74 N. E. 945, 188 Mass. 542—vi. 469(e), 2144(j).
198 Mass. 375, 84 N. E. 490—vi. 1987(c), 2000(l), 2000(m), 2144(j), 2186(e); vii. 3456(i).
- Barlow v. Farmers' Mut. Fire Ins. Co.**, 128 Ill. App. 580—vi. 392(b), 412(b).
- v. Grand Lodge A. O. U. W.**, 162 N. W. 757, L. R. A. 1917E, 1032—vi. 1057(g).
- Barner v. Lyter**, 31 Pa. Super. Ct. 435—vii. 3773(s), 3819(c).
- Barnes v. General Accident, Fire & Life Assur. Corporation**, 153 Pac. 489, 96 Kan. 679—vii. 3466(e).
- Barrett v. Connecticut Fire Ins. Co. (Mich.)**, 161 N. W. 916—vii. 3416(d).
- v. Grand Lodge A. O. U. W.**, 63 Misc. Rep. 429, 117 N. Y. Supp. 125—vi. 713(m), 717(n), 2215(g), 2378(p); vii. 3532(b).
- v. Mutual Life Ins. Co.**, 85 S. W. 749, 27 Ky. Law Rep. 586—vi. 2413(h).
- Barrows v. Mutual Reserve Life Ins. Co.**, 81 C. C. A. 71, 151 Fed. 461—vi. 698(f), 1021(c), 1031(g); vii. 2842(f).
- Bartallotte v. Commercial Casualty Ins. Co. (Sup.)**, 163 N. Y. Supp. 95—vii. 3181(b).
- Bartels Brewing Co. v. Employers' Indemnity Co.**, 95 Atl. 919, 251 Pa. 63—vii. 3572(c), 3576(d).
- Bartemeier v. Central Nat. Fire Ins. Co. (Iowa)**, 160 N. W. 24—vi. 1720(b), 1747(a).
- Bartholomew v. Security Mut. Life Ins. Co.**, 140 App. Div. 88, 124 N. Y. Supp. 917—vi. 2286(b), 2409(g).
- Bartlett v. Rothschild**, 214 Pa. 421, 63 Atl. 1030—vi. 360(k).
- Bartling v. German Mut. Ins. Co. (Iowa)**, 123 N. W. 63—vi. 150(e), 154(i), 188(a), 1720(b); vii. 3698(f).
- v. German Mut. Lightning & Tornado Ins. Co.**, 154 Iowa, 335, 134 N. W. 864—vi. 136(c), 203(c), 1066(c), 1716(b); vii. 3715(m).
- Bass v. Life & Annuity Ass'n**, 96 Kan. 205, 150 Pac. 588—vi. 641(i), 706(h), 2413(h).
96 Kan. 398, 151 Pac. 1117—vi. 641(i), 706(h), 2413(h).
- v. Occidental Life Ins. Co.**, 19 N. M. 193, 142 Pac. 798—vi. 662(a).
- Bassett v. Farmers' & Merchants' Ins. Co.**, 122 N. W. 703, 85 Neb. 85, 19 Ann. Cas. 252—vi. 136(c), 163(h).
- Bateman v. Sarbach**, 132 Pac. 169, 89 Kan. 488—vii. 3906(f).
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- Bathe v. Metropolitan Life Ins. Co.**, 152 Mo. App. 87, 132 S. W. 743—vi. 1969(f), 2126(b).
- Batson v. Fidelity Mut. Life Ins. Co.**, 155 Ala. 265, 46 South. 571, 130 Am. St. Rep. 21—vi. 486(k).
- Batson & Walsh v. South Carolina Mut. Ins. Co.**, 58 S. E. 956, 78 S. C. 309—vii. 3285(e).
- Batten v. Modern Woodmen**, 111 S. W. 513, 131 Mo. App. 381—vi. 2207(b).
- Battin v. Northwestern Mut. Life Ins. Co.**, 143 Fed. 473, 74 C. C. A. 459—vi. 2327(o), 2425(a).
- Baumann v. Metropolitan Life Ins. Co.**, 144 Wis. 206, 128 N. W. 864—vi. 2330(q); vii. 2699(b).
- Baumgarten v. Alliance Assur. Co. (C. C.)**, 159 Fed. 275—vii. 3887(c).
- Baumgarth v. Firemen's Fund Ins. Co.**, 116 N. W. 449, 152 Mich. 479—vii. 3606(e), 3626(s).
- Baumister v. Continental Casualty Co.**, 101 S. W. 152, 124 Mo. App. 33—vii. 3168(e), 3464(d).
- Baumler v. Farmers' Northern Mut. Fire Ins. Co.**, 148 Mich. 430, 111 N. W. 1069—vi. 1177(c); vii. 2558(a), 2574(e).
- Bayer v. Bayer**, 191 Mich. 423, 158 N. W. 109—vii. 3314(a).
- Beacon Lamp Co. v. Travellers' Ins. Co.**, 47 Atl. 579, 61 N. J. Eq. 59—vi. 795(h).
- Beaird v. New Jersey Plate Glass Co.**, 157 Ill. App. 1—vi. 730(a), 1822(e).
- Beall v. Graham**, 102 S. W. 636, 125 Mo. App. 38—vii. 3790(b).
- Bealmer v. Hartford Fire Ins. Co. (Mo. App.)**, 193 S. W. 847—vi. 1066(c), 1069(e), 1075(g).
- Beane v. Continental Casualty Co.**, 106 Miss. 813, 64 South. 732—vii. 3306(h).
- Beard v. Indemnity Ins. Co.**, 65 W. Va. 283, 64 S. E. 119—vi. 633(c); vii. 3172(g), 3174(g), 3187(d), 3204(i), 3216(m), 3219(m).
- v. North State Life Ins. Co.**, 104 S. C. 45, 88 S. E. 285—vii. 2683(b), 2757(b).
- v. Royal Neighbors**, 53 Or. 102, 99 Pac. 83, 19 L. R. A. (N. S.) 798, 17 Ann. Cas. 1199—vi. 1979(j), 2113(k), 2159(c), 2183(b).
- Beaseley v. Phoenix Ins. Co.**, 140 Ga. 126, 78 S. E. 722—vii. 2668(d), 2670(e).
- Beaseley v. Mutual Aid Ass'n**, 94 Ark. 499, 127 S. W. 974—vii. 3762(r).

- Beashears v. Perry County Farmers' Protective Ins. Co.**, 51 Ind. App. 8, 98 N. E. 889—vii. 2670(e).
- Beavers v. Security Mut. Ins. Co.**, 76 Ark. 595, 90 S. W. 13, 6 Ann. Cas. 585—vi. 1622(m), 1797(a), 1814(a); vii. 3014(c), 3076(m).
- Beber v. Brotherhood of Railroad Trainmen**, 106 N. W. 168, 75 Neb. 183, 121 Am. St. Rep. 782—vii. 3312(i).
- Becker v. Colonial Life Ins. Co.**, 138 N. Y. Supp. 491, 153 App. Div. 382—vi. 686(e).
- 33 N. Y. Supp. 481, 75 Misc. Rep. 213—vi. 686(e).
- v. Exchange Mut. Fire Ins. Co. (C. C.)** 165 Fed. 816—vi. 1868(a), 1869(a); vii. 2777(e).
- 177 Fed. 918, 101 C. C. A. 198—vi. 1868(a), 1869(a).
- Beckman v. Edwards**, 59 Wash. 411, 110 Pac. 6, Ann. Cas. 1912B, 40—vi. 360(k).
- Beddall v. Citizens' Ins. Co.**, 28 Pa. Super. Ct. 600—vi. 1361(j); vii. 2605(e).
- Bednarek v. Brotherhood of American Yeomen**, 48 Utah, 67, 157 P. 884—vi. 2096(a); vii. 2567(d).
- Beecher v. Vermont Mut. Fire Ins. Co.**, 90 Vt. 347, 98 Atl. 917—vi. 1680(k).
- Beeker v. Exchange Mut. Fire Ins. Co. (C. C.)** 165 Fed. 816—vii. 2608(g).
- Beeman v. Supreme Lodge Shield of Honor**, 29 Pa. Super. Ct. 387—vi. 129(h), 2338(b), 2368(i).
- Beerly v. Globe Indemnity Co.**, 194 Ill. App. 334—vii. 3535(a).
- Beeson v. Brotherhood of Locomotive Firemen and Enginemen (Kan.)** 166 Pac. 466—vii. 3776(u), 3781(u).
- Beggs v. Supreme Council Catholic Knights & Ladies**, 146 Ill. App. 168—vi. 620(c), 622(e); vii. 2460(a), 2495(o).
- Begley v. Miller**, 137 Ill. App. 278—vi. 285(f), 312(b); vii. 3736(h), 3759(r), 3762(r), 3819(c).
- Behlmer v. Grand Lodge A. O. U. W.**, 123 N. W. 1071, 109 Minn. 305, 26 L. R. A. (N. S.) 305—vii. 3461(b).
- Beile v. Travelers' Protective Ass'n**, 155 Mo. App. 629, 135 S. W. 497—vi. 632(c), 638(g); vii. 3156(a), 3157(a), 3172(g), 3181(b), 3184(b), 3194(f), 3201(h).
- Beirne v. Modern Nat. Reserve**, 111 P. 1032, 42 Mont. 332—vi. 2433(f).
- Beiser v. Sovereign Camp of Woodmen of the World (Ala.)** 74 South. 235—vii. 2514(g).
- Beistle v. McConnell**, 141 Mich. 463, 104 N. W. 729—vii. 3700(g).
- Belden v. Union Central Life Ins. Co.**, 141 P. 370, 167 Cal. 740—vii. 2504(c), 2781(f).
- 141 P. 373, 167 Cal. 798—vii. 2504(c), 2781(f).
- Bell v. Missouri State Life Ins. Co.**, 166 Mo. App. 390, 149 S. W. 33—vi. 451(f), 452(f).
- Bell v. Union Cent. Life Ins. Co.**, 33 Ohio Cir. Ct. R. 69—vi. 120(d).
- Bellinger v. German Ins. Co.**, 100 N. Y. Supp. 424, 113 App. Div. 917, 51 Misc. Rep. 463—vii. 3631(b), 3963(d), 3984(i).
- 82 N. E. 1124, 189 N. Y. 533—vii. 3631(b), 3963(d), 3984(i).
- Bemis v. Pacific Coast Casualty Co.**, 125 Minn. 54, 145 N. W. 622—vi. 1285(i); vii. 2622(a).
- Benanti v. Delaware Ins. Co.**, 86 Conn. 15, 84 Atl. 109, Ann. Cas. 1913D, 826—vi. 1181(g); vii. 2692(e).
- Benard v. Protected Home Circle**, 161 App. Div. 59, 146 N. Y. Supp. 232—vii. 3241(f), 3242(g), 3244(h), 3257(m), 3265(o).
- Bendet v. Ellis**, 120 Tenn. 277, 111 S. W. 795, 18 L. R. A. (N. S.) 114, 127 Am. St. Rep. 1000—vi. 274(o), 308(h).
- Benedict v. Security Ins. Co.**, 133 N. Y. Supp. 165, 147 App. Div. 810—vi. 848(a), 1839(e); vii. 2819(b).
- Benes v. Supreme Lodge, Knights & Ladies of Honor**, 231 Ill. 134, 83 N. E. 127, 14 L. R. A. (N. S.) 540, 121 Am. St. Rep. 304—vi. 554(j), 697(e), 698(f).
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- Benjamin v. Bankers' Union**, 173 Ill. App. 620—vi. 2341(c); vii. 3557(a).
- v. District Grand Lodge No. 4, Independent Order B'Nai B'rith**, 171 Cal. 260, 152 Pac. 731—vii. 3131(a), 3261(n), 3442(a).
- v. Mutual Reserve Fund Life Ass'n**, 146 Cal. 34, 79 Pac. 517—vi. 706(h), 712(l), 1033(b), 2348(d).
- Benner v. Fire Ass'n**, 229 Pa. 75, 78 Atl. 44, 140 Am. St. Rep. 706—vi. 367(b), 368(c), 378(h), 389(o), 680(b).
- Bennett v. Aetna Ins. Co.**, 88 N. E. 335, 201 Mass. 554, 131 Am. St. Rep. 414—vii. 3347(a), 3356(a).
- v. Beavers Reserve Fund Fraternity**, 159 Wis. 145, 150 N. W. 181—vi. 1013(a); vii. 2689(c).
- v. Mutual Fire Ins. Co.**, 100 Md. 337, 60 Atl. 99—vi. 135(b), 137(d), 142(g), 1722(d), 1741(g).
- v. New York Life Ins. Co.**, 60 Pa. Super. Ct. 605—vii. 3802(g).
- v. Sovereign Camp, Woodmen of the World (Tex. Civ. App.)** 168 S. W. 1023—vi. 2395(b), 2432(e); vii. 2496(o), 2703(b).
- v. Supreme Tent of Knights of Macabees**, 82 Pac. 744, 40 Wash. 431, 2 L. R. A. (N. S.) 389—vii. 4016(i).
- Bennettville & C. R. Co. v. Glens Falls Ins. Co.**, 79 S. E. 717, 96 S. C. 44—vi. 632(c), 736(b), 833(a).
- Benson v. Metropolitan Life Ins. Co.**, 161 Mo. App. 480, 144 S. W. 122—vi. 1991(g); vii. 2546(p).

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166 Ill. App. 511—vii. 3748(n), 3866(b).
- Berger v. Aetna Life Ins. Co., 95 N. Y. Supp. 541, 48 Misc. Rep. 385—vii. 2487(i), 3999(l).
- v. Independent Brothers (Sup.) 147 N. Y. Supp. 934—vii. 3271(a).
- Bergeron v. Mechanics' & Traders' Ins. Co., 226 Mass. 236, 115 N. E. 318—vii. 3612(k).
- v. Modern Brotherhood, 119 N. W. 681, 83 Neb. 419—vii. 3585(a), 3872(d).
- Berman v. Fraternities Health & Accident Ass'n, 107 Me. 368, 78 Atl. 462—vi. 1958(h), 2142(h); 2695(g), 2777(e).
- v. North British & Mercantile Ins. Co., 74 Misc. Rep. 431, 132 N. Y. Supp. 392—vi. 408(a).
- Bernard v. Protected Home Circle, 146 N. Y. Supp. 232, 151 App. Div. 59—vii. 3244(h).
- Berner v. Brotherhood of American Yeomen, 154 Ill. App. 27—vi. 542(a), 1932(a), 1939(f).
- Bernhard v. Rochester German Ins. Co., 65 Atl. 134, 79 Conn. 388, 8 Ann. Cas. 298—vii. 3503(h), 3627(s).
- Bernheim v. Martin, 45 Wash. 120, 88 Pac. 106—vii. 3762(r), 3769(s).
- Bernick v. Illinois Commercial Men's Ass'n, 175 Ill. App. 511—vii. 3212(k), 3213(k), 3264(o).
- Bernstein v. District Grand Lodge No. 4, Independent Order of B'nai B'rith, 2 Cal. App. 624, 84 Pac. 271—vi. 714(m).
- Berry v. United Commercial Travelers, 172 Iowa, 429, 154 N. W. 598, L. R. A. 1916B, 617, Ann. Cas. 1918A, 706—vii. 3201(h).
- v. Virginia State Ins. Co., 64 S. E. 859, 83 S. C. 13—vii. 2775(d), 3126(d), 3839(b).
- Berryhill v. Supreme Tribe of Ben Hur, 167 Mo. App. 530, 152 S. W. 93—vi. 2361(i).
- Berryman v. Bankers' Life Ins. Co., 117 App. Div. 730, 102 N. Y. Supp. 695—vi. 120(d); vii. 3287(f).
- Bertine v. North River Ins. Co., 99 Misc. Rep. 297, 165 N. Y. Supp. 567—vi. 639(h).
- Berton v. Atlas Assur. Co., 203 Mass. 134, 89 N. E. 244—vii. 2807(k), 2809(l).
- Bertrand v. Franklin Life Ins. Co., 44 South. 186, 119 La. 423—vi. 2121(o).
- Beth Moshav Z'Keinim v. Grand Lodge Independent Western Star Order, 141 Ill. App. 305—vi. 1082(c).
- Betts v. Massachusetts Bonding & Ins. Co. (N. J.) 101 Atl. 257—vi. 631(b), 691(a); vii. 3329(e).
- Beyer v. Home Ins. Co., 141 Mo. App. 589, 125 S. W. 1184—vii. 2558(a), 2570(e).
- Beyer v. International Aluminum Co., 101 N. Y. Supp. 83, 115 App. Div. 853—vii. 3335(c).
- Bickford v. Aetna Ins. Co., 101 Me. 124, 63 Atl. 552, 8 Ann. Cas. 92—vi. 629(a), 632(c), 735(b), 851(c).
- Biddlecom v. General Accident Assur. Corporation, 152 S. W. 103, 167 Mo. App. 581—vii. 3586(a).
- Biehl v. General Accident Assur. Corp., 33 Pa. Super. Ct. 110—vii. 3156(a), 3218(m), 3220(m), 3223(m).
- Bierbach v. Mutual Benefit Health & Accident Ass'n (Wis.) 161 N. W. 251—vi. 698(f).
- Biermann v. Guaranty Mut. Life Ins. Co., 142 Iowa, 341, 120 N. W. 963—vi. 696(e), 1969(f), 1974(g), 1978(i); vii. 2524(d).
- Big Creek Drug Co. v. Stuyvesant Ins. Co., 115 Miss. 333, 75 South. 768—vi. 2521(c).
- Big Run Coal Co. v. Employers' Indemnity Co., 163 Ky. 596, 174 S. W. 25—vi. 921(e).
- Biggs v. Reliance Life Ins. Co., 137 Tenn. 598, 195 S. W. 174—vi. 1010(d).
- Bigus v. Pacific Coast Casualty Co., 145 Mo. App. 170, 129 S. W. 982—vii. 3033(i).
- Billings v. National Ins. Co., 27 Ohio Cir. Ct. R. 552—vii. 2605(8), 3527(g).
- Billmyer v. Hamburg-Bremen Fire Ins. Co., 49 S. E. 901, 57 W. Va. 42—vii. 3383(b), 3631(b), 3634(d).
- Bindell v. Kenton County Assessment Fire Ins. Co., 128 Ky. 389, 108 S. W. 325, 33 Ky. Law Rep. 385, 17 L. R. A. [N. S.] 189, 129 Am. St. Rep. 303—vii. 3015(d), 3016(d), 3037(a).
- Binder v. National Masonic Acc. Ass'n, 102 N. W. 190, 127 Iowa, 25—vi. 622(e), 632(c); vii. 3201(h), 3203(h), 3531(a), 3956(a), 3959(b).
- Bingell v. Royal Ins. Co., 87 Atl. 955, 240 Pa. 412—vii. 3390(h), 3561(d).
- Birch v. Manufacturers' Liability Ins. Co., 96 Atl. 1003, 88 N. J. Law, 655—vi. 428(i).
- v. Mutual Reserve Life Ins. Co., 91 App. Div. 384, 86 N. Y. Supp. 872—vii. 4007(f).
- 181 N. Y. 583, 74 N. E. 1115—vii. 4007(f).
- Bircher v. Modern Brotherhood, 25 S. D. 325, 126 N. W. 583—vii. 3257(m), 3265(o).
- Birge v. Franklin, 115 N. W. 278, 103 Minn. 482—vii. 3779(u).
- Bissinger & Co. v. Massachusetts Bonding & Ins. Co., 83 Or. 288, 163 Pac. 592—vi. 10(g), 2449(c).
- Bixler v. Modern Woodmen, 112 Va. 678, 72 S. E. 704, 38 L. R. A. (N. S.) 571—vi. 697(e), 2400(d).
- Bjorke v. Minnesota Farmers' Mut. Ins. Co., 123 N. W. 1085, 109 Minn. 528—vi. 586(d).

- B. J. Wolf & Sons v. Royal Ins. Co., 194 Fed. 853, 114 C. C. A. 641—vii. 3886(a).
- Black v. Fidelity-Phenix Fire Ins. Co., 81 S. E. 584, 14 Ga. App. 510—vi. 1622(m).
- v. Franklin Life Ins. Co., 67 S. E. 79, 133 Ga. 859—vi. 2411(g).
- v. Grain Shippers' Mut. Fire Ins. Ass'n, 171 Iowa, 309, 152 N. W. 7—vii. 2602(d), 2777(e), 2811(n).
- v. New York Life Ins. Co. (Sup.), 126 N. Y. Supp. 334—vi. 1094(g); vii. 3811(k).
- Black Co. v. London Guarantee & Accident Co., 111 N. E. 241, 216 N. Y. 560—vi. 2445(f).
- 144 N. Y. Supp. 424, 159 App. Div. 186—vi. 636(e), 688(f), 2439(c), 2444(f), 2445(f); vii. 2634(f), 2766(b).
- Blackman v. United States Casualty Co., 103 S. W. 784, 117 Tenn. 578—vi. 2105(f), 2108(g); vii. 3442(a), 3456(a).
- Blackstone v. Kansas City Life Ins. Co., 107 Tex. 102, 174 S. W. 821—vi. 2036(a), 2044(g), 2176(c).
- Blair v. National Shirt & Overalls Co., 137 Ill. App. 413—vii. 3073(j).
- Blais v. United Brotherhood of Carpenters and Joiners, 169 Ill. App. 596—vii. 2495(o), 2699(h).
- Blake v. Farmers' Mut. Lightning Protective Fire Ins. Co., 194 Mich. 589, 161 N. W. 890—vi. 345(b); vii. 2521(c), 3616(m).
- Blakely v. Fidelity Mut. Life Ins. Co. (C. C.) 143 Fed. 619—vii. 2833(c).
- 154 Fed. 43, 83 C. C. A. 155—vii. 2833(c).
- Blakeslee, Perrin & Darling v. Ocean Accident & Guarantee Corporation, 106 App. Div. 587, 151 N. Y. Supp. 1038—vi. 824(a).
- Blalock v. Empire Life Ins. Co., 13 Ga. App. 486, 79 S. E. 374—vi. 2324(n).
- Blanchard v. Prudential Ins. Co., 78 N. J. Eq. 471, 79 Atl. 533—vi. 993(b).
- Blanchard Co. v. Hamblin, 162 Mo. App. 242, 144 S. W. 880—vi. 5(a), 2815(a).
- Blenke v. Citizens' Life Ins. Co., 145 Ky. 332, 140 S. W. 561—vi. 1946(j), 1991(g), 2075(e).
- Bleznak v. Springfield Fire & Marine Ins. Co., 237 Fed. 589, 150 C. C. A. 471—vi. 1888(g); vii. 3432(m).
- Blinn v. Dame, 93 N. E. 601, 207 Mass. 159, 20 Ann. Cas. 1184—vii. 2837(d), 3737(i).
- Bloch v. American Ins. Co., 132 Wis. 150, 112 N. W. 45—vii. 3100(a).
- Blood v. Sovereign Camp Woodmen of the World, 140 Mo. App. 526, 120 S. W. 700—vii. 3819(c).
- Blount v. Royal Fraternal Ass'n, 79 S. E. 299, 163 N. C. 167—vi. 576(e); vii. 3270(a).
- Blum v. New York Life Ins. Co., 95 S. W. 317, 197 Mo. 513, 8 L. R. A. (N. S.) 923, 7 Ann. Cas. 1021—vii. 3755(g), 3759(r).
- Blume v. Pittsburgh Life & Trust Co., 104 N. E. 1031, 263 Ill. 160, 51 L. R. A. (N. S.) 1044, Ann. Cas. 1915C, 505—vi. 542(a), 638(g), 2417(i); vii. 2868(e).
- 183 Ill. App. 295—vi. 542(a), 638(g), 2417(i), 2868(e).
- Blunt v. National Fidelity & Casualty Co., 93 Neb. 685, 141 N. W. 1033—vii. 3373(a), 3440(a), 3456(a), 3456(i).
- Boardman v. Insurance Co., 84 Or. 60, 164 Pac. 558—vii. 2609(h).
- Board of Education of City and County of San Francisco v. Alliance Assur. Co. (C. C.) 159 Fed. 994—vii. 3037(a).
- Bochdam v. Supreme Lodge, K. P., 123 N. Y. Supp. 59, 67 Misc. Rep. 407—vi. 2373(n), 2378(p).
- Bodo, The (D. C.) 156 Fed. 980—vii. 3901(d).
- Boeck v. Modern Woodmen, 162 Iowa, 159, 143 N. W. 999—vi. 697(e); vii. 3134(b), 3141(e).
- Boehme v. Sovereign Camp Woodmen of the World, 84 S. W. 422, 98 Tex. 376, 4 Ann. Cas. 1019—vii. 3260(n).
- Boehmer v. Kalk, 155 Wis. 156, 144 N. W. 182—vii. 3759(r).
- Boening v. North American Union, 155 Ill. App. 528—vii. 2781(f), 3864(b).
- Bogart v. Standard Life & Accident Ins. Co. (C. C.) 187 Fed. 851—vii. 3162(c).
- Bohaker v. Travelers' Ins. Co., 215 Mass. 32, 102 N. E. 342, 46 L. R. A. (N. S.) 543—vii. 3175(h), 3176(a), 3255(l).
- Bohles v. Prudential Ins. Co., 83 Atl. 904, 83 N. J. Law. 246—vi. 636(e), 2330(q), 2432(e); vii. 2715(h), 3442(a), 3532(b).
- 84 N. J. Law. 315, 86 Atl. 438—vi. 636(e), 2432(e); vii. 2715(h), 3532(b).
- Boice v. Shepard, 78 Kan. 308, 96 Pac. 485—vii. 3722(b), 3748(n).
- Bollard v. New York Life Ins. Co., 162 N. Y. Supp. 706, 98 Misc. Rep. 286—vii. 2570(e).
- Bolles v. Mutual Reserve Fund Life Ass'n, 220 Ill. 400, 77 N. E. 198—vi. 691(a); vii. 3943(d).
- Bolte & Jansen v. Equitable Fire Ass'n, 23 S. D. 240, 121 N. W. 773—vi. 633(c), 642(i); vii. 2615(j), 3667(g).
- Bolton v. Inter-Ocean Life & Casualty Co., 187 Mo. App. 167, 172 S. W. 1187—vi. 1978(i); vii. 3299(e), 3561(d), 3871(d).
- Boman v. Bankers' Union, 76 Kan. 198, 91 Pac. 49, L. R. A. (N. S.) 1048—vi. 709(k).
- Bond v. Bankers' Life Ass'n, 133 Pac. 854, 90 Kan. 215—vi. 2375(o).
- v. Grand Lodge Brotherhood of Railroad Trainmen, 165 Ill. App. 490—vi. 632(c); vii. 3311(i), 3677(b).

- Bond v. National Fire Ins. Co., 77 W. Va. 736, 88 S. E. 389—vii. 2742(c), 3586(a), 3590(e).
- Bonewell v. North American Accident Ins. Co., 125 N. W. 59, 160 Mich. 137—vi. 1960(i), 2071(a), 2083(a); vii. 2525(d), 2532(i), 2569(e), 2574(e).
- 132 N. W. 1067, 167 Mich. 274, Ann. Cas. 1913A, 847—vi. 1960(i), 2071(a); vii. 2525(d), 2532(i).
- Bonham v. Johnson, 98 Ark. 459, 136 S. W. 191—vii. 3701(g).
- Bonslett v. New York Life Ins. Co. (Mo.) 190 S. W. 870—vii. 3972(g).
- Bonville v. John Hancock Mut. Life Ins. Co., 200 Mass. 197, 85 N. E. 1057—vi. 684(d).
- Boos v. Aetna Ins. Co., 22 N. D. 11, 132 N. W. 222—vi. 397(d), 403(j).
- Booth & Boyd Lumber Co. v. Caledonian Ins. Co. (Mich.) 162 N. W. 955—vii. 3585(a).
- Borchers v. Barckers, 143 Mo. App. 72, 122 S. W. 357—vi. 1106(e), 1118(k).
- 158 Mo. App. 267, 138 S. W. 555—vi. 1105(d).
- Boren v. Brotherhood of Railroad Trainmen, 145 Mo. App. 136, 129 S. W. 491—vii. 3538(d).
- Borger v. Connecticut Fire Ins. Co., 142 Pac. 115, 24 Cal. App. 696—vii. 3559(b), 3955(a).
- 29 Cal. App. 476, 156 Pac. 70—vii. 3959(b).
- Born v. Perkins, 158 N. Y. Supp. 673, 173 App. Div. 214—vii. 3968(f).
- Börnstein v. District Grand Lodge No. 4, Independent Order B'nai B'rith, 84 Pac. 271, 2 Cal. App. 624—vi. 27(b), 714(m), 715(n), 717(n).
- Boskowitz v. Continental Ins. Co., 161 N. Y. Supp. 680, 175 App. Div. 18—vii. 3125(c), 3414(c).
- 220 N. Y. 648, 115 N. E. 1034—vii. 3125(c), 3414(c).
- Bosler v. Modern Woodmen, 100 Neb. 570, 160 N. W. 966, L. R. A. 1917C, 195—vii. 3143(f).
- Boston Co-op. Bank v. American Cent. Ins. Co., 87 N. E. 594, 201 Mass. 350, 23 L. R. A. (N. S.) 1147—vi. 1722(d), 1758(f).
- Boston Forwarding & Transfer Co. v. Contractors' Mut. Liability Ins. Co., 226 Mass. 372, 115 N. E. 494—vi. 465(b).
- Boston Ice Co. v. Boston & M. R. R., 77 N. H. 6, 86 Atl. 356, 45 L. R. A. (N. S.) 835, Ann. Cas. 1914A, 1090—vi. 649(a); vii. 3899(c).
- Boston & A. R. Co. v. Mercantile Trust & Deposit Co., 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97—vii. 2810(m).
- Bothell v. National Casualty Co., 59 Wash. 209, 109 Pac. 590—vii. 3307(h).
- Bothin v. California Title Ins. & Trust Co., 96 Pac. 500, 153 Cal. 718, Ann. Cas. 1914D, 634—vii. 3326(d).
- Bottomley v. Royal Ins. Co., 76 N. E. 463, 190 Mass. 73—vii. 3032(i).
- Bouchard v. Dirigo Mut. Fire Ins. Co., 113 Me. 17, 92 Atl. 899, L. R. A. 1915D, 187—vi. 1705(h), 1791(f); vii. 3559(c).
- 96 Atl. 244, 114 Me. 361—vi. 1297(g); vii. 3014(c), 3020(f).
- Boulanger v. British Underwriters, 141 La. 461, 75 South. 207—vi. 1824(e).
- Boulware v. Missouri State Life Ins. Co., 176 Mo. App. 593, 159 S. W. 761—vi. 2410(g).
- Bounds v. Sovereign Camp of Woodmen of the World, 85 S. E. 770, 101 S. C. 335, Ann. Cas. 1917C, 589—vii. 3152(f).
- Boutin v. National Casualty Co., 150 Pac. 449, 86 Wash. 372—vii. 2706(c).
- Boutross v. Palatine Ins. Co., 164 Pac. 1069, 100 Kan. 574—vii. 3435(b), 3644(j), 3646(k), 3656(p).
- Boutwell v. Globe & Rutgers Fire Ins. Co., 117 App. Div. 904, 102 N. Y. Supp. 1127—vii. 2820(c).
- 193 N. Y. 323, 85 N. E. 1087—vii. 2820(c).
- Bowditch v. Norwich Union Fire Ins. Soc., 79 N. E. 788, 193 Mass. 565—vi. 1295(e).
- Bowen v. Mutual Life Ins. Co., 20 S. D. 103, 104 N. W. 1040—vi. 450(d), 465(b), 470(e), 475(g), 493(n).
- v. Prudential Ins. Co., 178 Mich. 63, 144 N. W. 543, 51 L. R. A. (N. S.) 587—vi. 444(a).
- Bowman v. Anderson, 268 Mo. 1, 186 S. W. 1012—vii. 3133(b).
- v. Northern Acc. Co., 124 Mo. App. 477, 101 S. W. 691—vi. 421(f); vii. 3174(g).
- Bowron v. Georgia Casualty Co. (D. C.) 223 Fed. 673—vii. 3319(a), 3331(a).
- Bowyer v. Continental Casualty Co., 72 W. Va. 333, 78 S. E. 1000—vi. 684(d), 1966(b), 1974(g).
- Boyd v. Fidelity Mut. Life Ins. Co., 41 South. 268, 88 Miss. 562—vi. 2425(a).
- v. Southern Mut. Aid Ass'n, 41 South. 164, 145 Ala. 167—vi. 577(g).
- Boyer v. State Farmers' Mut. Hail Ins. Co., 121 Pac. 329, 86 Kan. 442, 40 L. R. A. (N. S.) 164, Ann. Cas. 1915A, 671—vi. 830(a).
- 123 Pac. 742, 87 Kan. 293—vi. 830(a).
- Boykin v. Franklin Life Ins. Co., 82 S. E. 60, 14 Ga. App. 666—vi. 998(e).
- Bozeman v. Sun Ins. Co., 170 Ala. 373, 54 South. 178—vi. 1860(a).
- Bozeman's Adm'r v. Prudential Ins. Co., 130 Ky. 572, 113 S. W. 836—vi. 1118(c), 2411(g).

- Bracher v. Equitable Life Assur. Soc., 103 App. Div. 269, 92 N. Y. Supp. 1105—vii. 3286(f).
186 N. Y. 62, 78 N. E. 714, 116 Am. St. Rep. 533—vii. 3286(f).
- Bracken County Ins. Co. v. Murray, 166 Ky. 821, 179 S. W. 842—vi. 52(c), 397 (d), 409(a).
- Bracket v. Modern Brotherhood, 157 S. W. 690, 154 Ky. 340, 45 L. R. A. (N. S.) 1144—vi. 2214(f), 2433(f).
- Bradford v. Watson, 65 Fla. 461, 62 South. 484—vii. 3726(d).
- Bradley v. Federal Life Ins. Co., 178 Ill. App. 524—vi. 2318(k); vii. 2700 (b), 2704(b), 3943(d).
- v. Lehigh Valley R. Co. (D. C.) 145 Fed. 569—viii. 3898(b).
 (D. C.) 153 Fed. 350, 82 C. C. A. 426—vii. 3898(b).
- v. Modern Woodmen, 146 Mo. App. 428, 124 S. W. 69—vii. 3129(a).
- v. Prudential Ins. Co., 187 Mass. 226, 72 N. E. 989—viii. 3867(c).
- v. Standard Life & Accident Ins. Co., 112 App. Div. 536, 98 N. Y. Supp. 797—vi. 411(b), 535 (b).
 46 Misc. Rep. 41, 93 N. Y. Supp. 245—vi. 411(b), 535(b).
- Bradley & Co. v. Brown, 78 Neb. 836, 112 N. W. 331, 13 L. R. A. (N. S.) 152, 126 Am. St. Rep. 647—vi. 775(g).
- Bradshaw v. American Benev. Ass'n, 112 Mo. App. 435, 87 S. W. 46—vii. 3294(c).
- v. Des Moines Ins. Co. (Iowa) 134 N. W. 628—viii. 4004(c).
- v. Mutual Life Ins. Co., 109 App. Div. 375, 95 N. Y. Supp. 780—vii. 3755(q).
- 112 N. Y. Supp. 107, 127 App. Div. 817—vii. 3779(u).
- 125 N. Y. Supp. 1114, 140 App. Div. 917—vii. 3767(s).
- 187 N. Y. 347, 80 N. E. 203, 10 Ann. Cas. 266—vii. 3755(q).
- 98 N. E. 851, 205 N. Y. 467—vii. 3767(s), 3779(u).
- Brady v. New Jersey Fidelity Ins. Co., 167 S. W. 1171, 180 Mo. App. 214—vii. 3585(a).
- Bragg v. Royal Ins. Co., 98 Atl. 632, 115 Me. 196—vii. 2792(c), 2815(a).
- Brohmsteadt v. Mystic Workers, 152 Wis. 580, 140 N. W. 354—vii. 3152(f).
- Bramblett v. Hargis' Ex'x, 94 S. W. 20, 123 Ky. 141, 29 Ky. Law Rep. 610—vi. 273(n), 308(h), 1099(a).
- Brashear v. American Patriots, 144 S. W. 163, 161 Mo. App. 566—vi. 2142 (h); vii. 3560(c).
- Brashears v. Perry County Farmers' Protective Ins. Co., 51 Ind. App. 8, 98 N. E. 889—vi. 692(b), 693(c), 694(c), 1657(b), 1669(f); vii. 2665(c), 2690(d).
- Brassil v. Maryland Casualty Co., 133 N. Y. Supp. 187, 147 App. Div. 815—vii. 3331(a), 3334(b).
104 N. E. 622, 210 N. Y. 235, L. R. A. 1915A, 629—vii. 3334(b).
- Braunstein v. Fraternal Union, 133 Minn. 8, 157 N. W. 721—vii. 4007(f).
- Bray v. Virginia Fire & Marine Ins. Co., 139 N. C. 390, 51 S. E. 922—vi. 632 (c), 636(e), 1822(e).
- Breakstone v. Appleton Mut. Fire Ins. Co., 149 Wis. 303, 135 N. W. 853—vi. 691(a), 1877(e).
- Breard v. New York Life Ins. Co., 70 South. 799, 138 La. 774—vi. 1080(b), 1110(g); vii. 2863(b), 3270(a), 3287 (f), 3755(q), 3759(r).
- Brecht v. Law Union & Crown Ins. Co. (C. C.) 153 Fed. 452—vi. 1736 (e); vii. 3690(b).
160 Fed. 399, 87 C. C. A. 351, 18 L. R. A. (N. S.) 197—vii. 3690(b).
- Breeden v. Aetna Life Ins. Co., 23 S. D. 417, 122 N. W. 348—vi. 633 (c); vii. 3457(a), 3477(a), 3503 (h), 3550(c), 3561(d).
- v. Frankfort Marine, Accident & Plate Glass Ins. Co., 220 Mo. 327, 119 S. W. 576—vi. 545(b), 2454(f).
- v. Western & Southern Life Ins. Co., 146 S. W. 1104, 148 Ky. 488—vi. 678(a); vii. 3736(h).
- Brehm Lumber Co. v. Svea Ins. Co., 79 Pac. 34, 36 Wash. 520, 68 L. R. A. 109—vi. 1646(o), 1924(w).
- Brenizer v. Supreme Council, Royal Arcanum, 53 S. E. 835, 141 N. C. 409, 6 L. R. A. (N. S.) 235—vi. 65(k); vii. 4007(f).
- Breslow v. Southern Tier Masonic Relief Ass'n, 107 App. Div. 123, 94 N. Y. Supp. 787—vi. 706(i), 707(i), 717(n).
- Brewster v. Empire State Surety Co., 130 N. Y. Supp. 439, 145 App. Div. 678—vii. 3331(a).
- Brickell v. Atlas Assur. Co., 10 Cal. App. 17, 101 Pac. 16—vi. 637(f), 1486 (c), 1736(e).
- Bricker v. Great Western Acc. Ass'n, 161 Iowa, 61, 140 N. W. 851—vii. 2699 (b), 2781(f).
- Bridal Veil Lumbering Co. v. Pacific Coast Casualty Co., 75 Or. 57, 145 Pac. 671—vii. 3319(a).
- Bridge v. Connecticut Mut. Life Ins. Co., 141 Pac. 375, 167 Cal. 774—vi. 1099 (a); vii. 3805(i).
- Briggs v. Life Ins. Co., 155 N. C. 73, 70 S. E. 1068—vi. 554(j), 555(j).
- v. Royal Highlanders, 84 Neb. 834, 122 N. W. 69—vi. 701(g), 704 (h); vii. 3226(a).
- Brigham v. Mutual Life Ins. Co., 95 Wash. 196, 163 Pac. 380—vi. 1988(d), 2142(h).

- Bright v. Hanover Fire Ins. Co., 92 Pac. 779, 48 Wash. 60—vii. 3095(g), 3096(g).
- Brighton Beach Racing Ass'n v. Home Ins. Co., 113 App. Div. 728, 99 N. Y. Supp. 219—vi. 1736 (e).
- 93 N. Y. Supp. 654, 47 Misc. Rep. 177—vi. 1736(e).
- 189 N. Y. 526, 82 N. E. 1124—vi. 1736(c).
- Brill v. Metropolitan Surety Co. (Sup.) 113 N. Y. Supp. 476—vii. 3042(c).
- Brinen v. Supreme Council of Catholic Mut. Ben. Ass'n, 103 N. W. 603, 140 Mich. 220—vii. 3766(r).
- Brinsmaid v. Iowa State Traveling Men's Ass'n, 132 N. W. 34, 152 Iowa, 134, 42 L. R. A. (N. S.) 1161, Ann. Cas. 1913B, 1282—vii. 3452(h), 3774(s).
- v. Order of United Commercial Travelers, 157 Iowa, 651, 138 N. W. 465—vii. 3175(h), 3203(h).
- Brisou v. Metropolitan Life Ins. Co. (Ky.) 115 S. W. 785—vi. 1979(j), 2096 (a).
- British American Assur. Co. v. Colorado & Southern Ry. Co., 125 Pac. 508, 1135, 52 Col. 589, 41 L. R. A. (N. S.) 1202—vii. 3899(c).
- v. Francisco, 58 Tex. Civ. App. 75, 123 S. W. 1144—vii. 2508(d), 2601(d), 2663(b).
- British-American Ins. Co. v. Columbian Optical Co., 108 N. W. 130, 76 Neb. 812—vii. 3125(c).
- v. Wilson, 77 Conn. 559, 60 Atl. 293—vi. 359(j), 535(b), 537(c); vii. 2790(a), 2792(c).
- British & Foreign Marine Ins. Co. v. Cummings, 113 Md. 350, 76 Atl. 571—vi. 1161(e), 1181(g), 1221 (n); vii. 2516(a).
- v. Maldonado & Co., 182 Fed. 744, 106 C. C. A. 122—vii. 2995(j).
- Britt v. Sovereign Camp of Woodmen of the World, 134 S. W. 1073, 153 Mo. App. 698—vi. 2237(a), 2336(a); vii. 2703(b).
- Brittenham v. Sovereign Camp Woodmen of the World, 167 S. W. 587, 180 Mo. App. 523—vi. 636(e), 2205(a), 2336 (a); vii. 2467(c), 2496(o), 2681(h).
- Britton v. Metropolitan Life Ins. Co., 80 S. E. 1072, 165 N. C. 149, Ann. Cas. 1915D, 363—vii. 868(j).
- Brix v. American Fidelity Co., 171 Mo. App. 518, 153 S. W. 789—vii. 3298(e), 3456(a), 3477(a), 3485(e), 3531(a).
- Broadway Realty Co. v. Lawyers' Title Ins. & Trust Co., 157 N. Y. Supp. 1088, 171 App. Div. 792—vi. 678(a), 784(a); vii. 3327 (d).
- 154 N. Y. Supp. 1024, 91 Misc. Rep. 137—vi. 635(d), 678(a), 784(a); vii. 3327(d).
- Broady v. Patrons' Fire & Tornado Ass'n, 94 Kan. 245, 146 Pac. 343—vii. 2555(a), 2593(l).
- Brock v. Metropolitan Life Ins. Co., 156 N. C. 112, 72 S. E. 213—vi. 1978(i), 2127(c).
- v. Travelers' Ins. Co., 91 Atl. 279, 88 Conn. 308—vii. 3343(g).
- Brogi v. Brogi, 211 Mass. 512, 98 N. E. 573—vi. 253(f), 286(g).
- Bromley's Adm'r v. Washington Life Ins. Co., 92 S. W. 17, 122 Ky. 402, 28 Ky. Law Rep. 1300, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685—vi. 273(n), 308(h), 322 (c).
- Bronson v. New York Fire Ins. Co., 64 W. Va. 494, 63 S. E. 283, 19 L. R. A. (N. S.) 643, 16 Ann. Cas. 868—vi. 1747(a).
- Brooklyn Trust Co. v. Seventh Regiment Veteran & Active League, 113 App. Div. 717, 99 N. Y. Supp. 248—vii. 3774(s).
- Brooks v. Conservative Life Ins. Co., 106 N. W. 913, 132 Iowa, 377, 119 Am. St. Rep. 560, 11 Ann. Cas. 339—vi. 2338(b), 2382(r).
- Brotherhood of American Yeomen v. Fordham, 180 S. W. 206, 120 Ark. 605—vi. 2096(a).
- v. Hickey (Tex. Civ. App.) 191 S. W. 162—vii. 3133(b).
- Brotherhood of Locomotive Firemen v. Hand, 90 Miss. 893, 44 South. 161—vi. 434(l).
- Brotherhood of Locomotive Firemen & Enginemen v. Aday, 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S.) 126—vi. 632(c), 636(e); vii. 3289(b), 3290(b), 3301(f), 3312(g).
- v. Cole, 108 Ark. 527, 158 S. W. 153—vi. 2061(k).
- v. Corder, 52 Ind. App. 214, 97 N. E. 125—vi. 398(e), 428(i), 434 (l), 435(l), 701(g).
- v. Cravers, 113 Ark. 400, 168 S. W. 1073—vi. 698(f).
- Brotherhood of Painters, Decorators & Paperhangers v. Barton, 46 Ind. App. 160, 92 N. E. 64—vi. 633 (c); vii. 2715(h), 2719(i), 3135 (b, c).
- v. Peters, 46 Ind. App. 733, 92 N. E. 183—vi. 633(c); vii. 2715(h), 2719(i), 3135(b, c).
- Brotherhood of Ry. Trainmen v. Dee (Tex. Civ. App.) 108 S. W. 492—vi. 2380(g), 2398(c), 2428 (c); vii. 2660(b), 3288(b), 3724 (b).
- 101 Tex. 597, 111 S. W. 396—vi. 2380(g), 2398(c), 2428(c), 2660(b), 3288(b), 3724(b).
- v. Roberts, 48 Tex. Civ. App. 325, 107 S. W. 626—vii. 2550(t).
- v. Swearingen, 171 S. W. 455, 161 Ky. 665—vi. 2048(k), 2108(h), 2144(j).

- Brotherhood of Ry. Trainmen v. Taylor, 29 Ohio Cir. Ct. R. 171—vii. 3736(h).
- v. Walsh, 89 Ohio St. 15, 103 N. E. 759—vii. 3301(f).
- B. Roth Tool Co. v. New Amsterdam Casualty Co., 161 Fed. 709, 88 C. C. A. 569—vii. 3315(a), 3332(a).
- Brown v. Bowman, 10 Ga. App. 707, 73 S. E. 1078—vi. 56(f), 434(l), 486(k), 1037(j).
- v. Connecticut Fire Ins. Co. (Mo. App.) 184 S. W. 122—vii. 3046(a).
- 197 Mo. App. 317, 195 S. W. 62—vi. 1376(g), 1763(g).
- (Okla.) 153 Pac. 173—vi. 615(f), 636(e), 1468(c).
- v. Equitable Life Assur. Soc. (C. C.) 142 Fed. 835—vi. 120(d), 691(a).
- 151 Fed. 1, 81 C. C. A. 1, 10 Ann. Cas. 402—vi. 120(d), 691(a).
- v. Grand Fountain of United Order of True Reformers, 28 App. D. C. 200—vi. 798(b).
- v. Grand Lodge A. O. U. W., 13 Cal. App. 537, 110 Pac. 351—vii. 3131(a).
- v. Great Camp of Knights of Modern Maccabees, 167 Mich. 123, 132 N. W. 562—vi. 712(1), 2245(g); vii. 2693(f), 2694(g).
- v. Home Ins. Co., 82 Kan. 442, 108 Pac. 824—vi. 347(b), 365(b), 375(e), 463(a).
- v. Knights of Protected Ark, 43 Colo. 289, 96 Pac. 450—vi. 707(i), 2338(b), 2341(c), 2395(b), 2717(h).
- v. Merchants' Marine Ins. Co., 152 Fed. 411, 81 C. C. A. 553—vii. 3893(a).
- v. Modern Woodmen, 156 Pac. 767, 97 Kan. 665, L. R. A. 1916E, 588—vii. 3769(s).
- v. Mutual Benefit Life Ins. Co., 131 Ga. 38, 61 S. E. 1123—vi. 465(b), 500(c).
- v. Mystic Workers, 151 Ill. App. 517—vii. 3152(f).
- v. Providence-Washington Ins. Co. (Mo. App.) 195 S. W. 65—vi. 1376(g), 1763(g).
- v. Spackman, 29 Pa. Super. Ct. 638—vi. 954(k), 968(s).
- v. United Moderns, 87 S. W. 357, 39 Tex. Civ. App. 343—vii. 3250(i), 3253(k).
- v. Vermont Mut. Fire Ins. Co., 74 Atl. 1061, 83 Vt. 161, 29 L. R. A. (N. S.) 698—vii. 3893(a).
- Brown Co. v. Norwich Union Fire Ins. Society (C. C.) 180 Fed. 933—vii. 3585(a).
- Brown & McCabe, Stevedores, v. London Guarantee & Accident Co. (D. C.) 232 Fed. 298—vii. 3330(a).
- Browne v. Commercial Union Assur. Co., 158 Pac. 765, 30 Cal. App. 547—vi. 347(b), 348(b), 878(s); vii. 2744(c).
- Bruck v. John Hancock Mut. Life Ins. Co., 194 Mo. App. 529, 185 S. W. 753—vi. 2144(j), 2185(d).
- Bruff v. Northwestern Mut. Fire Ass'n, 59 Wash. 125, 109 Pac. 280, Ann. Cas. 1912A, 1138—vii. 3042(c).
- Bruger v. Princeton & St. M. Mut. Fire Ins. Co., 109 N. W. 95, 129 Wis. 281—vi. 693(c); vii. 2781(f), 3126(d), 3409(d).
- Bruner v. Brotherhood of American Yeomen, 136 Iowa, 612, 111 N. W. 977—vi. 434(l), 435(l).
- Bruning v. Brotherhood Acc. Co., 77 N. E. 710, 191 Mass. 115—vii. 4016(i).
- Brunjes v. Metropolitan Life Ins. Co., 83 N. J. Law, 296, 84 Atl. 1062—vi. 2156(a), 2168(h).
- Brunswick v. Standard Acc. Ins. Co., 195 Mo. App. 651, 187 S. W. 802—vi. 650(b); vii. 3245(h).
- Brunswick-Balke-Collender Co. v. Northern Assur. Co., 105 N. W. 76, 142 Mich. 29—vi. 189(a), 1165(f), 1222(o), 1376(f); vii. 3383(b).
- 113 N. W. 1113, 150 Mich. 311—vi. 189(a), 1387(f), 1893(i); vii. 2775(d).
- Brunswick Realty Co. v. Frankfort Ins. Co., 99 Misc. Rep. 639, 166 N. Y. Supp. 36—vii. 3330(a).
- Bruzas v. Peerless Casualty Co., 111 Me. 308, 89 Atl. 199—vii. 2706(c), 3294(c).
- Bryant v. American Bonding Co., 77 Ohio St. 90, 82 N. E. 960—vi. 846(i).
- v. Continental Casualty Co. (Civ. App.) 145 S. W. 636—vii. 3157(a).
- 107 Tex. 582, 182 S. W. 673, Ann. Cas. 1918A, 517—vii. 2157(a).
- v. Granite State Fire Ins. Co., 174 Mich. 102, 140 N. W. 482—vii. 2650(r).
- v. Metropolitan Life Ins. Co., 147 N. C. 181, 60 S. E. 983—vi. 1991(g), 2156(a), 2159(c).
- v. Modern Woodmen, 125 N. W. 621, 86 Neb. 372, 27 L. R. A. (N. S.) 326, 21 Ann. Cas. 365—vi. 1956(f), 1958(h), 2127(c).
- Buchanan v. Security Mut. Life Ins. Co., 144 S. W. 178, 161 Mo. App. 579—vi. 993(b).
- (Mo. App.) 144 S. W. 185—vi. 54(e), 619(b), 993(b), 2314(h).
- Buchholz v. Metropolitan Life Ins. Co., 177 Mo. App. 683, 160 S. W. 573—vii. 3471(c), 3587(c).
- Buchman v. Insurance Co. of North America, 134 Ga. 506, 68 S. E. 71—vi. 1818(c), 1829(g).

- Buchner v. Title Guaranty & Surety Co.**, 144 App. Div. 326, 123 N. Y. Supp. 1007—vii. 3320(b).
- Buck v. Equitable Life Assur. Soc.**, 96 Wash. 683, 165 Pac. 878—vii. 2757(b).
- Buckingham & Hecht v. North German Fire Ins. Co. (C. C.)** 149 Fed. 622—vii. 4007(f).
- Buckler v. Supreme Council Catholic Knights**, 136 S. W. 1006, 143 Ky. 618—vii. 3781(u).
- Buckley v. Citizens' Ins. Co.**, 98 N. Y. Supp. 622, 112 App. Div. 451—vi. 924(g); vii. 2801(h), 2803(i), 2807(k), 2809(l).
- 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N. S.) 889—vi. 924 (g); vii. 2807(k), 2809(l).
- Buckner v. Jefferson Standard Life Ins. Co.**, 172 N. C. 762, 90 S. E. 897—vii. 3289(b).
- Budnik v. Metropolitan Life Ins. Co.**, 177 Ill. App. 14—vii. 2717(h).
- Buffalo Fertilizer Co. v. Aroostook Mut. Fire Ins. Co.**, 84 Atl. 1078, 109 Me. 483—vi. 137(d), 176(h), 203(c), 1716(b).
- Buffalo Forge Co. v. Mutual Security Co.**, 83 Conn. 393, 76 Atl. 995—vii. 2621(a), 2634(f), 2690(d), 3057(b).
- Buffalo Steel Co. v. Aetna Life Ins. Co.**, 136 N. Y. Supp. 977—vii. 2768(d), 3319(a), 3330(a), 3332 (a).
- 141 N. Y. Supp. 1027, 156 App. Div. 453—vii. 2768(d), 3319(a).
- Buford v. Equitable Assur. Soc.**, 98 N. Y. Supp. 152—vi. 120(d).
- Bulkeley v. Brotherhood Accident Co.**, 91 Conn. 727, 101 Atl. 92—vi. 2208 (c); vii. 3223(m).
- Bull v. Insurance Co. of North America**, 218 Fed. 616, 134 C. C. A. 374—vii. 2974(d).
- Bullock v. Mutual Life Ins. Co.**, 166 Mich. 240, 131 N. W. 574—vi. 2126 (b), 2168(h).
- Bumpus v. American Cent. Ins. Co.**, 108 Me. 217, 79 Atl. 848—vii. 733(b).
- Burbank v. Pioneer Mut. Ins. Ass'n**, 60 Wash. 253, 110 Pac. 1005, Ann. Cas. 1912B, 762—vi. 632(c), 641(i); vii. 3350(a), 3490(c).
- Burchard v. Western Commercial Travelers' Ass'n**, 123 S. W. 973, 139 Mo. App. 606—vi. 2238(b), 2336(a), 2338 (b), 2348(d), 2375(o), 2382(r), 2428(c).
- Burdick v. Modern Woodmen**, 47 Wash. 572, 92 Pac. 439—vii. 2724(l).
- Burgess v. Mercantile Town Mut. Ins. Co.**, 89 S. W. 568, 114 Mo. App. 169—vii. 3362(d), 3411(f), 3490(c), 3523(f), 3531(a), 3556(a).
- Burke v. Continental Ins. Co.**, 100 App. Div. 108, 91 N. Y. Supp. 402—vi. 205(d), 770(e), 1746(k).
- 128 App. Div. 391, 112 N. Y. Supp. 865—vi. 1746(k).
- 184 N. Y. 77, 570, 76 N. E. 1086—vi. 205(d), 770(e), 1746 (k).
- Burke v. Grand Lodge, A. O. U. W.**, 118 S. W. 493, 136 Mo. App. 450—vi. 2336(a); vii. 2713(f).
- v. London Guarantee & Accident Co.**, 110 N. Y. Supp. 1124, 126 App. Div. 933—vii. 3335(c).
- 93 N. Y. Supp. 652, 47 Misc. Rep. 171—vii. 3335(c).
- v. Maryland Casualty Co.**, 192 Mich. 173, 158 N. W. 398—vi. 784(a).
- v. Modern Woodmen**, 84 Pac. 275, 2 Cal. App. 611—vi. 808(h); vii. 3742(l), 3774(s).
- v. Prudential Ins. Co.**, 221 Mass. 253, 108 N. E. 1069, Ann. Cas. 1917E, 641—vi. 792(f), 2259(a), 2413(h), 2830(b).
- v. Scheer**, 89 Neb. 80, 130 N. W. 962, 33 L. R. A. (N. S.) 1057—vi. 938(c).
- Burkhardt v. Columbia Relief Fund Ass'n**, 35 Pa. Super. Ct. 284—vii. 3183(b).
- Burnett v. Mutual Life Ins. Co. (Ind. App.)** 114 N. E. 232—vii. 3737(i), 3755 (q).
- Burnham v. China Mut. Ins. Co.**, 75 N. E. 74, 189 Mass. 100, 109 Am. St. Rep. 627—vii. 2893(h).
- v. Michigan Mut. Life Ins. Co.**, 112 N. W. 704, 149 Mich. 84—vi. 2267(e).
- Burns v. Burns**, 109 App. Div. 98, 95 N. Y. Supp. 797—vi. 566(j), 627(a); 660(i), 799(b), 808 (h); vii. 3727(d), 3742(l).
- 82 N. E. 1107, 190 N. Y. 211, —vi. 566(j), 627(a), 660(i), 799 (b), 808(h); vii. 3727(d), 3742 (l).
- v. Metropolitan Life Ins. Co.**, 124 S. W. 539, 141 Mo. App. 212—vi. 2025(d), 2185(d).
- Burns & Reilly Real Estate Co. v. Philadelphia Life Ins. Co.**, 86 Atl. 642, 239 Pa. 22—vi. 1039(a).
- Burr v. Royal League**, 193 Ill. App. 238—vi. 802(d).
- Burridge v. New York Life Ins. Co.**, 211 Mo. App. 158, 109 S. W. 560—vi. 1081(b), 2263(b), 2411(g), 2432(e), 2866(d).
- Burt v. Burt**, 67 Atl. 210, 218 Pa. 198, 11 Ann. Cas. 708—vi. 1933(b); vii. 3724(b).
- Burton v. Columbian Nat. Life Ins. Co.**, 127 Pac. 1037, 20 Cal. App. 21—vi. 2259(a).
- Burton-Lingo Co. v. Patton**, 15 N. M. 304, 107 Pac. 679, 27 L. R. A. (N. S.) 420—vi. 1763(g).
- Buse v. National Ben Franklin Ins. Co.**, 160 N. Y. Supp. 566, 96 Misc. Rep. 229—vii. 3079(a), 3099(a), 3114(g).
- Bush v. Block**, 195 Mo. App. 287, 187 S. W. 153—vi. 1110(g).
- v. Hartford Fire Ins. Co.**, 71 Atl. 916, 222 Pa. 419—vi. 1382(k); vii. 2463(b), 2604(e), 3554(d).

- Bush v. Indiana & Ohio Live Stock Ins. Co.**, 74 W. Va. 244, 81 S. E. 984—vi. 678(b), 1974(g); vii. 3410(e).
- v. Modern Woodmen (Iowa)** 152 N. W. 31—vi. 813(k), 815(l), 1110(g); vii. 3732(f), 3766(r), 3819(c).
- (Iowa) 162 N. W. 59—vi. 799 (b); vii. 3756(q).
- Bushnell v. Farmers' Mut. Ins. Co.**, 85 S. W. 103, 110 Mo. App. 223—vi. 1738 (f); vii. 2558(a), 2683(b), 3015(c).
- Business Men's Accident Ass'n v. Webb** (Tex. Civ. App.) 163 S. W. 380—vi. 457(i); vii. 2735(a).
- Busing v. Modern Woodmen**, 151 Ill. App. 49—vii. 3140(e).
- Busta v. Court of Honor**, 172 Ill. App. 71—vi. 2400(d); vii. 2724(l).
- Butler v. Grand Lodge A. O. U. W.**, 79 Pac. 861, 146 Cal. 172—vi. 2395 (b), 2398(c).
- v. Michigan Mut. Life Ins. Co.**, 93 App. Div. 619, 87 N. Y. Supp. 1129—vii. 2525(d).
- 77 N. E. 398, 184 N. Y. 337—vii. 2525(d).
- v. Supreme Council, A. L. H.**, 93 N. Y. Supp. 1012, 105 App. Div. 164—vi. 698(f), 706(h), 706(i), 713(m), 717(n); vii. 3969(f).
- v. Supreme Court I. O. F.**, 48 Wash. 147, 93 Pac. 66—vii. 3949(d).
- 110 Pac. 1007, 60 Wash. 171—vi. 2208(c); vii. 3129(a), 3131(a).
- Butter Bros. v. American Fidelity Co.**, 120 Minn. 157, 139 N. W. 355, 44 L. R. A. (N. S.) 609—vii. 2767(d), 3319 (a), 3576(d).
- C**
- Cabell v. Mutual Ben. Life Ins. Co.**, 163 S. W. 1119, 157 Ky. 752—vi. 2409(g).
- Cady v. Fidelity & Casualty Co.**, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260—vi. 2110(i); vii. 3241(f), 3242(g), 3250(i), 3257(m), 3262(n), 3356(a), 3458 (b).
- v. Travelers' Ins. Co.**, 142 N. W. 107, 93 Neb. 634—vi. 2417(i).
- Caffrey v. Knights and Ladies of Columbia**, 63 Atl. 189, 213 Pa. 609—vi. 1953(c).
- Cahill v. Standard Marine Ins. Co.**, 139 App. Div. 780, 124 N. Y. Supp. 496—vii. 2892(h), 2904 (d).
- 204 N. Y. 190, 97 N. E. 486—vii. 2892(h), 2904(d).
- Cain v. Knights of Pythias, etc.**, 11 Ga. App. 364, 75 S. E. 444—vi. 253(f), 261 (i); vii. 3815(b).
- Caldwell v. Grand Lodge of United Workmen**, 148 Cal. 195, 82 Pac. 781, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356—vi. 311(a), 709(k), 711(l), 809(i), 812(j), 813(k), 2067(b).
- Caldwell v. Iowa State Traveling Men's Ass'n**, 156 Iowa, 327, 136 N. W. 678—vii. 3157(a), 3172(g), 3174(g), 3176(a), 3200(h), 3212 (k).
- v. Life Ins. Co.**, 52 S. E. 252, 140 N. C. 100—vi. 1039(a), 1050(i).
- v. Virginia Fire & Marine Ins. Co.**, 124 Tenn. 593, 139 S. W. 698—vi. 378(h), 398(f), 405(l); vii. 3373(b).
- Caledonian Fire Ins. Co. v. Shepherd**, 111 Miss. 175, 71 South. 314—vii. 2476 (b), 2601(d).
- Caledonian Ins. Co. v. Indiana Reduction Co.** (Ind. App.) 115 N. E. 596—vi. 1541(f); vii. 2690(d), 3544(a).
- v. Northern Pac. Ry. Co.**, 79 Pac. 544, 32 Mont. 46—vii. 3893(a).
- v. Smith**, 65 Fla. 429, 62 South. 595, 47 L. R. A. (N. S.) 619; vii. 2611(i).
- California Canneries Co. v. Canton Ins. Office**, 25 Cal. App. 303, 143 Pac. 549—vi. 536(b), 1272(q); vii. 2882(c), 2969 (a), 2974(d), 2995(j).
- California Ins. Co. v. Settle**, 162 Ky. 82, 172 S. W. 119—vi. 375(e).
- California Reclamation Co. v. New Zealand Ins. Co.**, 23 Cal. App. 611, 138 Pac. 960—vi. 616(f), 1204(a), 1545(b); vii. 2789(a).
- Callahan v. London & Lancashire Fire Ins. Co.**, 98 Misc. Rep. 589, 163 N. Y. Supp. 322—vii. 3042(c), 3660(b), 3959(b).
- v. Supreme Tent of Knights of Macabees of the World** (Sup.) 121 N. Y. Supp. 354—vii. 3765(r).
- Calvin Phillips & Co. v. Fishback**, 84 Wash. 124, 146 Pac. 181—vi. 1011(d).
- Camden Fire Ins. Ass'n v. Baird** (Tex. Civ. App.) 187 S. W. 699—vii. 3690(b).
- v. Bomar** (Tex. Civ. App.) 176 S. W. 156—vi. 1717(b), 1341(h); vii. 3838(b).
- v. Missouri, K. & T. Ry. Co. of Texas** (Tex. Civ. App.) 175 S. W. 816—vii. 3908(g).
- v. Puett** (Tex. Civ. App.) 164 S. W. 418—vi. 1318(g).
- v. Wandell** (Tex. Civ. App.) 195 S. W. 289—vii. 2531(i), 2555(a), 2622(a).
- Camden Fire Ins. Co. v. Yarbrough** (Tex. Civ. App.) 182 S. W. 66—vi. 1821(d).
- Camden Wholesale Grocery v. National Fire Ins. Co.**, 106 S. C. 467, 91 S. E. 732—vi. 691(a), 1410(h), 1448(j), 1835 (b).
- Camden & Atlantic Tel. Co. v. United States Casualty Co.**, 75 Atl. 1077, 227 Pa. 242—vii. 3313(a).
- Cameron v. Royal Neighbors of America** (Mich.) 163 N. W. 902—vii. 2549(t).
- Campbell v. Germania Fire Ins. Co.**, 158 N. W. 63, 163 Wis. 329—vi. 1797(a).

- Campbell v. Maryland Casualty Co., 97 N. E. 1026, 52 Ind. App. 228—vii. 3334(b).
- v. Order of Washington, 53 Wash. 398, 102 Pac. 410—vi. 619(b), 620(c); vii. 3242(g).
- Campbell Milk Co. v. United States Fidelity & Guaranty Co., 146 N. Y. Supp. 92, 161 App. Div. 738; vii. 3337(d).
- Candelaria v. Columbian Nat. Life Ins. Co., 60 Colo. 340, 153 Pac. 447—vi. 532(c), 643(k).
- Cannon Mfg. Co. v. Employers' Indemnity Co., 76 S. E. 536, 161 N. C. 19, Ann. Cas. 1914D, 1095—vii. 3331(a).
- Canterbury v. Northwestern Mut. Life Ins. Co., 124 Wis. 169, 102 N. W. 1096—vi. 1087(e).
- Canton Ins. Office v. Independent Transp. Co., 217 Fed. 213, 133 C. C. A. 207, L. R. A. 1915C, 408—vi. 638(g), 1551(e).
- Canton Nat. Bank v. American Bonding & Trust Co., 73 Atl. 684, 111 Md. 41, 18 Ann. Cas. 820—vii. 3320(b).
- Capella v. Royal Ins. Co., 143 Wis. 78, 126 N. W. 547—vii. 3039(b).
- Capital Fire Ins. Co. v. Carroll, 26 Okl. 286, 109 Pac. 535—vi. 629(a), 752(i), 1181(g), 1646(o).
- v. Johnson, 82 Ark. 90, 100 S. W. 749—vii. 2665(c), 2670(e).
- v. Kaufman, 91 Ark. 310, 121 S. W. 289—vi. 1814(a), 1818(c), 1825(f), 1826(f).
- v. King, 82 Ark. 400, 102 S. W. 194—vi. 1322(k), 1502(k).
- 89 Ark. 346, 116 S. W. 894—vi. 1431(e), 1437(i).
- v. Montgomery, 81 Ark. 508, 99 S. W. 687—vii. 2521(c), 2535(j), 2555(a).
- v. Shearwood, 87 Ark. 326, 112 S. W. 878—vii. 2692(e).
- Caplin v. Penn Mut. Life Ins. Co., 100 Misc. Rep. 374, 166 N. Y. Supp. 675—vi. 1090(f).
- Capp v. Security Mut. Life Ins. Co., 94 S. W. 734, 117 Mo. App. 532—vi. 2408(g).
- Cardinale v. Society of Civility and Labor (Sup.) 102 N. Y. Supp. 471—vii. 2717(h), 3271(a).
- Cardwell v. Virginia State Ins. Co. (Ala.) 73 South. 466—vi. 1734(e).
- Carey v. John Hancock Mut. Life Ins. Co., 100 N. Y. Supp. 289, 114 App. Div. 769—vii. 2708(c).
- v. Switchmen's Union of North America, 107 N. W. 129, 98 Minn. 28—vii. 3677(b), 3679(b).
- Carfman v. Fidelity & Deposit Co., 167 Mo. App. 507, 152 S. W. 126—vii. 3949(d).
- Carland v. General Accident, Fire & Life Assur. Corp., 183 S. W. 965, 122 Ark. 468—vii. 3298(e).
- Carleton v. Patrons' Androscooggin Mut. Fire Ins. Co., 109 Me. 79, 82 Atl. 649, 39 L. R. A. (N. S.) 951—vi. 413(c), 1443(d), 1835(b), 1902(i), 1903(j); vii. 2646(o), 2694(g).
- Carlston v. St. Paul Fire & Marine Ins. Co., 37 Mont. 118, 94 Pac. 756, 127 Am. St. Rep. 715—vii. 3631(b), 3648(l).
- Carlton Lumber Co. v. Lumber Ins. Co. of New York, 81 Or. 396, 158 Pac. 807, 159 Pac. 969—vi. 878(s); vii. 3061(a).
- Carmichael v. John Hancock Mut. Life Ins. Co., 101 N. Y. Supp. 602, 116 App. Div. 291—vi. 451(f), 2096(a).
- 95 N. Y. Supp. 587, 48 Misc. Rep. 386—vi. 456(h), 1965(b); vii. 2461(b).
- 49 Misc. Rep. 461, 97 N. Y. Supp. 976—vi. 451(f), 2096(a).
- Carp v. National Assur. Co. (Mo. App.) 99 S. W. 523—vi. 1823(e), 1827(f); vii. 3628(t).
- v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137—vi. 1817(b), 1822(e); vii. 2741(b).
- Carpenter v. Carpenter, 227 Mass. 288, 116 N. E. 494—vii. 3755(q), 3762(r).
- v. Modern Woodmen of America, 160 Iowa, 602, 142 N. W. 411—vii. 3544(a).
- Carr v. Grand Lodge United Brothers of Friendship (Tex. Civ. App.) 189 S. W. 510—vii. 3748(n).
- v. Prudential Ins. Co., 101 N. Y. Supp. 158, 115 App. Div. 755—vi. 2308(d), 2310(e), 2432(e), 2433(f), 2781(f).
- Carroll v. Fidelity & Casualty Co. of New York (C. C.) 137 Fed. 1012—vii. 3156(a), 3160(a), 3207(j).
- v. Hartford Fire Ins. Co., 154 Pac. 985, 28 Idaho, 466—vi. 529(j); vii. 2555(a), 3416(d), 3915(j).
- Carrozza v. National Life Ins. Co., 62 Pa. Super. Ct. 153—vii. 2559(b).
- Carruth v. Clawson, 97 Ark. 50, 133 S. W. 178—vii. 3762(r), 3769(s).
- Carson v. National Life Ins. Co., 77 S. E. 353, 161 N. C. 441—vi. 1101(b); vii. 3819(c).
- Carter v. Aetna Life Ins. Co., 91 Pac. 178, 76 Kan. 275, 11 L. R. A. (N. S.) 1155—vii. 3334(b).
- v. Bankers' Life Ins. Co., 83 Neb. 810, 120 N. W. 455—vi. 398(e), 433(k), 436(a); vii. 3952(d).
- Carthage Stone Co. v. Travelers' Ins. Co., 172 S. W. 458, 186 Mo. App. 318—vii. 3331(a).
- Cary v. Phoenix Ins. Co., 83 Conn. 690, 78 Atl. 426—vii. 3898(b).
- v. Preferred Accident Ins. Co., 127 Wis. 67, 106 N. W. 1055, L. R. A. (N. S.) 926, 115 Am. St. Rep. 997, 7 Ann. Cas. 484—vii. 3195(f), 3200(h).

- Cary Brick Co. v. Fidelity & Casualty Co., 147 N. Y. Supp. 414, 162 App. Div. 873—vi. 632(c); vii. 3316(a).
- Case v. Meany, 165 Wis. 143, 161 N. W. 363—vi. 341(g), 1354(e); vii. 3698(f).
- Casey v. Ladies Catholic Benev. Ass'n, 195 Ill. App. 2—vii. 3772(s).
- v. Prudential Ins. Co., 162 Ill. App. 581—vii. 2570(e).
- Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524—vi. 232(l); vii. 3367(h), 3438(e), 3662(d).
- v. Des Moines Fire Ins. Co., 111 Minn. 538, 126 N. W. 526—vi. 232(l); vii. 3367(h), 3438(e), 5662(d).
- C. A. Smith Lumber Co. v. Colonial Assur. Co., 158 N. Y. Supp. 198, 172 App. Div. 149—vii. 2801(h).
- Casner v. New Amsterdam Casualty Co., 91 S. W. 1001, 116 Mo. App. 354—vi. 736(b).
- Cass County v. Mercantile Town Mut. Ins. Co., 188 Mo. 1, 96 S. W. 237—vi. 572(b), 619(b), 622(e); vii. 3942(d).
- Castagnino v. Mutual Reserve Fund Life Ass'n, 157 Fed. 29, 84 C. C. A. 533—vii. 3945(a).
- Castell v. Woodcock (Sup.) 121 N. Y. Supp. 585—vi. 220(c); vii. 3347(a), 3479(b).
- Castens v. Supreme Lodge Knights and Ladies of Honor, 190 Mo. App. 57, 175 S. W. 264—vii. 3257(m).
- Casualty Co. of America v. Taylor, 164 Ky. 786, 176 S. W. 194—vii. 3213(k).
- Cathcart v. Life Ins. Co. of Virginia, 57 S. E. 390, 144 N. C. 623—vi. 1039(a).
- Catholic Order of Foresters v. Collins, 51 Ind. App. 235, 99 N. E. 745—vi. 1932(a), 1933(b), 1940(f), 1951(b), 1952(c), 1962(k), 1982(l), 2158(b), 2168(h), 2169(i); vii. 2690(d).
- v. Lynch, 126 Ill. App. 439—vii. 2708(c), 2715(h), 2717(h).
- Cauthen v. Hartford Life Ins. Co., 80 S. C. 264, 61 S. E. 428—vi. 352(f), 460(j), 482(i), 495(o), 496(a), 507(f), 509(g), 2430(d).
- Cavagnaro v. Thompson, 138 N. Y. Supp. 819, 78 Misc. Rep. 637—vii. 3755(g).
- Cayard v. Robertson & Hobbs, 123 Tenn. 382, 131 S. W. 864, 30 L. R. A. (N. S.) 1224, Ann. Cas. 1912C, 152—vii. 3719(o).
- Cayford v. Metropolitan Life Ins. Co., 5 Cal. App. 715, 91 Pac. 266—vi. 2310(e); vii. 2486(h), 2718(i).
- Caywood v. Supreme Lodge of Knights & Ladies of Honor, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253, 17 Ann. Cas. 503—vi. 439(c), 441(c), 2375(o), 2425(a); vii. 3965(e), 3967(e), 3989(k).
- C. C. Handee Co. v. Insurance Co. of Pennsylvania, 149 N. W. 147, 158 Wis. 521—vii. 2790(a).
- Cecil v. Kentucky Livestock Ins. Co., 165 Ky. 211, 176 S. W. 986—vi. 830(a).
- Central Acc. Ins. Co. v. Rembe, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235, 5 Ann. Cas. 155—vii. 3157(a), 3195(f), 3200(h).
- 122 Ill. App. 507—vii. 3157(a), 3195(f), 3200(h).
- v. Spence, 126 Ill. App. 32—vi. 1933(b), 2023(a), 2024(b); vii. 3172(g).
- Central Glass Co. v. German American Ins. Co., 57 South. 538, 130 La. 18—vii. 3432(m).
- v. Hamburg-Bremen Fire Ins. Co., 63 South. 236, 133 La. 598—vii. 3886(a).
- v. Niagara Fire Ins. Co., 59 South. 972, 131 La. 513—vii. 3886(a).
- Central Life Assur. Soc. v. Mulford, 45 Colo. 240, 100 Pac. 423—vii. 2849(j).
- Central Life Ins. Co. v. Roberts, 165 Ky. 296, 176 S. W. 1139—vi. 505(e).
- Central Market Street Co. v. North British & Mercantile Ins. Co., 91 Atl. 662, 245 Pa. 272—vi. 1691(b); vii. 2621(a), 2683(b).
- Central Nat. Fire Ins. Co. of Chicago, Ill. v. Black, 220 Fed. S. 135 C. C. A. 584—vii. 3126(d), 3392(i), 3396(k).
- Central Trust Co. v. Fidelity Mut. Life Ins. Co., 45 Pa. Super. Ct. 313—vii. 2755(b), 3285(f).
- Central Trust & Safe Deposit Co. v. Dubuque Fire & Marine Ins. Co., 1 Ohio App. 447, 34 Ohio Cir. Ct. R. 218—vi. 628(a); vii. 3350(a).
- Century Realty Co. v. Frankfort Marine Accident & Plate Glass Ins. Co., 179 Mo. App. 123, 161 S. W. 624—vi. 632(c); vii. 3331(a).
- 179 Mo. App. 145, 161 S. W. 631—vi. 632(c); vii. 3331(a).
- v. Travelers' Ins. Co., 179 Mo. App. 144, 161 S. W. 630—vi. 632(c); vii. 3331(a).
- Cerny v. Jednota Cesky Dam, 146 Ill. App. 518—vi. 577(g), 704(h), 800(c); vii. 3722(b).
- v. Sesterska Podporujici Jednota, 146 Ill. 590—vi. 577(g), 704(h), 800(c); vii. 3722(b).
- C. E. Shepard & Co. v. New York Life Ins. Co., 89 Atl. 186, 87 Conn. 500—vii. 3731(u), 3802(g).
- Cessna v. United States Life Endowment Co., 152 Ill. App. 653—vi. 1933(b), 1950(a), 1954(d), 2113(k).
- Chadwick v. Phoenix Accident & Sick Benefit Ass'n, 106 N. W. 1122, 143 Mich. 481, 8 Ann. Cas. 170—vii. 3605(e).
- Chamberlain v. Shawnee Fire Ins. Co., 177 Ala. 516, 58 South. 267—vi. 1823(e), 1829(g); vii. 2777(e).

- Chambers v. Great State Council, I. O. R. M., 76 W. Va. 614, 86 S. E. 467—vi. 296(n), 1101(b).
- Chance v. Simpkins, 146 Ga. 519, 91 S. E. 773—vii. 3762(r).
- Chandler v. John Hancock Mut. Life Ins. Co., 167 S. W. 1162, 180 Mo. App. 394—vi. 691(a); vii. 3477(a), 3479(b), 3550(c).
- v. Mutual Life & Industrial Ass'n of Georgia, 61 S. E. 1036, 131 Ga. 82—vi. 290(k).
- v. Royal Highlanders (Neb.) 162 N. W. 642—vi. 68(m), 2365(j); vii. 2700(b), 2706(c).
- v. Traub, 49 South. 240, 159 Ala. 519—vi. 794(g).
- Chaney v. Farmers' Fire Ins. Co., 32 Pa. Super. Ct. 479—vi. 1372(c).
- Chapin v. Ocean Accident & Guarantee Corporation, 147 N. W. 465, 96 Neb. 213, 52 L. R. A. (N. S.) 227—vii. 3329(e), 3347(a), 3582(g).
- Chaplin v. Mutual Cash Guaranty Fire Ins. Co., 129 N. W. 238, 26 S. D. 632—vii. 3120(b).
- Charles Wolff Packing Co. v. Travelers' Ins. Co., 94 Kan. 630, 146 Pac. 1175—vii. 3316(a).
- Chartered Bank of India, Australia and China v. North River Ins. Co., 121 N. Y. Supp. 399, 136 App. Div. 646—vii. 3413(b).
- Chasse v. Bankers' Reserve Fund Life Ins. Co., 27 S. D. 70, 129 N. W. 568—vi. 490(l), 509(g).
- Cheever v. British-American Ins. Co., 83 N. Y. Supp. 728, 86 App. Div. 333—vii. 3430(m).
- 73 N. E. 1121, 180 N. Y. 550—vii. 3430(m).
- Chehalis River Lumber & Shingle Co. v. Empire State Surety Co. (D. C.) 206 Fed. 559—vii. 4011(h).
- Chelsea Exch. Bank v. Travelers' Ins. Co., 160 N. Y. Supp. 225, 173 App. Div. 829—vii. 3787(a).
- Chenier v. Insurance Co. of North America, 72 Wash. 27, 129 Pac. 905, 48 L. R. A. (N. S.) 319, Ann. Cas. 1914D, 649—vi. 385(m).
- Cherokee Life Ins. Co. v. Banks, 15 Ga. App. 65, 82 S. E. 597—vi. 268(g).
- Cherry v. Fidelity & Deposit Co., 27 Sup. Ct. 790, 205 U. S. 537, 51 L. Ed. 920—vi. 2435(a).
- Cheshire Brass Co. v. Wilson, 86 Atl. 26, 86 Conn. 551—vii. 2797(f), 2809(l).
- Cheswell v. Fraternal Acc. Ass'n., 85 N. E. 96, 199 Mass. 267—vii. 3174(g), 3882(g).
- Chevaliers, The, v. Shearer, 27 Ohio Cir. Ct. R. 509—vi. 697(e); vii. 3301(f).
- Chicago City Ry. Employes' Mut. Aid Ass'n v. Hogan, 124 Ill. App. 447—vi. 1024(d), 2277(k).
- Chicago Life Ins. Co. v. Robertson, 147 Ky. 61, 143 S. W. 740—vii. 4016(i).
- 165 Ky. 217, 176 S. W. 1010—vi. 457(i).
- Chicago Real Estate Board v. Mullenbach, 184 Ill. App. 437—vi. 784(a).
- Chicago Title & Trust Co. v. Haxtun, 129 Ill. App. 626—vi. 295(n), 323(d).
- Chisholm v. Royal Ins. Co., 114 N. E. 715, 225 Mass. 428—vii. 3590(e).
- Chismore v. Anchor Fire Ins. Co., 108 N. W. 230, 131 Iowa, 180—vii. 2639(j).
- Christatos v. New England Casualty Co., 159 N. Y. Supp. 700, 95 Misc. Rep. 534—vii. 3582(g).
- Christensen v. New York Life Ins. Co., 152 Mo. App. 551, 134 S. W. 100—vi. 2411(g).
- 160 Mo. App. 486, 141 S. W. 6—vi. 458(j), 691(a), 2407(g), 2411(g).
- Christenson v. El Riad Temple, Ancient Arabic Order Nobles of Mystic Shrine, 37 S. D. 68, 156 N. W. 581—vi. 620(c), 806(f); vii. 3756(q).
- v. Madson, 127 Minn. 225, 149 N. W. 288, Ann. Cas. 1916C, 584—vi. 806(f).
- Christie Lithograph & Printing Co. v. Hamblin (Mo. App.) 144 S. W. 882—vi. 5(a); vii. 2815(a).
- Christison v. St. Paul Fire & Marine Ins. Co. (Minn.) 163 N. W. 980, L. R. A. 1917F, 612—vii. 3063(a).
- Christman v. Christman, 157 N. W. 1099, 163 Wis. 433—vii. 3736(h), 3774(s).
- Christy v. American Temperance Life Ins. Ass'n, 123 N. Y. Supp. 740, 68 Misc. Rep. 178—vi. 632(c); vii. 3255(l), 3257(m), 3265(o), 3434(a).
- Chulek v. United States Fire Ins. Co., 30 Pa. Super. Ct. 435—vi. 1731(c), 1743(h).
- Church Co. v. Aetna Indemnity Co., 13 Ga. App. 826, 80 S. E. 1093—vi. 10(g), 851(d), 3337(d).
- Cigar Makers' International Union v. Huecker, 123 Ill. App. 336—vi. 706(h), 708(j), 802(d), 2432(e).
- Cilek v. New York Life Ins. Co., 95 Neb. 274, 145 N. W. 693—vi. 677(a), 2290(c), 2304(b), 2324(n).
- 97 Neb. 56, 149 N. W. 49—vi. 677(a), 2304(b).
- Cilley v. Preferred Acc. Ins. Co., 96 N. Y. Supp. 282, 109 App. Div. 394—vii. 3171(f).
- 79 N. E. 102, 187 N. Y. 517—vii. 3171(f).
- Cipriano v. Societa San Salvatore, 157 N. Y. Supp. 467, 94 Misc. Rep. 130—vi. 708(j).
- 161 N. Y. Supp. 284—vi. 708(j).
- Citizens' Fire Ins. Co. v. Lockridge & Ridgeway, 116 S. W. 303, 132 Ky. 1, 20 L. R. A. (N. S.) 226—vii. 3066(e).
- v. Lord, 100 Ark. 212, 139 S. W. 1114—vii. 3495(e), 3556(a).

- Citizens' Ins. Co. v. Helbig*, 84 N. E. 897, 234 Ill. 251—vi. 437(a); vii. 2808(l).
- 138 Ill. App. 115—vi. 437(a), 456(h), 459(j), 460(j), 495(o); vii. 2808(l), 3986(j).
- v. Henderson Elevator Co.*, 123 Ky. 478, 96 S. W. 601, 29 Ky. Law Rep. 976, 124 Am. St. Rep. 371—vii. 2791(b), 2810(l).
- 123 Ky. 478, 97 S. W. 810, 30 Ky. Law Rep. 225, 124 Am. St. Rep. 371—vii. 2791(b), 2801(h), 2808(l), 2810(l).
- 84 S. W. 580, 37 Ky. Law Rep. 581—vii. 2801(h), 2808(l).
- v. Herpolsheimer*, 76 Neb. 232, 109 N. W. 160—vii. 3396(k).
- 77 Neb. 232, 109 N. W. 160—vi. 177(b); vii. 3424(i), 3617(m).
- Citizens' Life Ins. Co. v. Boyle*, 139 Ky. 1, 129 S. W. 303—vi. 2324(n).
- v. Coleman*, 148 Ky. 750, 147 S. W. 414—vi. 490(l), 505(e).
- v. McClure*, 138 Ky. 138, 127 S. W. 749, 27 L. R. A. (N. S.) 1026—vii. 2755(b).
- Citizens' Mut. Fire Ins. Co., In re*, 127 N. W. 769, 162 Mich. 466. See Ely v. Oakland Circuit Judge.
- Citizens' Mut. Fire Ins. Co. v. Conowingo Bridge Co.*, 113 Md. 430, 77 Atl. 378—vi. 1357(g); vii. 2659(a), 3099(a), 3347(a), 3561(d).
- 116 Md. 422, 82 Atl. 372—vi. 437(a), 607(a), 678(a); vii. 3039(b), 3479(b).
- Citizens' Nat. Bank v. Yazoo Grocery Co. (Mass.)* 73 South. 877—vii. 3714(l).
- Citizens' Nat. Life Ins. Co. v. Egner*, 180 S. W. 778, 167 Ky. 476—vii. 2715(h).
- v. Morris*, 104 Ark. 288, 148 S. W. 1019—vi. 120(d), 2308(d); vii. 2709(d), 2777(e).
- v. Murphy*, 156 S. W. 1069, 154 Ky. 88—vi. 416(d).
- v. Ragan*, 13 Ga. App. 29, 78 S. E. 683—vi. 2322(m).
- v. Rutherford*, 164 S. W. 107, 157 Ky. 820—vii. 3287(f).
- v. Swords*, 109 Miss. 635, 68 South. 920—vi. 1951(b), 2174(b).
- Citizens' Savings Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co.*, 84 Atl. 970, 86 Vt. 267—vii. 3082(c), 3123(c), 3124(c), 3126(d), 3860(h).
- 86 Atl. 1056, 87 Vt. 23—vii. 3125(c).
- Citizens' State Bank v. Shawnee Fire Ins. Co.*, 137 Pac. 78, 91 Kan. 18, 49 L. R. A. (N. S.) 972—vi. 636(e), 1758(f).
- Citizens' Trust & Guaranty Co. v. Globe & Rutgers Fire Ins. Co.*, 229 Fed. 326, 143 C. C. A. 446, Ann. Cas. 1917C, 416—vi. 783(a), 2440(d); vii. 3481(c), 3544(a).
- City of Aurora v. Firemen's Fund Ins. Co.*, 165 S. W. 357, 180 Mo. App. 263—vii. 3047(a), 3089(g), 3125(c), 3889(c).
- City of Fall River v. Aetna Ins. Co.*, 219 Mass. 454, 107 N. E. 367—vi. 1289(c); vii. 3662(d).
- City of Lake Charles v. Equitable Life Assur. Soc.*, 38 South. 578, 114 La. 836—vi. 566(h).
- City of New York Ins. Co. v. Chicago, B. & Q. Ry. Co.*, 159 Iowa, 129, 140 N. W. 373—vii. 3893(a).
- City of Shreveport v. New York Life Ins. Co.*, 141 La. 360, 75 South. 80—vi. 658(g).
- Clair v. Supreme Council of the Royal Arcanum*, 155 S. W. 892, 172 Mo. App. 709—vi. 2039(a), 2245(g); vii. 2659(a), 2694(g).
- Clappenback v. New York Life Ins. Co.*, 136 Wis. 626, 118 N. W. 245—vi. 2409(g).
- Clarey v. Union Cent. Life Ins. Co.*, 143 Ky. 540, 136 S. W. 1014, 33 L. R. A. (N. S.) 881—vi. 562(d); vii. 3967(c).
- Clark v. Bankers' Accident Ins. Co.*, 96 Neb. 381, 147 N. W. 1118—vi. 374(d); vii. 3172(g), 3174(g).
- v. Bonsal & Co.*, 72 S. E. 954, 157 N. C. 270, 48 L. R. A. (N. S.) 191—vii. 3334(b), 3335(c).
- v. Equitable Life Assur. Soc. (C. C.)* 143 Fed. 175—vi. 1081(b).
- v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 201, 135 N. W. 1114, 42 L. R. A. (N. S.) 631—vi. 636(e), 701(g), 1016(b), 1024(d), 1033(h), 2375(o); vii. 3133(b), 3174(g), 3218(m).
- v. Metropolitan Life Ins. Co.*, 62 Pa. Super. Ct. 192—vi. 2144(j).
- v. Modern Woodmen of America*, 156 S. W. 72, 170 Mo. App. 210—vi. 2214(f).
- v. Mutual Life Ins. Co.*, 59 S. E. 283, 129 Ga. 571—vi. 469(e), 470(e).
- v. National Union Fire Ins. Co.*, 159 Ill. App. 256—vi. 778(g), 1738(f).
- v. New York Life Ins. Co.*, 85 S. E. 594, 101 S. C. 258—vi. 2407(g).
- v. North American Union*, 179 Mich. 131, 146 N. W. 336—vi. 697(e); vii. 2748(g).
- v. Pacific Mut. Life Ins. Co.*, 185 Ill. App. 580—vii. 3295(d), 3870(d), 3989(k), 3999(l).
- v. Southeastern Life Ins. Co.*, 101 S. C. 249, 85 S. E. 407—vi. 2433(f); vii. 2777(e).
- v. Woods Nat. Bank*, 113 S. W. 335, 52 Tex. Civ. App. 38—vi. 2201(b).
- Clark Millinery Co. v. National Union Fire Ins. Co.*, 160 N. C. 130, 75 S. E. 944, Ann. Cas. 1914C, 367—vii. 3652(m), 3959(b), 3982(h).

- Clark School Tp. v. Home Ins. & Trust Co., 20 Ind. App. 543, 51 N. E. 107—vi. 71(a).
- Clark & Sons v. Franklin Ins. Co., 58 South. 345, 130 La. 584—vi. 1818(c); vii. 3391(i), 3517(c).
- Clarke v. Fidelity & Deposit Co., 131 Pac. 468, 73 Wash. 62, 46 L. R. A. (N. S.) 931—vii. 3320(b).
- v. Home Fund Life Ins. Co., 79 S. C. 494, 61 S. E. 80—vi. 487(k), 492 (l), 505(e).
- v. Illinois Commercial Men's Ass'n, 180 Ill. App. 300—vi. 702(g); vii. 3169(e).
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- Clarkston v. Metropolitan Life Ins. Co., 190 Mo. App. 624, 178 S. W. 437—vii. 3472(d), 3755(q), 3762(r), 3783(u).
- Claudy v. Royal League, 168 S. W. 593, 259 Mo. 92—vi. 61(h), 698(f), 709(k), 900(a).
- Claver v. Woodmen of the World, 152 Mo. App. 155, 133 S. W. 153—vi. 61 (h), 687(f), 1932(a), 1951(b), 2178(d); vii. 3257(m), 3265(o).
- Claxton v. American Casualty Co., 158 Pac. 544, 30 Cal. App. 457—vii. 3295 (d).
- Clayburgh v. Agricultural Ins. Co., 155 Cal. 708, 102 Pac. 812, 18 Ann. Cas. 579—vi. 1610(f).
- Claypool v. Continental Casualty Co., 129 Ky. 682, 112 S. W. 835—vi. 413(c), 2092(b).
- Clayton v. Supreme Conclave, Improved Order of Heptasophs, 130 Md. 31, 99 Atl. 949—vi. 703(h), 807(g); vii. 3721 (b).
- Clemens v. Royal Neighbors of America, 103 N. W. 402, 14 N. D. 116, 8 Ann. Cas. 111—vi. 632(c); vii. 3248(i), 3264 (o).
- Clements v. Life Ins. Co., 155 N. C. 57, 70 S. E. 1076—vii. 2849(j).
- Clemments v. German Ins. Co. (C. C.) 153 Fed. 237—vii. 2650(r), 2653(t).
- Clifton v. Mutual Life Ins. Co., 168 N. C. 499, 84 S. E. 817—vi. 2327(o); vii. 2715(h), 2781(f).
- Cline v. Sovereign Camp, Woodmen of the World, 111 Mo. App. 601, 86 S. W. 501—vii. 2494(o), 2503(b), 2706(c).
- Clinton v. Modern Woodmen of America, 125 Ark. 115, 187 S. W. 939—vi. 451(f).
- Clover v. Modern Woodmen of America, 142 Ill. App. 276—vi. 2110(i).
- v. Woodmen of the World, 152 Mo. App. 155, 133 S. W. 153—vii. 3255(l).
- Clow v. Western Life Indemnity Co., 182 Ill. App. 251—vi. 2378(p); vii. 2834(d).
- Clute v. Clintonville Mut. Fire Ins. Co., 129 N. W. 661, 144 Wis. 638, 32 L. R. A. (N. S.) 240—vi. 1387(f), 1699(f), 1712(m).
- Clymer v. Supreme Council A. L. H. (C. C.) 138 Fed. 470—vi. 1056(f).
- Clymer Opera Co. v. Birmingham Fire Ins. Co., 50 Pa. Super. Ct. 639—vii. 2630(d).
- v. Flood City Mut. Fire Ins. Co., 85 Atl. 1111, 238 Pa. 137—vii. 2630(d).
- v. India Mut. Ins. Co., 50 Pa. Super. Ct. 644—vii. 2630(d).
- v. Rural Valley Mut. Fire Ins. Co., 50 Pa. Super. Ct. 645—vi. 1361 (j), 1902(i), 1903(j); vii. 2532(i).
- v. Safety Mut. Fire Ins. Co., 50 Pa. Super. Ct. 645—vii. 2630(d).
- Coast Lumber Co. v. Aetna Life Ins. Co., 125 Pac. 185, 22 Idaho, 264—vii. 3331 (a).
- Coastwise S. S. Co. v. Aetna Ins. Co. (D. C.) 161 Fed. 871—vii. 2893(h).
- Coats v. Camden Fire Ins. Ass'n, 135 N. W. 524, 149 Wis. 129—vi. 1183(h); vii. 2630(d), 2633(e).
- Cochburn v. Hawkeye Commercial Men's Ass'n, 163 Iowa, 28, 143 N. W. 1006—vii. 2777(e), 3311(i), 3455(i).
- Coen v. Denver Tp. Mut. Fire Ins. Co., 155 Ill. App. 332—vi. 218(c), 632(c), 756(k), 1174(a), 1176(b); vii. 3404(a).
- Coffin v. German Fire Ins. Co., 126 S. W. 253, 142 Mo. App. 295—vii. 3627(s).
- Coffman v. Liggett's Adm'r, 107 Va. 418, 59 S. E. 392—vi. 1110(g).
- v. Louisville & N. R. Co., 184 Ala. 474, 63 So. 527—vii. 3893(a).
- Coggins v. Aetna Ins. Co., 144 N. C. 7, 56 S. E. 506, 8 L. R. A. (N. S.) 839, 119 Am. St. Rep. 924—vi. 1814(a), 1820(d), 1924(w).
- Coghlan v. Supreme Conclave Improved Order of Heptasophs, 86 N. J. Law, 41, 91 Atl. 132—vi. 632(c), 715(n); vii. 3726(d), 3762(r).
- Cohen, In re (D. C.) 230 Fed. 733—vi. 285(f), 287(h).
- Cohen v. America Credit Indemnity Co. (Sup.) 119 N. Y. Supp. 700—vi. 846(i).
- v. Atlas Assur. Co., 148 N. Y. Supp. 563, 163 App. Div. 381—vii. 3641(i), 3642(i).
- v. Home Ins. Co. (Del.) 95 Atl. 912—vi. 1174(a).
- (Del. Super.) 97 Atl. 1014—vi. 649(a), 660(h), 1818(c), 1819 (d); vii. 2479(e), 2663(b).
- v. John Hancock Mut. Life Ins. Co., 135 App. Div. 776, 119 N. Y. Supp. 850—vii. 3741(k).
- v. Metropolitan Life Ins. Co., 147 N. Y. Supp. 434, 85 Misc. Rep. 406—vi. 678(a), 2156(a).
- v. Sun Ins. Office, 112 N. Y. Supp. 1125, 128 App. Div. 925—vii. 3123(c), 3432(m).
- 91 N. E. 265, 198 N. Y. 140—vii. 3123(c), 3432(m).

- Cohn v. Federal Ins. Co. (Sup.) 113 N. Y. Supp. 12—vii. 3042(c).
- v. Mechanics' & Traders' Ins. Co., 175 Ill. App. 594—vi. 1881(f); vii. 2811(n), 2815(a).
- v. North British & Mercantile Ins. Co., 175 Ill. App. 612—vi. 1881(f); vii. 2811(n), 2815(a).
- Coil v. Continental Ins. Co., 155 S. W. 872, 169 Mo. App. 634—vi. 1868(a).
- Coile v. Order of United Commercial Travelers, 161 N. C. 104, 76 S. E. 622—vi. 2368(l), 2391(u); vii. 2715(h).
- Colaizzi v. Pennsylvania R. Co., 128 N. Y. S. 312, 143 App. Div. 638—vi. 22(c).
- 208 N. Y. 275, 101 N. E. 859—vi. 22(e).
- Colaneri v. General Acc. Assur. Corporation, 110 N. Y. Supp. 678, 126 App. Div. 591—vi. 2142(h), 2156(a), 2159(c).
- Cole v. Knights of Maccabees of the World (Tex. Civ. App.) 188 S. W. 699—vi. 2382(r).
- v. Mutual Life Ins. Co., 129 La. 704, 56 South. 645, Ann. Cas. 1913B, 748—vi. 1969(f), 2100(c), 2126(b), 2163(e), 3952(d).
- v. Niagara Fire Ins. Co., 126 Mo. App. 134, 103 S. W. 569—vi. 1376(g); vii. 3690(b).
- v. North British Mercantile Ins. Co., 113 Me. 512, 95 Atl. 217—vii. 3409(d), 3415(d).
- v. State, 91 Miss. 628, 45 South. 11—vi. 1011(d).
- Coleman v. Anderson, 86 S. W. 730, 98 Tex. 570—vi. 1082(c), 1114(j), 1115(j); vii. 3756(g).
- (Tex. Civ. App.) 82 S. W. 1057—vi. 1082(c), 1114(j), 1115(j); vii. 3756(g).
- v. Caldwell County Mut. Fire Ins. Co., 125 Mo. App. 643, 103 S. W. 150—vii. 2558(a), 2722(k).
- v. Grand Lodge Colored Knights of Pythias (Tex. Civ. App.) 104 S. W. 909—vii. 3774(s).
- Colley v. National Live Stock Ins. Co., 185 Mo. App. 616, 171 S. W. 663—vi. 554(j), 1798(b); vii. 3042(c), 3890(c).
- Collings Carriage Co. v. German-American Ins. Co., 86 N. J. Eq. 53, 97 Atl. 726—vii. 3644(j), 3652(m).
- Collins' Case, 27 Pa. Super. Ct. 353—vii. 3152(g).
- Collins v. Casualty Co. of America, 112 N. E. 634, 224 Mass. 327, L. R. A. 1916E, 1203—vi. 1969(f), 1984(a), 2144(j); vii. 3201(h).
- v. Catholic Order of Foresters, 43 Ind. App. 549, 88 N. E. 87—vi. 687(f), 1946(j), 1954(d), 1969(f), 1979(j), 2108(h), 2121(o), 2122(p), 2144(j).
- v. German-American Mut. Life Ass'n, 86 S. W. 891, 112 Mo. App. 209—vii. 3819(c).
- Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 83 N. E. 542, 14 L. R. A. (N. S.) 356, 122 Am. St. Rep. 54, 13 Ann. Cas. 129—vii. 3152(g).
- 80 Pac. 609, 1092, 32 Mont. 329, 108 Am. St. Rep. 578—vi. 2044(g), 2048(k); vii. 2502(b), 2709(d).
- v. United Brothers of Friendship and Sisters of Mysterious Ten (Tex. Civ. App.) 192 S. W. 800—vi. 2023(a), 2028(f).
- v. United States Casualty Co., 172 N. C. 543, 90 S. E. 585—vi. 632(c); vii. 2372(e).
- Collinsville Sav. Soc. v. Boston Ins. Co., 60 Atl. 647, 77 Conn. 667, 69 L. R. A. 924—vii. 3639(h).
- Collman v. Equitable Life Assur. Soc., 110 N. W. 444, 133 Iowa, 177, 8 L. R. A. (N. S.) 1019—vi. 2417(i).
- Collver v. Modern Woodmen of America, 154 Iowa, 615, 135 N. W. 67—vi. 68(m); vii. 2494(o), 2683(b), 2695(h), 3142(e).
- Columbia Life Ins. Co. v. Tousey, 153 S. W. 767, 152 Ky. 447—vi. 1979(j), 2057(g), 2061(k), 2117(l).
- Columbian Exposition Salvage Co. v. Union Casualty & Surety Co., 220 Ill. 172, 77 N. E. 128—vi. 677(a), 1472(f), 1933(b), 2447(new), 2453(f); vii. 2544(o), 2767(d).
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- v. Mulkey, 146 Ga. 267, 91 S. E. 106—vi. 552(h).
- 13 Ga. App. 508, 79 S. E. 482—vi. 2271(g).
- 19 Ga. App. 247, 91 S. E. 344—vii. 2690(d).
- Columbian Three Color Co. v. Etna Life Ins. Co., 183 Ill. App. 384—vii. 2768(d), 3982(h).
- Columbus Dry Goods Co. v. Globe & Rutgers Fire Ins. Co., 131 App. Div. 603, 115 N. Y. Supp. 1106—vi. 220(c); vii. 3100(a).
- 142 App. Div. 561, 127 N. Y. Supp. 589—vi. 535(a), 537(c), 850(b).
- 206 N. Y. 662, 99 N. E. 1105—vi. 535(a), 537(c), 850(b).
- Columbus Mut. Life Ins. Co. v. Ford, 2 Ohio App. 410, 34 Ohio Cir. Ct. R. 479—vi. 2017(k).
- 88 Ohio St. 597, 106 N. E. 1052—vi. 2017(k).
- 107 N. E. 510, 90 Ohio St. 238—vi. 2017(k).

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- Comer v. Patrons' Mut. Fire Ins. Co., 53 Pa. Super. Ct. 516—vii. 3999(l).
- Commercial Bank v. American Bonding Co., 194 Mo. App. 224, 187 S. W. 99—vi. 851(d), 1951(b), 2435(a), 2439(c).
- v. Maryland Casualty Co. (Mo. App.) 187 S. W. 103—vi. 635(d), 2439(c).
- Commercial Casualty Co. v. Rice, 157 N. Y. Supp. 1, 93 Misc. Rep. 567—vii. 2831(b).
- Commercial Fire Ins. Co. v. Belk, 88 Ark. 506, 115 S. W. 172—vii. 2622(a).
- v. Waldron, 88 Ark. 120, 114 S. W. 210—vii. 3362(d), 3409(d), 3538(d).
- Commercial Life Ins. Co. v. McGinnis, 50 Ind. App. 630, 97 N. E. 1018—vi. 689(g); vii. 2524(d), 2625(a), 2755(b).
- v. Schroyer, 176 Ind. 654, 95 N. E. 1004, Ann. Cas. 1914A, 968—vii. 2665(c).
- Commercial Mut. Acc. Co. v. Davis, 215 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782—vii. 4001(b).
- Commercial Union Assur. Co. v. Dalzell, 210 Fed. 605, 127 C. C. A. 241—vii. 3606(e), 3631(b).
- v. Hill (Tex. Civ. App.) 167 S. W. 1095—vi. 1791(f); vii. 2777(e).
- v. Lyon & Kelly, 17 Ga. App. 441, 87 S. E. 761—vi. 1717(b); vii. 2537(k).
- v. Pacific Union Club, 169 Fed. 776, 95 C. C. A. 242—vii. 3025(f).
- v. Parker, 119 Ill. App. 126—vi. 632(c); vii. 3528(h).
- v. Ryalls, 169 Ala. 517, 53 South. 754—vi. 191(d).
- v. Shults, 130 Pac. 572, 37 Okl. 95—vii. 3347(a).
- Commercial Union Fire Ins. Co. v. King, 108 Ark. 130, 156 S. W. 445—vii. 2781(f), 2789(a), 2791(b), 2793(d), 3531(a).
- Com. v. Metropolitan Life Ins. Co., 254 Pa. 510, 98 Atl. 1072—vi. 5(a), 913(a).
- v. Philadelphia Contributionship, 242 Pa. 209, 88 Atl. 929—vii. 2789(a).
- v. Provident Savings Life Assur. Society, 159 S. W. 693, 155 Ky. 197—vii. 4007(f).
- 160 S. W. 476, 155 Ky. 771—vii. 4007(f).
- v. Richardson, 94 S. W. 639, 29 Ky. Law Rep. 622—vii. 2832(c).
- Commonwealth Bonding & Casualty Ins. Co. v. Bryant (Tex. Civ. App.) 185 S. W. 979—vii. 3290(b), 3558(b).
- v. Knight (Tex. Civ. App.) 185 S. W. 1037—vii. 3531(a).
- Commonwealth Bonding & Casualty Ins. Co. v. Wright (Tex. Civ. App.) 171 S. W. 1043—vi. 2439(c).
- Commonwealth Fire Ins. Co. v. Obenchain (Tex. Civ. App.) 151 S. W. 611—vi. 1742(g), 1880(f).
- Commonwealth Ins. Co. v. Finegold (Tex. Civ. App.) 183 S. W. 833—vi. 1829(g), 1893(i).
- Commonwealth Life Ins. Co. v. Bowling (Ky.) 114 S. W. 327—vi. 1040(c).
- v. Davis, 136 Ky. 339, 124 S. W. 345—vi. 454(g), 680(b).
- v. Hughes, 144 Ky. 608, 139 S. W. 769—vii. 3253(k), 3258(m), 3871(d).
- 145 Ky. 650, 140 S. W. 1014—vii. 3253(k), 3258(m), 3871(d).
- v. Rider, 154 S. W. 906, 153 Ky. 130—vii. 2683(b).
- Compton Heights Laundry Co. v. General Accident Fire & Life Assur. Corporation, 195 Mo. App. 313, 190 S. W. 382—vii. 2768(d), 3330(a), 3331(a).
- Conant v. Boston Chamber of Commerce, 87 N. E. 906, 201 Mass. 479—vii. 3790(b).
- Conard v. Southern Tier Masonic Relief Ass'n, 93 N. Y. Supp. 626, 101 App. Div. 611—vi. 555(j).
- Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35—vi. 505(e), 632(c); vii. 3616(m), 3627(t).
- v. Mitchell, 183 S. W. 770, 122 Ark. 357—vii. 3495(e).
- Condon v. Exton-Hall Brokerage & Vessel Agency, 142 N. Y. Supp. 548, 80 Misc. Rep. 369—vi. 68(l); vii. 2796(e).
- Condon v. Exton-Hall Brokerage & Vessel Agency, 144 N. Y. Supp. 760, 83 Misc. Rep. 130—vi. 68(l); vii. 2796(e).
- Cone v. Century Fire Ins. Co., 139 Iowa, 205, 117 N. W. 307—vi. 1634(b), 1663(e), 1685(n), 1686(p), 1715(a), 1720(b), 1743(h), 1893(i).
- Conithan v. Royal Ins. Co., 91 Miss. 386, 45 South. 361, 18 L. R. A. (N. S.) 214, 124 Am. St. Rep. 701, 15 Ann. Cas. 539—vi. 547(d).
- Conley v. Northwestern Fire & Marine Ins. Co., 34 Okl. 749, 127 Pac. 424—vii. 2518(a), 2621(a).
- v. Supreme Court, I. O. F., 122 N. W. 567, 158 Mich. 190—vi. 2254(b); vii. 3679(t).
- Connally & Co. v. Hopkins (Tex. Civ. App.) 195 S. W. 656—vii. 3715(m).
- Connecticut Fire Ins. Co. v. Buchanan, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758—vi. 1625(b), 1650(g).
- v. Chester, P. & Ste. G. R. Co., 171 Mo. App. 70, 153 S. W. 544—vii. 3908(g).
- v. Colorado Leasing Min. & Mill. Co., 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597—vi. 632(c), 678(a), 1204(a), 1221(n), 1222(o), 1225(g), 1226(r), 1376(g), 1378(h), 1385(b), 1388(g), 1482(a); vii. 3359(b).

- Connecticut Fire Ins. Co. v. George, 153 Pac. 116—vii. 3355(d).
- v. Manning, 160 Fed. 382, 87 C. C. A. 334, 15 Ann. Cas. 338—vi. 1185(k), 1192(b), 1378(h), 1404(f).
- v. Moore, 156 S. W. 867, 154 Ky. 18, Ann. Cas. 1914B, 1106—vii. 2485(g), 2524(d), 2622(a).
- v. Union Mercantile Co., 161 Ky. 718, 171 S. W. 407—vi. 1858(r); vii. 3117(a), 3127(d), 3432(m).
- Connecticut General Life Ins. Co. v. Mullen, 197 Fed. 299, 118 C. C. A. 345, 43 L. R. A. (N. S.) 725—vi. 469(e).
- Connecticut Mut. Life Ins. Co. v. King, 47 Ind. App. 587, 93 N. E. 1046—vii. 3129(a).
- v. Mulkey, 142 Ga. 358, 82 S. E. 1054—vi. 1979(j).
- v. Tucker, 61 Atl. 142, 27 R. I. 170—vi. 1100(b).
- (R. I.) 66 Atl. 209—vi. 1100(b).
- Connell v. Iowa State Traveling Men's Ass'n, 139 Iowa, 444, 116 N. W. 820—vii. 3184(b), 3263(o), 3265(o), 3458(a).
- Conner v. Conner, 145 Ill. App. 608—vi. 1082(c).
- 163 Ill. App. 436—vii. 3758(q).
- v. Life & Annuity Ass'n, 157 S. W. 814, 171 Mo. App. 364—vi. 1979(j), 1991(g).
- v. Supreme Commandery Golden Cross, 117 Tenn. 549, 97 S. W. 306—vi. 703(h), 708(j), 712(l), 1021(c).
- Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981—vi. 795(h); vii. 3330(a), 8719(o).
- Conqueror Zinc & Lead Co. v. Ætna Life Ins. Co., 133 S. W. 156, 152 Mo. App. 332—vii. 3331(a), 3841(b).
- Conroy v. Equitable Acc. Co., 63 Atl. 356, 27 R. I. 467—vii. 3872(d).
- Constantino v. Massachusetts Accident Co., 109 N. E. 447, 221 Mass. 464—vi. 2254(b); vii. 3447(d).
- Continental Beneficial Ass'n v. Arbogast (Okl.) 163 Pac. 512—vii. 3286(f).
- v. Holt, 181 S. W. 648, 167 Ky. 806—vi. 636(e); vii. 3271(a).
- Continental Casualty Co. v. Bows, 72 Fla. 17, 72 South. 278—vii. 3301(f).
- v. Bridges (Tex. Civ. App.) 114 S. W. 170—vii. 2699(b), 2702(b).
- v. Brittner, 81 Ark. 568, 99 S. W. 1100—vii. 3223(m).
- v. Buchtel, 105 N. W. 707, 74 Neb. 823—vii. 3442(a), 3516(c).
- v. Colvin, 77 Kan. 561, 95 Pac. 565—vii. 3160(a), 3297(e), 3303(f), 3456(a), 3470(b).
- v. Cunningham, 188 Ala. 159, 66 South. 41, L. R. A. 1915A, 538—vii. 3211(k).
- Continental Casualty Co. v. Deeg, 59 Tex. Civ. App. 35, 125 S. W. 353—vii. 3216(m), 3219(m), 3220(m), 3223(m).
- v. Fleming (Ky.) 124 S. W. 331—vii. 3207(j), 3312(i).
- v. Hagerty, 90 S. W. 561, 28 Ky. Law Rep. 925—vii. 3223(m).
- v. Harrod, 100 S. W. 262, 30 Ky. Law Rep. 1117—vi. 681(c); vii. 3966(c).
- v. Hunt, 53 Ind. App. 657, 101 N. E. 519—vii. 3522(f), 3991(k).
- 90 S. W. 1056, 28 Ky. Law Rep. 1006—vii. 3172(f), 3174(g).
- v. Jasper, 121 Ky. 77, 88 S. W. 1078—vii. 2719(i).
- v. Jennings, 45 Tex. Civ. App. 14, 99 S. W. 423—vii. 2715(h), 3220(m), 3472(d).
- v. Johnson, 119 Ill. App. 93—vi. 2322(m); vii. 2504(c), 2719(i), 3223(m), 3742(l).
- 85 Pac. 545, 74 Kan. 129, 6 L. R. A. (N. S.) 609, 118 Am. St. Rep. 308, 10 Ann. Cas. 851—vii. 3157(a).
- v. Lindsay, 111 Va. 389, 69 S. E. 344—vi. 1990(g), 2034(a), 2065(a), 2070(d); vii. 3458(b), 3531(a).
- v. Lloyd, 165 Ind. 52, 73 N. E. 824—vii. 3176(a), 3201(h).
- v. Mathis, 150 S. W. 507, 150 Ky. 477—vii. 3200(h), 3295(d), 3462(d), 3531(a), 3561(d), 3959(b).
- v. Morris, 46 Tex. Civ. App. 394, 102 S. W. 773—vii. 3208(k), 3303(g).
- v. Ogburn, 175 Ala. 357, 57 South. 852, Ann. Cas. 1914D, 377—vi. 636(e); vii. 3168(e), 3169(e), 3544(a), 3559(c).
- 186 Ala. 398, 64 South. 619—vii. 3312(i), 3561(d).
- v. Owen, 38 Okl. 107, 131 Pac. 1084—vi. 658(g), 1979(j), 1985(b), 1988(d), 1992(h), 2000(l), 2154(f).
- v. Peltier, 51 S. E. 209, 104 Va. 222—vii. 3201(h).
- v. Pittman, 89 S. E. 716, 145 Ga. 641—vii. 3157(a).
- v. Semple (Ky.) 112 S. W. 1122—vii. 3201(h), 3203(h).
- v. Todd, 82 Ark. 214, 101 S. W. 168—vii. 3223(m).
- v. Wade, 101 Tex. 102, 105 S. W. 35—vi. 637(f); vii. 3295(d).
- (Tex. Civ. App.) 99 S. W. 877—vi. 637(f), 2433(f); vii. 3295(d), 3886(b).
- v. Waters, 97 S. W. 1103, 30 Ky. Law Rep. 243—vii. 3441(a).
- v. Wynne, 36 Okl. 325, 129 Pac. 16—vi. 1964(a); vii. 3290(b), 3311(i), 3409(d).
- Continental Fire Ins. Co. v. Wilford Stunston & Co., 100 S. W. 338, 39 Ky. Law Rep. 1176—vii. 2509(e).

- Continental Ins. Co. v. Bair (Ind. App.) 114 N. E. 763—vi. 184(a), 633 (c), 1069(e), 1768(c); vii. 2479(e), 2506(d), 2617(k), 3383(c), 3385(e), 3531(a), 3700(g).
(Ind. App.) 116 N. E. 752—vii. 2481(f), 2604(e).
- v. Bradley, 189 S. W. 706, 172 Ky. 549—vi. 1731(c), 1862(b).
- v. Buchanan, 108 S. W. 355, 32 Ky. Law Rep. 1298—vii. 2521(c), 2690(d), 2811(n), 3531(a).
- v. Chance, 48 Okl. 324, 150 Pac. 114—vii. 3537(d), 3556(a).
- v. Cummings (Tex. Civ. App.) 95 S. W. 48—vii. 2540(m), 2680(h).
- v. Ford, 140 Ky. 406, 131 S. W. 189—vi. 1207(d), 1215(i), 1221(n), 1222(o), 1410(g), 1413(j); vii. 2555(a).
- v. Hargrove, 131 Ky. 837, 116 S. W. 256—vi. 923(f), 1869(a); vii. 2775(d).
- v. Hull, 38 Okl. 307, 132 Pac. 657—vii. 4001(b).
- v. Parkes, 39 South. 204, 142 Ala. 650—vii. 2811(n), 2819(b), 3350(a), 3532(b).
- v. Peden, 145 Ky. 775, 141 S. W. 43—vii. 2725(m), 2727(o).
- v. Phipps (Mo. App.) 190 S. W. 994—vi. 926(h); vii. 2815(a), 2828(h).
- v. Reynolds, 107 Md. 96, 68 Atl. 277—vii. 2772(b), 2777(e), 3960(b).
- v. Rosenberg, 7 Pennewill (Del.) 174, 74 Atl. 1073—vi. 628(a), 1814(a), 1815(b), 1818(c), 1820(d), 1821(d), 1822(e), 1825(f), 1829(g); vii. 2521(c), 2622(a), 3410(e), 3435(b), 3590(e).
- v. Smith, 61 Ind. App. 401, 112 N. E. 15—vi. 926(h).
- v. Thomason, 84 S. W. 546, 27 Ky. Law Rep. 158—vii. 2481(f), 2683(b), 2695(h), 3121(c), 3701(g).
- Continental Life Ins. Co. v. Searing, 240 Fed. 653, 153 C. C. A. 451—vii. 3456(i).
- Continental Life Ins. & Inv. Co. v. Hattabaugh, 21 Idaho, 285, 121 Pac. 81—vi. 118(c), 529(j).
- Convery v. Brotherhood of Railroad Trainmen, 190 Ill. App. 479—vii. 3290(b).
- Conway v. Minnesota Mut. Life Ins. Co., 62 Wash. 49, 112 Pac. 1106, 40 L. R. A. (N. S.) 148—vi. 2398(c); vii. 2709(d), 2718(i).
- v. Phoenix Mut. Life Ins. Co., 35 N. E. 420, 140 N. Y. 79—vi. 2286(b).
- Cook v. Metropolitan Life Ins. Co., 134 S. W. 13, 150 Mo. App. 299—vi. 2310(e).
- v. Modern Brotherhood of America, 131 N. W. 334, 114 Minn. 299—vi. 2041(e).
- Cook v. National Fidelity & Casualty Co., 100 Neb. 641, 160 N. W. 957—vi. 607(a), 845(g).
- v. Supreme Conclave Improved Order of Heptasophs, 202 Mass. 85, 88 N. E. 584—vii. 3750(n), 3784(u).
- Cooper v. American Cent. Ins. Co., 123 S. W. 497, 139 Mo. App. 570—vi. 437(a), 1779(j).
- v. German-American Ins. Co., 104 N. W. 687, 96 Minn. 81—vi. 1622(m); vii. 2601(d).
- v. Order of Railway Conductors of America, 156 Iowa, 481, 137 N. W. 472—vii. 3734(g), 3756(q).
- v. Phoenix Accident & Sick Ben. Ass'n, 104 N. W. 734, 141 Mich. 478—vii. 3312(d), 3991(k).
- v. West, 190 S. W. 1035, 173 Ky. 289—vii. 3754(p), 3787(a).
- Co-operative Ins. Ass'n v. Hubbs, 115 S. W. 670, 53 Tex. Civ. App. 68—vii. 3125(c).
- v. Ray (Tex. Civ. App.) 138 S. W. 1122—vi. 642(i), 1318(g); vii. 2733(a), 3089(g).
- Co-operative Stores Co. v. United States Fidelity Guaranty Co., 137 Tenn. 609, 195 S. W. 177—vi. 346(b), 631(b).
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- Copple v. Life & Annuity Ass'n (Mo. App.) 196 S. W. 399—vii. 3253(k).
- Coppoletti v. Citizens' Ins. Co., 123 Minn. 325, 143 N. W. 787—vii. 2658(a), 2668(d), 2782(g).
- Corbett v. Physicians' Casualty Ass'n, 135 Wis. 505, 115 N. W. 365, 16 L. R. A. (N. S.) 177—vi. 583(b), 584(b).
- Cornelius v. Central Acc. Ins. Co., 67 Atl. 840, 218 Pa. 532—vi. 2094(e).
- Cornell v. Mutual Life Ins. Co., 179 Mo. App. 420, 165 S. W. 858—vi. 1091(f), 1100(b), 1110(g).
- v. Travelers' Ins. Co., 120 App. Div. 459, 104 N. Y. Supp. 999—vi. 495(o), 2308(d), 2432(e); vii. 2699(b), 3255(l), 3448(e).
- 85 N. E. 1107, 192 N. Y. 587—vi. 495(o), 2308(d); vii. 2699(b), 3255(l), 3448(e).
- Corn Novelty Co. v. Norwich Union Fire Ins. Soc., 162 N. Y. Supp. 1020, 176 App. Div. 261—vii. 3432(m).
- Correll v. National Acc. Soc., 139 Iowa, 36, 116 N. W. 1046, 130 Am. St. Rep. 294—vii. 3189(d), 3216(m), 3223(m), 3381(a), 3447(d), 3461(c), 3516(c), 3544(a).
- Corrigan v. Cambridge Mut. Beneficial Ass'n, 33 Pa. Super. Ct. 17—vi. 607(a).
- Cortis v. Van Derveer (Sup.) 91 N. Y. Supp. 743—vi. 934(o).

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- Coshocton Glass Co. v. Northwestern Mut. Life Ins. Co.*, 31 Ohio Cir. Ct. R. 675—vi. 297(p), 1100(b), 1101(b).
- Cosmopolitan Fire Ins. Co. v. Gingold*, 3 Ala. App. 537, 57 South. 266—vii. 2614(j), 3716(m).
- v. Moon*, 126 Pac. 756, 33 Okl. 445—vi. 1373(c); vii. 2653(t).
- v. Putnal*, 60 Fla. 41, 53 South. 444—vi. 1177(c).
- Cosmopolitan Life Ins. Co. v. Koegel*, 52 S. E. 166, 104 Va. 619—vi. 27(b), 56(f), 61(h); vii. 3263(o), 3943(d).
- Costello v. Grant County Mut. Fire & Lightning Ins. Co.*, 133 Wis. 361, 113 N. W. 639—vi. 350(d), 351(d), 411(b), 422(f).
- Coston v. Coston*, 108 N. W. 736, 145 Mich. 390—vii. 3819(c).
- Cotnam v. Massachusetts Mut. Life Ins. Co. (Iowa)* 162 N. W. 786—vi. 2413(h).
- Cottingham v. Maryland Motor Car Ins. Co.*, 168 N. C. 259, 84 S. E. 274, L. R. A. 1915D, 344, Ann. Cas. 1917B, 1237—vi. 632(c), 1779(j).
- Cottrell v. Munterville Mut. Fire & Lightning Ins. Ass'n*, 145 Iowa, 651, 124 N. W. 612—vii. 3008(a), 3042(c), 3531(a).
- Coughlin v. Knights of Columbus*, 79 Conn. 218, 64 Atl. 223—vi. 709(k), 2368(l); vii. 2494(o), 2498(a), 2499(a), 2500(a), 2504(c), 2708(c), 2711(d).
- v. Metropolitan Life Ins. Co.*, 189 Mass. 538, 76 N. E. 192—vi. 2000(m), 2033(i).
- Coulson v. Flynn*, 90 App. Div. 613, 86 N. Y. Supp. 1133—vi. 619(b), 620(c), 815(l), 816(l).
- 181 N. Y. 62*, 73 N. E. 507—vi. 619(b), 620(c), 815(l), 816(l).
- Coulter v. Travelers' Protective Ass'n*, 144 Ill. App. 255—vii. 3201(h), 3270(a), 3871(d).
- Courtney v. Fidelity Mut. Aid Ass'n*, 94 S. W. 768, 101 S. W. 1098, 120 Mo. App. 110—vi. 577(f), 702(g), 2322(m); vii. 2465(b), 3184(b), 3298(e).
- Court of Honor v. Clark*, 125 Ill. App. 490—vi. 1932(a), 1939(f), 1940(f).
- v. Dinger*, 77 N. E. 557, 221 Ill. 176—vi. 2110(i), 2147(l), 2398(c), 2400(d); vii. 2683(b), 2782(g).
- 123 Ill. App. 406*—vi. 2110(i), 2398(c), 2400(d); vii. 2683(b), 2782(g).
- v. Hering*, 178 Mich. 377, 144 N. W. 843—vi. 451(f).
- v. Hutchens (Ind. App.)* 79 N. E. 409—vi. 698(f), 708(j), 717(n); vii. 3236(c), 3240(e).
- 43 Ind. App. 321*, 82 N. E. 89—vi. 717(n); vii. 3236(c), 3240(e).
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- Covey v. National Union Fire Ins. Co.*, 161 Pac. 35, 31 Cal. App. 579—vi. 1675(i); vii. 3553(d), 3623(p), 3667(g).
- Cowen v. Equitable Life Assur. Soc.*, 37 Tex. Civ. App. 430, 84 S. W. 404—vi. 864(g), 2281(a), 2290(c), 2296(f), 2308(d), 2310(e); vii. 2724(l).
- Cowles v. Provident Life Assur. Society of New York*, 170 N. C. 368, 87 S. E. 119—vii. 3287(f).
- Cox, In re*, 114 N. E. 281, 225 Mass. 220—vii. 3314(a).
- Cox v. American Ins. Co.*, 184 Ill. App. 419—vii. 2460(a), 2462(b), 2658(a), 2740(b), 2782(g).
- v. C. G. Blake Co.*, 100 Misc. Rep. 135, 166 N. Y. Supp. 294—vi. 1165(f).
- v. Cox*, 192 Ill. App. 286—vii. 3754(p), 3802(g).
- v. Farmers' Mut. Fire Ins. Co.*, 65 S. E. 409, 133 Ga. 175—vii. 2820(c).
- v. Kansas City Life Ins. Co.*, 154 Mo. App. 464, 135 S. W. 1013—vii. 3887(c).
- Coy v. Granite State Ins. Co.*, 88 Atl. 355, 110 Me. 551—vii. 3432(m).
- Coyford v. Metropolitan Life Ins. Co.*, 5 Cal. App. 715, 91 Pac. 266—vii. 2724(i).
- Coykendall v. Blackmer*, 146 N. Y. Supp. 631, 161 App. Div. 11—vi. 918(c).
- Coyle v. United States Fidelity & Guaranty Co.*, 104 N. E. 559, 217 Mass. 268, Ann. Cas. 1917C, 450—vii. 3320(b).
- Craddock, Vinson & Co. v. Connecticut Fire Ins. Co.*, 169 S. W. 1015, 160 Ky. 519—vi. 1283(f), 1314(d).
- Craig v. Insurance Co. of State of Pennsylvania*, 162 Mich. 657, 127 N. W. 757—vii. 3718(n).
- v. United States Health & Accident Ins. Co.*, 61 S. E. 423, 80 S. C. 151, 18 L. R. A. (N. S.) 106, 128 Am. St. Rep. 877, 15 Ann. Cas. 216—vii. 3362(d), 3444(c), 3464(d).
- v. Western Life Ins. Co.*, 136 Mo. App. 5, 116 S. W. 1113—vi. 1015(b), 1024(d).
- Craiger v. Modern Woodmen of America*, 40 Ind. App. 279, 80 N. E. 429—vii. 3134(b), 3260(n).
- Cramer v. Blooming Grove Mut. Fire Ins. Co.*, 63 Pa. Super. Ct. 276—vi. 1789(e).
- Crandall v. Continental Casualty Co.*, 179 Ill. App. 330—vii. 3201(h).
- Crandon v. Home Ins. Co.*, 99 Kan. 785, 163 Pac. 458—vi. 1829(g); vii. 2692(e), 2741(b), 2742(c).

- Cranston v. West Coast Life Ins. Co., 63 Or. 427, 128 Pac. 427—vi. 465(b), 505(e), 2310(e).
72 Or. 116, 142 Pac. 762—vi. 612(d), 998(e); vii. 2777(e).
- Crawford v. North American Union, 193 Mo. App. 443, 182 S. W. 1043—vi. 2336(a); vii. 2708(c).
- v. Northwestern Traveling Men's Ass'n, 80 N. E. 736, 226 Ill. 57, 10 L. R. A. (N. S.) 264—vi. 691(a); vii. 3285(e).
- Crawford's Adm'r v. Travelers' Ins. Co., 99 S. W. 963, 124 Ky. 733, 30 Ky. Law Rep. 943, 124 Am. St. Rep. 425—vi. 356(h); vii. 2521(c).
- Creditors' Union v. Lundy, 16 Cal. App. 567, 117 Pac. 624—vi. 936(o).
- Creem v. Fidelity & Casualty Co., 132 App. Div. 241, 116 N. Y. Supp. 1042—vi. 2041(e); vii. 3331(a), 3965(e), 3968(f), 3984(i), 3997(i).
- 141 App. Div. 493, 126 N. Y. Supp. 555—vi. 662(a); vii. 2767(d), 3313(a), 3332(a), 3334(b), 3969(f), 3978(g).
- 100 N. E. 454, 206 N. Y. 733—vii. 3978(g).
- Cremo Light Co. v. Parker, 118 App. Div. 845, 103 N. Y. Supp. 710—vi. 1864(c).
- Crice v. Illinois Life Ins. Co., 92 S. W. 560, 122 Ky. 572, 29 Ky. Law Rep. 91, 121 Am. St. Rep. 489—vi. 1091(f); vii. 2837(d).
- Criscuolo v. Societe Monarchica Di Mutuo Soccorso Vittoria Emanuele III, 89 Conn. 249, 93 Atl. 532—vi. 1038(a), 2023(a), 2033(h).
- Crismond's Adm'r v. Jones, 117 Va. 34, 83 S. E. 1045, Ann. Cas. 1917C, 155—vi. 247(b), 273(n), 287(h), 290(k).
- Crites v. Capital Fire Ins. Co., 137 N. W. 847, 91 Neb. 771—vi. 1181(g), 1880(f).
- v. Modern Woodmen, 82 Neb. 298, 117 N. W. 776—vii. 2688(b).
- Crohn v. Order of United Commercial Travelers, 156 S. W. 472, 170 Mo. App. 273—vi. 442(a), 658(g).
- Crook v. New York Life Ins. Co., 75 Atl. 388, 112 Md. 268—vi. 2413(h), 2427(b); vii. 2476(b), 2606(f), 2699(b), 2719(j), 3864(b).
- Crosby v. Mutual Benefit Life Ins. Co., 109 N. E. 365, 221 Mass. 461—vii. 3767(s).
- v. Vermont Acc. Ins. Co., 84 Vt. 510, 80 Atl. 817—vi. 458(j), 629(a); vii. 2699(b), 2712(c).
- Crossan v. Pennsylvania Fire Ins. Co., 133 Mo. App. 537, 113 S. W. 704—vi. 1900(f), 1912(n); vii. 3095(g).
- Crosse v. Supreme Lodge Knights and Ladies of Honor, 254 Ill. 80, 98 N. E. 261, 45 L. R. A. (N. S.) 162—vi. 632(c), 1933(b), 1940(f), 1941(g), 1952(b, c), 2096(a), 2147(i), 2158(b).
- Crotty v. Continental Casualty Co., 146 S. W. 833, 163 Mo. App. 628—vii. 3440(a), 3450(g), 3456(a), 3755(g).
- Crouch v. Southern Surety Co., 131 Tenn. 260, 174 S. W. 1116, Ann. Cas. 1916C, 1220—vi. 1047(g).
- Crowder v. Continental Casualty Co., 115 Mo. App. 535, 91 S. W. 1016—vii. 2479(e), 2702(b), 2775(d), 3442(a), 3526(g), 3871(d).
- Crowell v. Maryland Motor Car Ins. Co., 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D, 50—vi. 542(a), 636(e), 1791(f).
- v. Northwestern Nat. Life Ins. Co., 140 Iowa, 258, 118 N. W. 412—vi. 1110(g); vii. 3759(r).
- 108 N. W. 962, 99 Minn. 214—vi. 942(c).
- Crowley v. A. O. H. Widows' and Orphans' Fund, 110 N. E. 276, 222 Mass. 228—vi. 2356(h); vii. 2496(o).
- Crumley v. Sovereign Camp of Woodmen of the World, 102 S. C. 386, 86 S. E. 954—vii. 2715(h).
- Crystal Ice Co. v. United Surety Co., 159 Mich. 102, 123 N. W. 619—vi. 10(g), 346(b); vii. 2521(c), 2764(a), 3579(e), 3580(e).
- C. Schmidt & Sons Brewing Co. v. Travelers' Ins. Co., 90 Atl. 653, 244 Pa. 286, 52 L. R. A. (N. S.) 126—vii. 3330(a).
- Csizik v. Verhovay Sick Benefit Ass'n, 60 Pa. Super. Ct. 466—vi. 2110(i).
- Cue v. Connecticut Fire Ins. Co., 89 Kan. 90, 130 Pac. 664, 44 L. R. A. (N. S.) 1218—vii. 2524(d), 2622(a), 2643(i).
- Cullen v. Insurance Co. of North America, 104 S. W. 117, 126 Mo. App. 412—vii. 3537(d), 3662(d).
- Culver v. Williamsburg City Fire Ins. Co., 124 S. W. 540, 141 Mo. App. 205—vii. 2735(a).
- Cummings v. Dirigo Mut. Fire Ins. Co., 112 Me. 379, 92 Atl. 298—vi. 162(f), 1354(e).
- v. Pennsylvania Fire Ins. Co., 153 Iowa, 579, 134 N. W. 79, 37 L. R. A. (N. S.) 1169, Ann. Cas. 1913E, 235—vii. 3030(h), 3034(j).
- v. Sovereign Camp of Woodmen of the World, 170 Mo. App. 194, 155 S. W. 488—vii. 3133(b), 3141(e), 3257(m), 3265(o).
- Cunat v. Supreme Tribe of Ben Hur, 249 Ill. 448, 94 N. E. 925, 34 L. R. A. (N. S.) 1192, Ann. Cas. 1912A, 213—vi. 2065(a), 2067(b); vii. 3752(n).
- 157 Ill. App. 138—vi. 2065(a); vii. 3752(n).
- Cundiff v. Royal Neighbors of America, 144 S. W. 128, 162 Mo. App. 117—vi. 2071(a); vii. 2625(a), 2633(e).
- Cunningham v. Connecticut Fire Ins. Co., 200 Mass. 333, 86 N. E. 787—vi. 391(b), 397(d), 450(d), 455(g).

Cunningham v. Modern Brotherhood of America, 96 Neb. 827, 148 N. W. 918—vi. 1958(h), 2105(f), 2159(c), 2186(e), 2371(m).

v. National Americans, 185 S. W. 786, 123 Ark. 620—vi. 2096(a).

v. Royal Neighbors of America, 24 S. D. 489, 124 N. W. 434, 140 Am. St. Rep. 793—vi. 452(f), 2124(a).

v. Seaboard Air Line Ry. Co., 51 S. E. 1029, 139 N. C. 427, 2 L. R. A. (N. S.) 921—vii. 3893(a).

v. Supreme Council of Royal Arcanum, 165 App. Div. 52, 151 N. Y. Supp. 83—vi. 706(h).

v. United States Casualty Co., 109 N. Y. Supp. 1014, 125 App. Div. 916—vii. 3559(b).

Curnen v. Law Union & Rock Ins. Co., 144 N. Y. Supp. 499, 159 App. Div. 493—vi. 732(a, b); vii. 3522(f).

Curran v. National Life Ins. Co., 96 Atl. 1041, 251 Pa. 420—vi. 607(a), 1011(d); vii. 3356(a), 3458(b), 3959(b).

Currence v. Sovereign Camp Woodmen of the World, 78 S. E. 442, 95 S. C. 61—vi. 2432(e).

Currie v. Continental Casualty Co., 147 Iowa. 281, 126 N. W. 164, 140 Am. St. Rep. 300—vii. 2814(p), 3297(e), 3319(a).

Currier v. Catholic Order of Foresters, 87 Vt. 83, 88 Atl. 525—vi. 1048(n).

Curry v. Empire Life Ins. Co., 98 N. Y. Supp. 6, 49 Misc. Rep. 65—vii. 3990(k).

v. Stone (Tex. Civ. App.) 92 S. W. 263—vi. 1004(f); vii. 2570(e), 2574(e).

Curtis v. Modern Woodmen of America, 159 Wis. 303, 150 N. W. 417—vi. 706(h); vii. 3139(e).

v. New York Life Ins. Co., 217 Mass. 47, 104 N. E. 553, Ann. Cas. 1915C, 945—vi. 20(c), 576(f).

Curtis & Gartside Co. v. Aetna Life Ins. Co. (Okla.) 160 Pac. 465—vii. 3334(b), 3841(b).

Cushman v. Carbondale Fuel Co., 98 N. W. 509, 122 Iowa, 656—vi. 795(h).

Cushman & Rankin Co. v. Boston & M. R. R., 73 Atl. 1073, 82 Vt. 390, 18 Ann. Cas. 708—vii. 3911(h).

Custer v. Fidelity Mut. Aid Ass'n, 60 Atl. 776, 211 Pa. 257—vi. 686(e), 689(g).

Cutting v. Atlas Mut. Ins. Co., 85 N. E. 174, 199 Mass. 380—vi. 636(e); vii. 3111(f), 3114(g).

Cuyler v. Wallace, 101 App. Div. 207, 91 N. Y. Supp. 690—vi. 1118(k).

183 N. Y. 291, 76 N. E. 1, 5 Ann. Cas. 407—vi. 1118(k).

Czerweny v. National Fire Ins. Co. (Sup.) 139 N. Y. Supp. 345—vi. 771(e); vii. 3531(a), 3590(d).

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Daffron v. Modern Woodmen of America, 190 Mo. App. 303, 176 S. W. 498—vi. 677(a), 698(f), 1950(a), 2033(b); vii. 2496(o), 2509(e), 2550(t), 2625(a).

Dague v. Grand Lodge Brotherhood of Railroad Trainmen, 73 Atl. 735, 111 Md. 95—vi. 128(g), 2378(p), 2391(u); vii. 3684(d).

Dahms & Sons Co. v. German Fire Ins. Co., 153 Iowa, 168, 132 N. W. 870, Ann. Cas. 1913D, 1301—vi. 629(a); vii. 3055(b).

Dahrooge v. Rochester-German Ins. Co., 177 Mich. 442, 143 N. W. 608—vii. 3975(g).

v. Sovereign Fire Assur. Co., 175 Mich. 248, 141 N. W. 572—vii. 2609(h), 3066(e).

D'Aigle Co. v. Western Ins. Co., 67 South. 827, 136 La. 777—vii. 3929(l).

Dailey v. Chappell, 31 Ohio Cir. Ct. R. 509—vi. 1012(d).

Dakan v. Union Mut. Life Ins. Co., 125 Mo. App. 451, 102 S. W. 634—vi. 641(i), 2409(g).

Dakin v. Queen City Fire Ins. Co., 59 Or. 269, 117 Pac. 419—vii. 3079(a), 3359(b), 3366(h), 3408(c).

Dale v. Modern Woodmen of America, 140 Ill. App. 16—vii. 4001(b).

Dalton v. Agricultural Ins. Co. (Iowa) 102 N. W. 125—vi. 864(g), 866(h).

v. Germania Fire Ins. Co. (Iowa) 102 N. W. 127—vi. 1856(q).

v. German Ins. Co., (Iowa) 102 N. W. 1131—vi. 184(a), 864(g), 866(h), 1359(g); vii. 2649(p), 3416(d), 3700(g).

v. Knights of Columbus, 67 Atl. 510, 80 Conn. 212, 125 Am. St. Rep. 116, 11 Ann. Cas. 568—vi. 809(i).

v. Milwaukee Mechanics' Ins. Co., 126 Iowa, 377, 102 N. W. 120—vi. 184(a), 864(g), 866(h), 1359(g); vii. 2649(p), 3416(d), 3700(g).

v. Providence-Washington Ins. Co. (Iowa) 102 N. W. 126—vi. 864(g), 866(h).

v. Queen Ins. Co. (Iowa) 102 N. W. 1131—vi. 864(g), 866(h), 1359(g).

v. United States Fire Ins. Co. (Iowa) 102 N. W. 1131—vi. 864(g), 866(h), 1359(g).

v. Westchester Fire Ins. Co. (Iowa) 102 N. W. 125—vi. 864(g).

v. Western Assur. Co. (Iowa) 102 N. W. 1131—vi. 864(g), 866(h), 1359(g).

v. Western Underwriters' Ass'n (Iowa) 102 N. W. 1131—vi. 864(g), 866(h), 1359(g).

Dalzell v. London & Lancashire Fire Ins. Co., 97 Atl. 452, 252 Pa. 265—vii. 3984(i).

- Damms v. Humboldt Fire Ins. Co., 75 Atl. 607, 226 Pa. 358, 18 Ann. Cas. 685—vii. 2621(a).
- Daugler v. National Surety Co., 168 App. Div. 89, 153 N. Y. Supp. 727—vii. 3042(c).
- Daniel v. Citizens' Mut. Fire Ins. Co., 149 Mich. 626, 113 N. W. 17—vi. 968(s).
- v. Modern Woodmen, 53 Tex. Civ. App. 570, 118 S. W. 211—vi. 628(a), 636(e), 2054(c), 2174(b).
- Danner v. Equitable Life Assur. Soc., 141 N. Y. Supp. 442, 156 App. Div. 562—vi. 615(f), 2413(h).
- Danvers Sav. Bank v. National Surety Co., 166 Fed. 671, 92 C. C. A. 423—vi. 851(d).
- Darden v. Liverpool & London & Globe Ins. Co., 68 South. 485, 109 Miss. 501—vii. 3094(g).
- Dargan v. Equitable Life Assur. Soc., 51 S. E. 125, 71 S. C. 356—vi. 456(h), 512(h).
- Da Rin v. Casualty Co. of America, 41 Mont. 175, 108 Pac. 649, 27 L. R. A. (N. S.) 1164, 137 Am. St. Rep. 709—vii. 3197(g), 3218(m), 3380(a), 3440(a), 3447(d), 3456(i), 3549(c).
- Darling v. Protective Assur. Society, 127 N. Y. Supp. 486, 71 Misc. Rep. 113—vi. 633(c); vii. 3959(b).
- Darter v. Grubb, 56 Ind. App. 206, 102 N. E. 843—vii. 3819(c).
- Daugherty v. Daugherty, 154 S. W. 9, 152 Ky. 732—vii. 3769(s).
- David Bradley & Co. v. Brown, 78 Neb. 836, 112 N. W. 331, 13 L. R. A. (N. S.) 152, 126 Am. St. Rep. 647—vi. 774(g).
- Davidson v. German Ins. Co., 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884, 12 Ann. Cas. 1065—vii. 2793(d), 2805(j).
- v. Temple of Supreme Tribe of Ben Hur, 135 Iowa, 88, 111 N. W. 46—vi. 2373(n); vii. 2706(c), 2709(d).
- Davies v. Maryland Casualty Co., 89 Wash. 571, 154 Pac. 1116, L. R. A. 1916D, 395—vi. 1069(e); vii. 3334(b).
- 89 Wash. 571, 155 Pac. 1035, L. R. A. 1916D, 398—vi. 1069(e); vii. 3334(b).
- Davin v. Davin, 114 App. Div. 396, 99 N. Y. Supp. 1012—vii. 3722(b).
- Davis v. Bremer County Farmers' Mut. Fire Ins. Ass'n, 154 Iowa, 326, 134 N. W. 860—vi. 1066(c), 1067(c); vii. 3698(f), 3715(m).
- v. Catholic Order of Foresters, 165 Ill. App. 137—vi. 2096(a).
- v. Connecticut Fire Ins. Co., 112 Pac. 549, 158 Cal. 766, 32 L. R. A. (N. S.) 604—vi. 1610(f), 1611(f), 1612(f).
- v. Continental Ins. Co., 60 Pa. Super. Ct. 341—vii. 2792(c).
- v. Davis, 190 S. W. 459, 136 Tenn. 520—vii. 3753(q), 3767(s).
- Davis v. Home Ins. Co., 127 Tenn. 330, 155 S. W. 131, 44 L. R. A. (N. S.) 626—vi. 1868(a); vii. 2469(c).
- v. McGraw, 92 N. E. 332, 206 Mass. 294, 138 Am. St. Rep. 398—vii. 3783(u).
- v. Midland Casualty Co., 190 Ill. App. 338—vii. 3163(c), 3290(b).
- v. National Casualty Co., 115 Minn. 125, 131 N. W. 1013—vi. 619(b), 620(c); vii. 2875(h).
- v. National Council of Knights and Ladies of Security, 196 Mo. App. 485, 196 S. W. 97—vii. 2514(g), 2715(h).
- v. National Life Ins. Co., 74 N. E. 330, 188 Mass. 299—vii. 3886(b).
- v. New York Life Ins. Co., 212 Mass. 310, 98 N. E. 1043, 41 L. R. A. (N. S.) 250—vi. 566(h); vii. 3755(q), 3778(u).
- v. Northwestern Mut. Fire Ass'n, 92 Pac. 881, 48 Wash. 50, 15 Ann. Cas. 333—vii. 3347(a).
- v. Northwestern Mut. Life Ins. Co., 163 N. Y. Supp. 56, 98 Misc. Rep. 456—vi. 2286(b); vii. 3964(d).
- v. Pioneer Mut. Ins. Ass'n, 44 Wash. 532, 87 Pac. 829—vii. 3093(g), 3347(a), 3362(d), 3387(f).
- v. Salem County Mut. Fire Ins. Co., 85 N. J. Law, 324, 96 Atl. 391—vii. 2711(d).
- v. Supreme Council Royal Arcanum, 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722, 11 Ann. Cas. 777—vii. 3225(a).
- v. United States Health & Acc. Ins. Co., 73 N. H. 425, 62 Atl. 728—vii. 3955(a), 3960(b).
- Davis-Kaser Co. v. Colonial Fire Underwriters' Ins. Co. (Agency) 157 Pac. 870, 91 Wash. 383—vii. 3949(d).
- Davis Mfg. Co. v. Firemen's Fund Ins. Co. (D. C.) 210 Fed. 653—vii. 3641(i), 3644(j), 3648(l).
- v. Stuyvesant Ins. Co., 145 N. Y. Supp. 192, 160 App. Div. 74—vii. 3656(p), 3657(p).
- Davison, In re (D. C.) 179 Fed. 750—vii. 3810(j).
- v. Maryland Casualty Co., 83 N. E. 407, 197 Mass. 167—vii. 3330(a), 3331(a), 3334(b).
- Dawedoff v. Hooper (Tex. Civ. App.) 190 S. W. 522—vii. 3898(b).
- Dawson v. Equitable Life Assur. Soc., 105 S. W. 422, 32 Ky. Law Rep. 86—vii. 2868(e).
- Day v. Home Ins. Co., 177 Ala. 600, 58 South. 549, 40 L. R. A. (N. S.) 652—vi. 637(f), 904(e), 1814(a), 1820(d).
- v. Supreme Forest, Woodmen Circle, 174 Mo. App. 260, 156 S. W. 721—vi. 2344(d); vii. 2718(i).

- Deal v. Deal*, 87 S. C. 395, 69 S. E. 886, Ann. Cas. 1912B, 1142—vii. 3755(g), 3767(s).
- v. Hainley*, 135 Mo. App. 507, 116 S. W. 1—vi. 253(f), 238(h), 269(h), 290(k), 299(b), 300(c), 308(h), 328(h); vii. 3788(a).
- Dean v. Dean*, 162 Wis. 303, 156 N. W. 135—vi. 717(n); vii. 3767(s).
- Dearborn v. Niagara Fire Ins. Co.*, 17 N. M. 223, 125 Pac. 606—vi. 864(g).
- Dechter v. National Council of Knights and Ladies of Security*, 153 N. W. 742, 130 Minn. 329, Ann. Cas. 1917C, 142—vii. 3960(b).
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- Degenhardt v. Aachen & Munich Fire Ins. Co.*, 44 Pa. Super. Ct. 644—vii. 3401(l).
- v. Atlas Assur. Co.*, 44 Pa. Super. Ct. 653—vii. 3401(l).
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- De Haven's Estate*, In re, 84 Atl. 676, 236 Pa. 146—vi. 1110(g).
- Deitz v. Dunham & Chemung Tp. Mut. Fire Ins. Co.*, 160 Ill. App. 180—vi. 632(c), 737(b).
- Delafield v. London & Lancashire Fire Ins. Co.*, 177 App. Div. 477, 164 N. Y. Supp. 221—vii. 3033(i).
- Delaney v. Kelly*, 103 App. Div. 409, 92 N. Y. Supp. 1021—vi. 2398(c), 45 Misc. Rep. 286, 92 N. Y. Supp. 265—vi. 2398(c).
- Delaware Ins. Co. v. Hill* (Tex. Civ. App.) 127 S. W. 283—vi. 345(b), 552(h), 824(a), 866(h), 1071(f), 1315(e), 1316(f), 1325(m), 1738(f); vii. 2604(e), 3036(a), 3122(c), 3123(c).
- v. Hutto* (Tex. Civ. App.) 159 S. W. 73—vii. 4001(b).
- v. Pennsylvania Fire Ins. Co.*, 126 Ga. 380, 55 S. E. 330, 7 Ann. Cas. 1134—vi. 398(g), 436(a), 437(a), 611(d).
- v. Wallace* (Tex. Civ. App.) 160 S. W. 1130—vi. 758(m); vii. 2464(b), 2604(e).
- Delaware Underwriters Fire Ins. Co. v. National Union Fire Ins. Co.*, 60 Pa. Super. Ct. 325—vii. 3932(a).
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- De Loach & Co. v. Aetna Ins. Co.*, 62 S. E. 473, 4 Ga. App. 746—vi. 1832(a), 1857(q).
- Delvaux v. Metropolitan Life Ins. Co.*, 172 Ill. App. 537—vi. 2163(e).
- De Michele v. London & Lancashire Fire Ins. Co.*, 40 Utah. 312, 120 Pac. 846, Ann. Cas. 1914D, 1076—vi. 507(f), 512(h); vii. 3379(e).
- Deming v. Prudential Ins. Co.*, 169 Ill. App. 96—vi. 686(e), 689(g), 2127(c); vii. 2625(a), 190 Ill. App. 604—vii. 2521(c).
- Deming Inv. Co. v. Shawnee Fire Ins. Co.*, 83 Pac. 918, 16 Okl. 1, 4 L. R. A. (N. S.) 607—vi. 1133(d), 1154(a), 1156(b); vii. 2499(a), 2653(t).
- Dempster v. Opocensky*, 81 Neb. 612, 116 N. W. 524—vi. 693(c).
- De Mun Estate Corporation v. Frankfort General Ins. Co.*, 196 Mo. App. 1, 187 S. W. 1124—vi. 636(e); vii. 3329(e).
- Dennis v. Fidelity Mut. Life Ins. Co.*, 124 N. W. 575, 159 Mich. 594—vi. 454(g), 505(e); vii. 2681(b).
- v. Home Ins. Co. (D. C.)* 136 Fed. 481—vi. 721(a).
- v. Modern Brotherhood of America*, 119 Mo. App. 210, 95 S. W. 967—vi. 561(b), 799(b), 800(c), 803(e); vii. 3238(d), 3756(q), 3781(u), 3785(u).
- De Noyelles v. Delaware Ins. Co.*, 138 N. Y. Supp. 855, 73 Misc. Rep. 649—vi. 1295(e); vii. 2517(a), 2521(c), 2641(k).
- Denoyer v. First Nat. Acc. Co.*, 130 N. W. 475, 145 Wis. 450—vi. 356(b), 2041(e), 2254(b).
- Dent v. Railway Mail Ass'n (C. C.)* 183 Fed. 840—vii. 3156(a), 3157(a), 3161(b), 3185(c), 3194(f), 3271(a), 3296(e).
- De Paola v. National Ins. Co.*, 38 R. I. 126, 94 Atl. 700—vi. 732(b), 884(u); vii. 3667(g).
- Depue v. Travelers' Ins. Co. (C. C.)* 166 Fed. 183—vii. 3163(c), 3296(e), 3959(b).
- De Rossett Hat Co. v. London Lancashire Fire Ins. Co.*, 183 S. W. 720, 134 Tenn. 199—vi. 900(a); vii. 3890(c).
- Desforges, Succession of*, 135 La. 64 South. 978, 52 L. R. A. (N. S.) 639—vii. 3754(p), 3755(q).
- Des Moines Ins. Co. v. Moon*, 126 Pac. 753, 33 Okl. 437—vi. 1373(c); vii. 2653(t).
- Des Moines Life Ins. Co. v. Clay*, 116 S. W. 232, 89 Ark. 230—vi. 2057(g), 2064(l), 2113(k).
- Des Moines Sav. Bank v. Kennedy*, 142 Iowa, 272, 120 N. W. 742—vii. 3805(i).
- Despain v. Pacific Mut. Life Ins. Co.*, 106 Pac. 1027, 81 Kan. 722—vii. 2479(e), 2537(k), 2579(g).
- Despatch Laundry Co. v. Employers' Liability Assur. Corporation*, 117 N. W. 506, 118 N. W. 152, 105 Minn. 384—vi. 2453(f).
- Dessauer v. Supreme Tent of Knights of Maccabees of the World*, 191 Mo. App. 76, 176 S. W. 461—vi. 706(h).
- Devaney v. Ancient Order of Hibernians Life Ins. Fund*, 142 N. W. 316, 122 Minn. 221—vii. 3783(u).
- Devin v. Connecticut Mut. Life Ins. Co. (Okl.)* 158 Pac. 435, L. R. A. 1916F, 783—vi. 1102(c), 1110(g); vii. 3802(g).

- Devine v. Federal Life Ins. Co., 250 Ill. 203, 95 N. E. 174—vi. 442(a), 450(d), 456(h), 486(k), 487(k), 2267(e).
157 Ill. App. 254—vi. 486(k), 487(k).
- v. Modern Woodmen of America, 171 Ill. App. 592—vii. 3140(e).
- De Voney v. Modern Woodmen of America, 148 Ill. App. 68—vii. 3228(b), 3241(f).
- Dewey v. Fleischer, 129 Wis. 591, 109 N. W. 525—vi. 289(j), 294(n).
- v. National Casualty Co., 72 Misc. Rep. 23, 129 N. Y. Supp. 136—vii. 3538(d).
- Diamond v. Duncan (Tex. Civ. App.) 138 S. W. 429—vi. 337(c).
172 S. W. 1100, 107 Tex. 256—vi. 341(g).
107 Tex. 256, 177 S. W. 955—vi. 341(g).
- v. Metropolitan Life Ins. Co. (Sup.) 116 N. Y. Supp. 617—vi. 687(f), 2142(h), 2156(a).
- Dibble v. Reliance Life Ins. Co., 170 Cal. 199, 149 Pac. 171, Ann. Cas. 1917E, 34—vii. 2755(b).
- Dibrell v. Citizens' Nat. Life Ins. Co., 153 S. W. 428, 152 Ky. 208—vi. 2259(a), 2276(i), 2411(g).
- Dick v. General Assembly of Order of Amaranth, 113 N. W. 1125, 150 Mich. 215—vi. 704(h), 707(i).
- Dickey v. Continental Casualty Co., 40 Tex. Civ. App. 199, 89 S. W. 436—vi. 408(a), 439(c).
- v. Springfield Fire & Marine Ins. Co. (Okl.) 156 Pac. 204—vi. 1818(c), 1821(e).
- Dickinson v. Fraternal Aid Union, 175 Ky. 410, 194, 349—vi. 637(f).
- v. National Life & Trust Co., 20 S. D. 437, 107 N. W. 537—vi. 1039(a).
- Diddle v. Continental Casualty Co., 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. (N. S.) 779—vii. 3216(m), 3218(m).
- Diehl v. Mutual Life Ins. Co., 176 Ill. App. 462—vi. 1956(f), 1969(f), 1979(j), 2096(a); vii. 2636(g).
- Diehm v. Northwestern Mut. Life Ins. Co., 129 Mo. App. 256, 108 S. W. 139—vii. 3778(u).
- Dieterich v. Modern Woodmen, 161 Mo. App. 97, 142 S. W. 460—vi. 712(l), 713(m), 717(n), 801(d).
- Dillon v. Continental Casualty Co., 130 Mo. App. 502, 109 S. W. 89—vii. 3216(m), 3223(m).
- v. National Council Knights and Ladies of Security, 244 Ill. 202, 91 N. E. 417—vi. 2365(j), 2404(e); vii. 2718(i), 2748(g).
148 Ill. App. 121—vi. 2365(j), 2404(e); vii. 2718(i), 2748(g).
- Di Mombercelli v. Van Riper, 87 Misc. Rep. 453, 150 N. Y. Supp. 841—vii. 3778(u).
- Dinan v. Supreme Council Catholic Mut. Ben. Ass'n, 62 Atl. 1067, 213 Pa. 489—vi. 578(h).
- Dineen v. General Acc. Ins. Co. of Philadelphia, 110 N. Y. Supp. 344, 126 App. Div. 167—vi. 632(c), 2072(b).
- Dineen v. American Ins. Co., 98 Neb. 97, 152 N. W. 307, L. R. A. 1915E, 618, Ann. Cas. 1917B, 1246—vi. 691(a); vii. 3047(a), 3059(c).
- Diseker v. Equitable Life Assur. Society, 87 S. C. 187, 69 S. E. 153—vii. 3138(d).
- District Grand Lodge No. 11, Endowment of Grand United Order of Odd Fellows v. Pratt, 132 S. W. 998, 96 Ark. 614—vi. 2433(f).
- District Grand Lodge No. 18, etc., v. Hall, 17 Ga. App. 589, 87 S. E. 845—vii. 4001(a).
- District Grand Lodge No. 23, United Order of Odd Fellows v. Hill, 3 Ala. App. 483, 57 South. 147—vi. 38(l), 282(d), 292(i), 327(g), 2387(t); vii. 2715(h), 3548(b).
- District Grand Lodge of Alabama v. Jones, 59 South. 313, 5 Ala. App. 367—vi. 456(h).
- Dixie Fire Ins. Co. v. A. Layne & Bro., 161 S. W. 530, 156 Ky. 606—vii. 2777(e).
- v. American Bonding Co., 162 N. C. 384, 78 S. E. 430—vi. 649(a); vii. 3331(a), 3579(e), 3968(f).
- v. American Confectionery Co., 124 Tenn. 247, 136 S. W. 915, 34 L. R. A. (N. S.) 897—vii. 3654(p).
- v. Nelson, 157 S. W. 416, 128 Tenn. 70—vii. 3320(b).
- v. Wallace, 156 S. W. 140, 153 Ky. 677, Ann. Cas. 1915C, 409—vi. 412(b), 1037(a).
- Dixon v. State Mut. Ins. Co., 34 Okl. 624, 126 Pac. 794, L. R. A. 1915F, 1210—vii. 3366(h), 3955(a).
- Dobson v. Triple Tie Ben. Ass'n, 129 Pac. 1173, 88 Kan. 705—vi. 2432(e); vii. 2715(h).
- Dodge v. Grain Shippers' Mut. Fire Ins. Ass'n, 176 Iowa, 316, 157 N. W. 955—vi. 185(a), 629(a), 638(g).
1283(f), 1763(g); vii. 2521(c), 2639(j).
- v. New York Life Ins. Co. (Mo. App.) 189 S. W. 609—vii. 2759(d), 3539(d), 3884(a).
- v. Thomason, 94 Ark. 21, 125 S. W. 648—vi. 1825(f); vii. 3531(a).
- Dodt v. Prudential Ins. Co., 186 Mo. App. 168, 171 S. W. 655—vi. 1987(c), 2185(d); vii. 3586(a).
- Doherty v. Phoenix Ins. Co., 112 N. E. 940, 224 Mass. 310—vii. 3597(a), 3631(b), 3641(i), 3654(p).
- Dohlin v. Knights of Modern Maccabees, 151 Mich. 644, 115 N. W. 975—vii. 3736(h).
- Dolan, In re (D. C.) 182 Fed. 949—vi. 1110(g).

- Dolan v. John Hancock Mut. Life Ins. Co.**, 141 N. Y. Supp. 101—vi. 577(f).
- v. Royal Neighbors of America**, 123 Mo. App. 147, 100 S. W. 498—vii. 3967(e).
- v. Supreme Council of Catholic Mut. Ben. Ass'n**, 113 N. W. 10, 13 L. R. A. (N. S.) 424—vi. 251 (e), 261(i), 566(i), 706(h), 799 (b), 802(d).
- 116 N. W. 383, 152 Mich. 266, 16 L. R. A. (N. S.) 555, 15 Ann. Cas. 232—vi. 251(e), 261 (i), 566(i), 706(h), 799(b), 802 (d).
- Doll v. Equitable Life Assur. Soc.**, 138 Fed. 705, 71 C. C. A. 121—vi. 2096 (a), 2117(l), 2176(c).
- Dollar v. La Fondere Campagnie**, 162 Fed. 563—vii. 2995(j).
- Dollar S. S. Co. v. Maritime Ins. Co. (C. C.)** 149 Fed. 616—vi. 218(c).
- Dolliver v. Granite State Fire Ins. Co.**, 89 Atl. 8, 111 Me. 275, 50 L. R. A. (N. S.) 1106, Ann. Cas. 1916C, 765—vi. 1680(k); vii. 2464(b).
- Dolsen v. Phoenix Preferred Acc. Ins. Co.**, 115 N. W. 50, 151 Mich. 228—vi. 2433(f); vii. 3989(k).
- Dominco v. Prudential Ins. Co.**, 49 Pa. Super. Ct. 156—vi. 2314(g), 2432(e).
- Dominion Trust Co. v. National Surety Co.**, 221 Fed. 618, 137 C. C. A. 342, Ann. Cas. 1917C, 447—vi. 635(d), 2451 (c); vii. 3320(b).
- Donahue v. Mutual Life Ins. Co. (N. D.)** 164 N. W. 50—vi. 509(g), 632(c), 843 (g), 1984(a).
- Donley v. Glens Falls Ins. Co.**, 100 App. Div. 69, 91 N. Y. Supp. 302—vi. 1133(d), 1137(e), 1433(f), 1898(c), 1903(j).
- 184 N. Y. 107, 76 N. E. 914, 6 Ann. Cas. 81—vi. 1133(d), 1137(e), 1433(f), 1898(c), 1912 (n).
- Doody Co. v. Green**, 62 S. E. 984, 131 Ga. 568—vi. 290(k); vii. 3790(b).
- Dorman v. Connecticut Fire Ins. Co.**, 41 Okl. 509, 139 Pac. 262, 51 L. R. A. (N. S.) 873—vi. 348(b), 413(c).
- Dorroh-Kelly Mercantile Co. v. Orient Ins. Co.**, 104 Tex. 199, 135 S. W. 1165—vi. 632(c), 1820(d), 1821(d), 1829(g).
- Dorwin v. North Wisconsin Farmers' Mut. Cyclone Ins. Co.**, 152 N. W. 454, 160 Wis. 663—vii. 3053(a).
- Doscher v. Vanderbilt**, 160 N. Y. Supp. 871—vi. 900(a).
- v. Vanderbilt**, 177 App. Div. 813, 164 N. Y. Supp. 264—vi. 27(b), 900(a).
- Doty v. Dickey**, 96 S. W. 544, 29 Ky. Law Rep. 900—vi. 1100(b).
- Dougherty v. Supreme Court of Independent Order of Foresters**, 125 Minn. 142, 145 N. W. 813—vii. 2495(o), 2706 (c), 2708(c).
- Douler v. Prudential Ins. Co.**, 128 N. Y. Supp. 396, 143 App. Div. 537—vi. 2130 (d).
- Douville v. Pacific Coast Casualty Co.**, 138 Pac. 506, 25 Idaho, 396, Ann. Cas. 1917A, 112—vii. 3526(g), 3966(c).
- Dowdall v. Supreme Council, Catholic Mut. Ben. Ass'n**, 123 App. Div. 913, 108 N. Y. Supp. 1130—vi. 706(h), 713(m), 715(n), 717(n).
- 196 N. Y. 405, 89 N. E. 1075, 31 L. R. A. (N. S.) 417—vi. 706(h), 713(m), 717(n).
- Downey v. National Fire Ins. Co.**, 77 W. Va. 386, 87 S. E. 487—vi. 1774(g); vii. 3435(b).
- Downs v. German Alliance Ins. Co.**, 6 Pennewill (Del.) 166, 67 Atl. 146—vi. 1331(c), 1369(a), 1375(e); vii. 3356(a), 3362(d), 3373(b), 3382(b), 3968(f).
- v. Knights of Columbus**, 76 N. H. 165, 80 Atl. 227—vi. 698(f), 702 (g); vii. 2690(d), 2781(f).
- v. Michigan Commercial Ins. Co.**, 157 Ill. App. 32—vi. 191(d); vii. 2521(c), 2622(a), 3557(a), 3561 (d).
- Downs Farmers' Warehouse Ass'n v. Pioneer Mut. Ins. Ass'n**, 83 Pac. 423, 41 Wash. 372—vi. 1793(h).
- Doyle v. Hill**, 75 S. C. 261, 55 S. E. 446—vi. 1007(h).
- v. Maryland Casualty Co.**, 182 S. W. 946, 168 Ky. 795—vi. 637(f); vii. 3195(f).
- v. New Jersey Fidelity & Plate Glass Ins. Co.**, 163 Ky. 789, 182 S. W. 944, Ann. Cas. 1917D, 851—vii. 3295(d).
- Drago v. Prudential Ins. Co.**, 184 Ill. App. 618—vi. 449(d).
- Drake v. Elliot**, 199 Mass. 327, 85 N. E. 85—vii. 3775(t).
- Draper v. Delaware State Grange Mut. Fire Ins. Co.**, 5 Boyce (Del.) 143, 91 Atl. 206—vi. 5(a), 85(a), 137(d), 142(g).
- v. Oswego County Fire Relief Ass'n**, 115 App. Div. 807, 101 N. Y. Supp. 168—vi. 1791(f); vii. 2465(b), 2470(d), 2620(a), 2741 (b).
- 190 N. Y. 12, 82 N. E. 755—vi. 1791(f); vii. 2470(d), 2620(a), 2741(b).
- Dresen v. Metropolitan Life Ins. Co.**, 195 Ill. App. 292—vi. 253(f), 1043(e).
- Dresser v. Hartford Life Ins. Co.**, 80 Conn. 681, 70 Atl. 39—vi. 632(c), 1021 (c), 1039(a).
- Dreuil & Co., In re (D. C.)** 221 Fed. 796—vii. 3755(g).
- Drews v. Metropolitan Life Ins. Co.**, 79 N. J. Law, 398, 75 Atl. 167—vii. 2755 (b).

- Driscoll v. Modern Brotherhood of America, 77 Neb. 282, 109 N. W. 158—vi. 434(l), 435(l), 450(e), 610(c).
- Driskell v. United States Health & Accident Ins. Co., 93 S. W. 880, 117 Mo. App. 362—vii. 3171(f), 3176(a), 3288(a).
- Driver v. Planters' Mut. Ins. Ass'n, 78 Ark. 127, 93 S. W. 752—vi. 1871(b), 2432(e).
- Dromgold v. Royal Neighbors of America, 261 Ill. 60, 103 N. E. 584—vi. 68(m), 677(a), 698(f); vii. 2506(d), 2658(a), 2683(b), 2773(c).
- 177 Ill. App. 1—vi. 68(m), 677(a), 698(f); vii. 2506(d), 2658(a), 2683(b), 2773(c).
- Drown v. New Amsterdam Casualty Co. (Cal.) 165 Pac. 5—vii. 3153(h).
- Drummond v. White-Swearingen Realty Co. (Tex. Civ. App.) 165 S. W. 20—vi. 360(k); vii. 3093(g).
- Dubinsky v. Hartford Fire Ins. Co. (Mo. App.) 196 S. W. 1045—vii. 2521(c), 2801(h), 2807(k).
- Du Brutz v. Bank of Visalia, 87 Pac. 467, 469, 4 Cal. App. 201—vi. 2413(h).
- Dudley v. Fifth Avenue Trust Co., 100 N. Y. Supp. 934, 115 App. Div. 396—vi. 1094(g).
- Duenser v. Supreme Council of Royal Arcanum, 262 Ill. 475, 104 N. E. 801, 51 L. R. A. (N. S.) 726—vii. 3748(n).
- 178 Ill. App. 648—vi. 814(k); vii. 3748(n).
- Duff v. Prudential Ins. Co. (N. J.) 101 Atl. 371—vi. 1984(a), 2096(a).
- Duffie v. Bankers' Life Ass'n, 160 Iowa, 19, 139 N. W. 1087, 46 L. R. A. (N. S.) 25—vi. 427(b).
- Duffy v. Fidelity Mut. Life Ins. Co., 55 S. E. 79, 142 N. C. 103, 7 L. R. A. (N. S.) 238—vi. 2296(f), 2356(h), 2430(d).
- 59 S. E. 1131, 143 N. C. 697—vi. 2296(f), 2356(h), 2430(d).
- Duke v. Eminent Household of Columbian Woodmen, 183 S. W. 1028, 97 Ark. 290—vi. 2432(e).
- Dulany v. Fidelity & Casualty Co., 66 Atl. 614, 106 Md. 17—vi. 2169(i); vii. 2510(f), 3294(c), 3960(b).
- Dull v. Royal Ins. Co., 159 Mich. 671, 124 N. W. 533—vi. 1717(b); vii. 2529(g), 2531(i), 2660(b).
- Duluth St. Ry. Co. v. Fidelity & Deposit Co., 136 Minn. 299, 161 N. W. 595, L. R. A. 1917D, 684—vii. 3033(i).
- Dumphy v. Commercial Union Assur. Co. (Tex. Civ. App.) 142 S. W. 116—vi. 1531(h).
- 174 S. W. 814, 107 Tex. 107—vi. 1848(k).
- Dunbar v. Royal League, 184 Ill. App. 1—vi. 800(c), 805(f), 806(f).
- Duncan v. Missouri State Life Ins. Co., 160 Fed. 646, 87 C. C. A. 542—vii. 2715(h), 2726(n).
- Dunham v. Philadelphia Casualty Co., 179 Mo. App. 553, 162 S. W. 728—vii. 2767(d), 3334(b).
- Dunlevy v. New York Life Ins. Co. (D. C.) 204 Fed. 670—vi. 1079(a), 1102(c), 1110(g).
- v. Columbian Nat. Life Ins. Co., 89 S. E. 432, 18 Ga. App. 383—vi. 2267(e).
- v. Farmers' Fire Ins. Co., 34 Pa. Super. Ct. 245—vii. 3361(b), 3516(b).
- v. Knights of Gideon Mut. Aid Society, 151 N. C. 133, 65 S. E. 761—vi. 435(l).
- Dunn v. New Amsterdam Casualty Co., 141 App. Div. 478, 126 N. Y. Supp. 229—vii. 3163(c), 3724(b), 3755(q), 3819(c).
- 67 Misc. Rep. 109, 121 N. Y. Supp. 686—vii. 3163(c), 3724(b), 3755(q), 3819(c).
- v. Standard Live & Acc. Ins. Co., 197 Mo. App. 457, 196 S. W. 100—vi. 637(f); vii. 3199(h).
- Dunton v. Westchester Fire Ins. Co., 104 Me. 372, 71 Atl. 1037, 20 L. R. A. (N. S.) 1058—vi. 78(b), 531(j), 630(b), 644(l); vii. 3597(a), 3605(d).
- Dupriest v. American Cent. Life Ins. Co., 97 Ark. 229, 133 S. W. 826—vi. 447(b), 456(h).
- Duschenes v. National Surety Co., 139 N. Y. Supp. 881, 79 Misc. Rep. 232—vi. 635(d); vii. 3042(c).
- Dusenbury v. General Grant Council, No. 128, Junior Order United American Mechanics, 161 N. Y. Supp. 103, 96 Misc. Rep. 665—vi. 813(k).
- Dusseault v. Association Canado-Americaine, 74 N. H. 407, 68 Atl. 461—vii. 3271(a).
- Dustin v. Interstate Business Men's Acc. Ass'n, 37 S. D. 635, 159 N. W. 395, L. R. A. 1917B, 319—vii. 3297(e).
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- Dvorak v. Bohemian Roman Catholic First Cent. Union, 170 Ill. App. 624—vi. 127(f).
- Dworak v. Supreme Lodge of Western Bohemian Fraternal Ass'n (Neb.) 163 N. W. 471—vi. 61(h), 799(b).

E

- Eagle v. New York Life Ins. Co., 48 Ind. App. 284, 91 N. E. 814—vi. 118(c), 566(j); vii. 3732(f), 3755(q).
- Eagle Fire Co. v. Lewallen, 56 Fla. 246, 47 South. 947—vii. 2464(b); 2481(f), 2506(d), 2508(d), 2521(c), 2617(k).
- Eagleton v. Prudential Ins. Co., 193 Ill. App. 306—vii. 2469(c), 2528(f), 2625(a).
- Eames v. New York Life Ins. Co., 114 S. W. 85, 134 Mo. App. 331—vi. 2430(d).

- Early v. Providence & Washington Ins. Co.**, 31 R. I. 225, 76 Atl. 753, 140 Am. St. Rep. 750—vii. 3597 (a), 3627(t), 3631(b).
- v. Royal Exch. Assur. Co. (R. I.)** 76 Atl. 756—vii. 3597(a), 3627(t), 3631(b).
- East Carolina R. Co. v. Maryland Casualty Co.** 58 S. E. 906, 145 N. C. 114—vii. 3318(a).
- Easter v. Brotherhood of American Yeomen**, 154 Mo. App. 456, 135 S. W. 964—vi. 54(e), 57(f), 61 (h), 2344(d), 2430(d).
- 172 Mo. App. 292, 157 S. W. 992—vi. 54(e), 513(a), 2391 (u); vii. 2839(d).
- Eatman v. Eatman (Tex. Civ. App.)** 135 S. W. 165—vii. 3765(r), 3769(s).
- Eaton v. Globe & Rutgers Fire Ins. Co.**, 227 Mass. 354, 116 N. E. 536—vi. 528(j), 1821(d); vii. 3356(a), 3410(e), 3631(b).
- v. International Travelers' Ass'n (Tex. Civ. App.)** 136 S. W. 817—vi. 409(k), 711(l); vii. 3952 (d).
- v. Western Life Indemnity Co.**, 185 Ill. App. 217—vi. 2432(e); vii. 2681(h).
- Ebensburg Building & Loan Ass'n v. Westchester Fire Ins. Co.**, 28 Pa. Super. Ct. 341—vii. 3710(j), 3842(c).
- Eberhard v. Northwestern Mut. Life Ins. Co. (D. C.)** 210 Fed. 520—vii. 3946(a).
- Eberhardt v. Federal Ins. Co.**, 14 Ga. App. 340, 80 S. E. 856—vii. 3631(b), 3635(d), 3636(e), 3648(l), 3654(p).
- Eberlein v. Fidelity & Deposit Co.** 159 N. W. 553, 164 Wis. 242—vii. 3334(b).
- Eberly v. Springfield Fire & Marine Ins. Co.**, 51 Pa. Super. Ct. 474—vii. 3410 (e), 3991(k).
- Eckert v. Century Fire Ins. Co.**, 147 Iowa, 507, 124 N. W. 170—vii. 2521 (c), 2558(a), 2572(e).
- E. C. Winsor & Son v. Mutual Fire & Tornado Ass'n**, 153 N. W. 97, 170 Iowa, 521—vi. 739(d), 1511(e), 1621(l); vii. 2464(b), 2683(b).
- Edelson v. Metropolitan Life Ins. Co.**, 158 N. Y. Supp. 1018, 95 Misc. Rep. 218—vi. 691(a).
- v. Norwich Union Fire Ins. Co.**, 59 Pa. Super. Ct. 379—vii. 3561(d).
- Edge v. St. Paul Fire & Marine Ins. Co.**, 20 S. D. 190, 105 N. W. 281—vi. 632(c), 1523(c).
- Edgefield Mfg. Co. v. Maryland Casualty Co.**, 58 S. E. 969, 78 S. C. 73—vii. 2768(d), 3334(b), 3572(c), 3575(c).
- Edgerly v. Ladies of the Modern Macabees**, 185 Mich. 148, 151 N. W. 692—vi. 2203(d), 2398(c), 2400(d).
- Edington v. Michigan Mut. Life Ins. Co.**, 183 S. W. 728, 134 Tenn. 188—vi. 2259(a), 2307(c), 2395(b).
- Edmiston v. The Homesteaders**, 93 Kan. 485, 144 Pac. 826, Ann. Cas. 1916D, 588—vii. 2706(c).
- Edmonds v. Modern Woodmen**, 125 Mo. App. 214, 102 S. W. 601—vi. 2023(a), 2033(h, i); vii. 2462(a), 2683(b).
- v. Mutual Life Ins. Co.**, 144 N. W. 718, 33 S. D. 55, 50 L. R. A. (N. S.) 592—vi. 2212(e).
- Edwall v. Mutual Life Ins. Co.**, 103 Pac. 52, 54 Wash. 695—vi. 2057(g).
- Edward C. Moore Co. v. American Credit Indemnity Co.**, 156 N. Y. Supp. 737, 170 App. Div. 660—vi. 2445(f); vii. 2766(b).
- Edwards v. American Patriots**, 162 Mo. App. 231, 144 S. W. 1117—vi. 619(b), 620(c), 663(a), 708(j); vii. 3677(b).
- v. Farmers' Mut. Ins. Ass'n**, 57 S. E. 707, 128 Ga. 353, 12 L. R. A. (N. S.) 484, 119 Am. St. Rep. 385, 10 Ann. Cas. 1036—vi. 1710(l); vii. 2694(g).
- v. Jefferson Standard Life Ins. Co.**, 173 N. C. 614, 92 S. E. 695—vi. 1110(g).
- v. Sovereign Camp, Woodmen of the World (Okla.)** 161 Pac. 170—vii. 2768(a).
- Edwards & Son v. Pacific Coast Casualty Co.**, 161 N. Y. Supp. 895, 98 Misc. Rep. 30—vii. 3582(g).
- Egan v. Merchants' Fire Ass'n**, 82 Pac. 898, 40 Wash. 513—vii. 3355(d), 3955(a).
- E. H. Emery & Co. v. American Ins. Co.**, 177 Iowa, 4, 158 N. W. 748—vi. 747(g), 751(h).
- E. H. Stanton Co. v. Rochester German Underwriters' Agency (D. C.)** 206 Fed. 978—vi. 824(a), 1812(n), 1893(f).
- Eisenbach v. Mutual Life Ins. Co.**, 162 App. Div. 595, 147 N. Y. Supp. 962—vi. 1080(b); vii. 3754(p).
- 212 N. Y. 593, 106 N. E. 1033—vi. 1080(b); vii. 3754(p).
- Elder v. Federal Ins. Co.**, 100 N. E. 655, 213 Mass. 389—vi. 1045(g), 1190(a), 1791(f).
- El Dia Ins. Co. v. Sinclair**, 228 Fed. 833, 143 C. C. A. 231—vi. 109(e), 442(a), 535(a), 1206(c).
- Electrova Co. v. Spring Garden Ins. Co.**, 72 S. E. 306, 156 N. C. 232, 35 L. R. A. [N. S.] 1216—vi. 547(d).
- Elhart v. Pacific Mut. Life Ins. Co.**, 47 Wash. 659, 92 Pac. 419—vii. 2748(g).
- Ellinger v. Equitable Life Assur. Soc.**, 132 Wis. 259, 111 N. W. 567, 11 L. R. A. (N. S.) 1089—vi. 120(d).
- 138 Wis. 390, 120 N. W. 235—vi. 124(d).
- Elliott v. Frankfort Marine, Accident & Plate Glass Ins. Co.**, 156 Pac. 481, 172 Cal. 261, L. R. A. 1916F, 1026—vi. 2041(e), 2051 (a); vii. 2525(d).

- Elliott v. Home Mut. Mail Ass'n, 160 Iowa, 105, 140 N. W. 431—vii. 696(d); vii. 3532(b).
- v. Knights of the Modern Macca-bees, 46 Wash. 320, 89 Pac. 929, 13 L. R. A. (N. S.) 856—vi. 608(b), 1048(h), 2024(b); vii. 2520(c).
- Ellis v. Anderson, 49 Pa. Super. Ct. 245—vi. 505(e), 507(f), 1010(d), 2259(a).
- v. Metropolitan Life Ins. Co., 228 Pa. 230, 77 Atl. 460—vi. 686(e).
- Ellison v. District Grand Lodge No. 23, Grand United Order of Odd Fellows, 11 Ala. App. 442, 66 South. 872—vi. 708(j).
- Elsey v. Fidelity & Casualty Co. (Ind. App.) 109 N. E. 413—vii. 3157(a).
- Eltonhead v. Travelers' Ins. Co., 177 App. Div. 170, 163 N. Y. Supp. 838—vii. 3755(q).
- Ely v. Hartford Life Ins. Co., 128 Ky. 799, 110 S. W. 265, 33 Ky. Law Rep. 272—vi. 1107(e); vii. 3819(c).
- Ely v. Oakland Circuit Judge, 162 Mich. 466, 125 N. W. 375, 127 N. W. 769—vi. 572(b), 952(h), 1047(g); vii. 2811(m).
- Emanuel v. Maryland Casualty Co., 94 N. Y. Supp. 36, 47 Misc. Rep. 378—vii. 2487(i).
- Emery v. Lord, 29 App. D. C. 589—vi. 341(g), 1657(b), 1658(c).
- Emery & Co. v. American Ins. Co., 177 Iowa, 4, 158 N. W. 748—vi. 747(g), 751(h).
- Emig's Adm'r v. Mutual Ben. Life Ins. Co., 106 S. W. 230, 127 Ky. 588, 32 Ky. Law Rep. 484, 23 L. R. A. (N. S.) 828—vi. 2410(g), 2411(g).
- Eminent Household of Columbian Woodmen v. Gallant, 194 Ala. 680, 69 South. 884—vi. 23(f), 1990(g); vii. 3143(f).
- v. Gaunt, 128 Ark. 626, 194 S. W. 700—vii. 3514(b).
- v. Hancock (Tex. Civ. App.) 174 S. W. 657—vi. 698(f); vii. 3302(f).
- v. Hewitt, 184 S. W. 52, 122 Ark. 480—vi. 708(j); vii. 3450(g).
- v. Howle, 109 Ark. 400, 160 S. W. 238—vii. 3149(f).
- 124 Ark. 224, 187 S. W. 176—vii. 3146(f).
- v. Kesterson, 140 Ky. 562, 131 S. W. 384—vii. 3149(f).
- v. Prater, 24 Okl. 214, 103 Pac. 558, 23 L. R. A. (N. S.) 917, 20 Ann. Cas. 287—vi. 1935(d), 2096(a), 2112(j), 2122(p).
- 37 Okl. 568, 133 Pac. 48—vii. 1979(j).
- Emmons v. Grand Lodge, A. O. U. W., 4 Boyce (Del.) 272, 88 Atl. 459—vi. 706(h); vii. 3783(u).
- v. Supreme Conclave Improved Order of Heptasophs, 6 Penne-will (Del.) 115, 63 Atl. 891—vi. 798(b).
- Emory v. Glens Falls Ins. Co., 7 Penne-will (Del.) 101, 76 Atl. 230—vii. 3362(d), 3503(h), 3968(f).
- Empire Development Co. v. Title Guar-antee & Trust Co., 157 N. Y. Supp. 68, 171 App. Div. 116—vii. 3327(d).
- Empire Life Ins. Co. v. Einstein, 12 Ga. App. 380, 77 S. E. 209—vii. 3143(f), 3150(f).
- v. Gee, 171 Ala. 435, 55 South. 166—vi. 687(e), 1987(c), 1988(d), 1990(g), 1991(g), 2124(a), 2186(e).
- 178 Ala. 492, 60 South. 90—vi. 638(g), 1952(c), 1956(f); vii. 3169(e), 3175(h).
- v. Johnson, 142 Ga. 330, 82 S. E. 893, Ann. Cas. 1916B, 267—vii. 3218(m), 3223(m).
- v. Jones, 82 S. E. 62, 14 Ga. App. 647—vi. 1953(c), 1979(j), 2015(i).
- v. Mason, 78 S. E. 935, 140 Ga. 141—vi. 1107(e); vii. 3811(k).
- v. Wier, 135 Ga. 130, 68 S. E. 1035—vi. 993(b), 2432(e).
- Empire Mut. Annuity & Life Ins. Co. v. Avery, 3 Ga. App. 97, 59 S. E. 324—vi. 409(a), 422(f), 457(i), 1002(e).
- Empire Mut. Life Ins. Co. v. Allen, 141 Ga. 413, 81 S. E. 120—vii. 3205(i), 3216(m), 3219(m).
- Empire State Surety Co. v. Cameron, 124 N. W. 442, 110 Minn. 92—vii. 2814(p).
- v. Moran Bros. Co., 71 Wash. 171, 127 Pac. 1104—vi. 922(e).
- v. Northwest Lumber Co., 203 Fed. 417, 121 C. C. A. 527—vii. 3572(c), 3575(c).
- v. Pacific Nat. Lumber Co., 200 Fed. 224, 118 C. C. A. 410—vii. 2768(d).
- Employers' Indemnity Co. v. Kelly Coal Co., 149 S. W. 992, 149 Ky. 712, 41 L. R. A. (N. S.) 963—vii. 3318(a).
- Employers' Liability Assur. Corporation v. Chicago & Big Muddy Coal & Coke Co., 141 Fed. 962, 73 C. C. A. 278—vii. 2768(d).
- v. Grand Rapids Bridge Co., 139 Mich. 351, 102 N. W. 975—vi. 616(f).
- v. Jones County Lumber Co., 72 South. 152, 111 Miss. 759—vii. 3572(c), 3574(c).
- v. Kelly-Atkinson Const. Co., 182 Ill. App. 372—vi. 643(k).
- 195 Ill. App. 620—vi. 922(e).
- v. Morrow, 143 Fed. 750, 74 C. C. A. 640—vii. 3302(f).
- v. Stanley Deposit Bank, 149 S. W. 1025, 149 Ky. 735—vi. 2437(b); vii. 3579(e).
- E. M. Upton Cold Storage Co. v. Pa-cific Coast Casualty Co., 147 N. Y. Supp. 765, 162 App. Div. 842—vii. 3343(g).

- Ennis v. Retail Merchants' Ass'n Mut. Fire Ins. Co., 33 N. D. 20, 156 N. W. 234—vi. 1829(g), 1903(j); vii. 2681(h), 3531(a).
- Enright v. National Council Knights and Ladies of Security, 253 Ill. 460, 97 N. E. 681—vi. 629(a), 677(a), 698(f), 2171(a), 161 Ill. App. 365—vi. 629(a), 677(a), 698(f), 2171(a).
- Ensel v. Lumber Ins. Co., 88 Ohio St. 269, 102 N. E. 955—vi. 765(a), 1331(c), 1394(b).
- Ensworth v. National Life Ass'n, 81 Conn. 592, 71 Atl. 791—vii. 2832(c).
- Enthoven v. American Fidelity Co. (Sup.) 128 N. Y. Supp. 805—vii. 2583(h).
- Equitable Life Assur. Soc. v. Amos, 140 S. W. 172, 145 Ky. 167—vi. 2417(i), 2422(j).
- v. Babbitt, 11 Ariz. 116, 89 Pac. 531, 13 L. R. A. (N. S.) 1046—vi. 2407(g).
- v. Brame, 112 Miss. 859, 73 South. 812—vi. 1038(a); vii. 3864(b).
- v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682—vi. 120(d).
- v. Commonwealth, 89 S. W. 537, 121 Ky. 543, 28 Ky. Law Rep. 333; 89 S. W. 538, 28 Ky. Law Rep. 550, 551—vi. 1012(d).
- 89 S. W. 538, 28 Ky. Law Rep. 550, 551—vi. 1012(d).
- v. Cosby (Ky.) 126 S. W. 142—vi. 2409(g), 2423(k).
- v. Ellis, 105 Tex. 526, 147 S. W. 1152—vi. 2259(a), 2430(d); vii. 2460(a), 2464(b), 2479(d), 2699(b), 2700(b), 2724(l), 2777(e).
- 105 Tex. 526, 152 S. W. 625—vi. 2430(d); vii. 2479(d), 2699(b), 2724(l), 2777(e).
- (Tex. Civ. App.) 137 S. W. 184—vi. 2259(a), 2310(e), 2432(e); vii. 2460(a), 2464(b), 2700(b), 2704(b), 2777(e).
- v. Golson, 48 South. 1034, 159 Ala. 508—vi. 2259(a), 2417(i).
- v. Hardin, 166 Ky. 51, 178 S. W. 1155—vii. 3270(a).
- v. Keiper (C. C.) 159 Fed. 206—vi. 2112(j).
- 165 Fed. 595, 91 C. C. A. 433—vi. 2096(a), 2112(j).
- v. Kitts Adm'r, 109 Va. 105, 63 S. E. 455—vi. 456(h).
- v. Meuth, 140 S. W. 157, 145 Ky. 160, Ann. Cas. 1913B, 661—vi. 629(a).
- 141 S. W. 37, 145 Ky. 746—vi. 629(a).
- v. O'Connor's Adm'r, 162 Ky. 262, 172 S. W. 496—vi. 273(n), 290(k).
- v. Perkins, 41 Ind. App. 183, 80 N. E. 682—vi. 658(g), 2277(k), 2425(a); vii. 3810(j).
- Equitable Life Assur. Soc. v. Stough, 45 Ind. App. 411, 89 N. E. 612—vii. 2837(d), 3755(g).
- v. Weightman (Okla.) 160 Pac. 629, L. R. A. 1917B, 1210—vii. 3153(h), 3724(b), 3802(g).
- v. Weil, 103 Miss. 186, 60 South. 133, Ann. Cas. 1915B, 636—vi. 124(d), 652(b).
- v. Wilson, 144 Ga. 729, 87 S. E. 1055—vi. 2413(h).
- 110 Va. 571, 66 S. E. 836—vi. 532(k).
- v. Winn, 126 S. W. 153, 137 Ky. 641, 28 L. R. A. (N. S.) 558—vi. 123(d), 124(d).
- Equitable Life Ins. Co. v. Hebert, 37 Ind. App. 373, 76 N. E. 1023, 117 Am. St. Rep. 324—vii. 3255(l), 3257(m), 3265(o).
- Equitable Mut. Fire Ins. Corp.'s Receiver v. Murray, 131 Ky. 740, 115 S. W. 816—vi. 938(b), 952(h).
- Equitable Surety Co. v. Bank of Hazen, 121 Ark. 422, 181 S. W. 279—vi. 2435(a), 2449(c); vii. 3579(e), 3580(e).
- 121 Ark. 630, 181 S. W. 1200—vi. 2435(a), 2449(c); vii. 3579(e), 3580(e).
- Equitable Trust Co. v. National Surety Co., 63 Atl. 699, 214 Pa. 159, 6 Ann. Cas. 465—vii. 3343(g).
- v. Newman, 146 App. Div. 953, 131 N. Y. Supp. 1113—vi. 507(f).
- 69 Misc. Rep. 494, 127 N. Y. Supp. 243—vi. 507(f), 1012(d).
- 72 Misc. Rep. 52, 129 N. Y. Supp. 259—vi. 507(f), 1012(d).
- v. Taylor, 131 N. Y. Supp. 475, 146 App. Div. 424—vi. 507(f).
- Erb v. Commercial Mut. Accident Co., 232 Pa. 215, 81 Atl. 207—vii. 3156(a), 3159(a), 3207(j).
- Erickson v. Brotherhood of Locomotive Firemen & Enginemen, 129 Minn. 264, 152 N. W. 537—vi. 428(i).
- v. Ladies of the Maccabees of the World, 25 S. D. 183, 126 N. W. 259—vi. 1957(g), 2026(d); vii. 2562(b), 3285(f).
- v. Modern Woodmen of America, 86 Pac. 584, 43 Wash. 242—vi. 814(k).
- Ericson v. Supreme Ruling of Fraternal Mystic Circle, 105 Tex. 170, 146 S. W. 160—vi. 1019(c), 1054(e).
- Erie Brewing Co. v. Ohio Farmers' Ins. Co., 30 Ohio Cir. Ct. R. 390—vii. 3639(h).
- 81 Ohio St. 1, 89 N. E. 1065, 25 L. R. A. (N. S.) 740, 135 Am. St. Rep. 735, 18 Ann. Cas. 265—vii. 3639(h).
- Ertischek v. New Hampshire Fire Ins. Co., 162 N. Y. Supp. 1047, 98 Misc. Rep. 279—vi. 1699(f), 1705(h), 1712(m).

- Essington Enamel Co. v. Granite State Fire Ins. Co., 45 Pa. Super. Ct. 550—vi. 482(i), 507(f); vii. 2509(e).
- Estes v. Brotherhood of Railroad Trainmen, 70 S. E. 725, 88 S. C. 221—vii. 2773(c), 2781(f).
- v. Local Union, No. 43, United Brotherhood of Carpenters & Joiners of America, 97 Atl. 326, 90 Conn. 426—vi. 632(c), 820 (n); vii. 3724(b), 3762(r), 3769 (s).
- Etheredge v. Aetna Ins. Co., 102 S. C. 313, 86 S. E. 687—vi. 629(a).
- Etter v. St. Paul Fire & Marine Ins. Co., 54 Pa. Super. Ct. 187—vi. 368(c).
- Eureka Life Ins. Co. v. Hawkins, 39 App. D. C. 329—vi. 2197(g); vii. 2715 (h).
- Evans v. Central Life Ins. Co., 125 Pac. 86, 87 Kan. 641, 41 L. R. A. (N. S.) 1130—vi. 457(i), 1039 (a).
- v. Crawford County Farmers' Mut. Fire Ins. Co., 109 N. W. 952, 130 Wis. 189, 9 L. R. A. (N. S.) 485, 118 Am. St. Rep. 1009—vii. 3376(c), 3413(b), 3698(f).
- v. Glens Falls Ins. Co., 38 Utah, 461, 113 Pac. 1019—vi. 837(c), 839(c).
- v. Modern Woodmen of America, 147 Mo. App. 155, 129 S. W. 485—vi. 1997(j), 2033(i), 2232 (b), 2254(b), 2256(c).
- v. Moore, 28 Ohio Cir. Ct. R. 1—vi. 273(o).
- v. Southern Tier Masonic Relief Ass'n, 94 App. Div. 541, 88 N. Y. Supp. 162—vi. 715(n), 182 N. Y. 453, 75 N. E. 317—vi. 715(n).
- Evanston Golf-Club v. Home Ins. Co., 95 S. W. 980, 119 Mo. App. 175—vi. 744(f).
- Evansville Ice & Storage Co. v. Fidelity & Casualty Co., 61 Ind. App. 194, 111 N. E. 812—vi. 635(d); vii. 3316(a).
- Everson v. Casualty Co. of America, 94 N. E. 459, 208 Mass. 214—vii. 2831(b), 3209(k).
- v. General Accident Fire & Life Assur. Corp., 88 N. E. 658, 202 Mass. 169—vi. 1127(b), 1151(o), 1933(b), 1948(k), 1984(a), 2090 (a), 2092(b), 2094(e), 2207(b), 2254(b); vii. 3307(h), 3356(a).
- Eves v. Sovereign Camp W. O. W., 153 Mo. App. 247, 133 S. W. 657—vii. 3762 (r).
- E. W. Edwards & Son v. Pacific Coast Casualty Co., 161 N. Y. Supp. 895, 98 Misc. Rep. 30—vii. 3582(g).
- Exchange Bank v. Nebraska Underwriters' Ins. Co., 120 N. W. 1010, 84 Neb. 110, 133 Am. St. Rep. 614—vii. 2540 (m).
- Exchange Mut. Fire Ins. Co. v. Consolidated Mut. Fire Ins. Co., 46 Pa. Super. Ct. 601—vi. 1625 (b), 1636(i); vii. 2621(a), 3934 (b).
- Exchange Mut. Fire Ins. Co. v. Warsaw-Wilkinson Co., 181 Fed. 330, 104 C. C. A. 518—vi. 822(a).
- Exchange Underwriters' Agency of Royal Exch. Assur. v. Bates, 195 Ala. 161, 69 South. 956—vi. 735(b), 1376(g).

F

- Fadden v. Phoenix Ins. Co., 77 N. H. 392, 92 Atl. 335—vi. 166(j), 1332(d); vii. 3093(g).
- Fager v. Commercial Union Assur. Co., 189 Mo. App. 464, 176 S. W. 1064—vi. 1900(f); vii. 3120(b), 3889(c).
- Fahle v. Connecticut Mut. Life Ins. Co., 155 Mo. App. 15, 134 S. W. 60—vi. 2411(g).
- Fair v. Metropolitan Life Ins. Co., 5 Ga. App. 708, 63 S. E. 812—vii. 2528 (f), 2625(a), 2650(r), 3468(b).
- Fairbanks Canning Co. v. London Guaranty & Accident Co., 154 Mo. App. 327, 133 S. W. 664—vi. 632(c), 795 (h); vii. 2768(d).
- Fairfield v. Union Life Ins. Co., 196 Ill. App. 7—vi. 1965(b); vii. 2755(b).
- Falberg v. Continental Casualty Co., 195 Ill. App. 237—vi. 2065(a), 2090 (a); vii. 2690(d).
- Falkinberg v. Modern American Fraternal Order, 149 Ill. App. 622—vi. 2365(j).
- Fanner v. Home Ins. Co., 195 Mo. App. 138, 189 S. W. 626—vi. 1382(j).
- Farber v. American Automobile Ins. Co., 177 S. W. 675, 191 Mo. App. 307—vi. 68(l), 1185(k), 1190(a), 1318(g); vii. 3089(g).
- Fargo v. Supreme Tent Knights of Macabees, 96 App. Div. 491, 89 N. Y. Supp. 65—vi. 707(i), 717(n); vii. 3236(c), 185 N. Y. 578, 78 N. E. 1103—vi. 707(i), 717(n); vii. 3236 (c).
- Farley v. Spring Garden Ins. Co., 148 Wis. 622, 134 N. W. 1054—vii. 2465(b), 2545(o), 2649(p).
- v. Western Assur. Co., 62 Or. 41, 124 Pac. 199—vii. 3503(h).
- Farmers' Alliance Ins. Co. v. Ferguson, 78 Kan. 791, 98 Pac. 231—vii. 2680 (h), 2683(b).
- Farmers' Feed Co. v. Insurance Co. of North America, 92 C. C. A. 95, 166 Fed. 111—vii. 2621 (a).
- (D. C.) 162 Fed. 379—vii. 2621 (a).
- Farmers' Home Ins. Co. v. Carey, 130 Ky. 602, 113 S. W. 841—vi. 973(v), 982(f).
- Farmers' Mercantile Co. v. Farmers' Ins. Co., 161 Iowa, 5, 141 N. W. 447—vii. 2487(i), 3076(m), 3077(m), 3077 (n), 3085(e), 3823(a).
- Farmers' Milling Co. v. Mill Owners' Mut. Fire Ins. Co., 127 Iowa, 314, 103 N. W. 207—vi. 950(g); vii. 2680(h), 2789(a).

- Farmers' Mutual v. Reser*, 88 N. E. 349, 43 Ind. App. 634—vi. 756 (k).
 88 N. E. 353, 43 Ind. App. 738—vi. 756(k).
Farmers' Mut. Equity Ins. Society v. Smith, 165 S. W. 675, 158 Ky. 459, L. R. A. 1915B, 844—vi. 643(j), 1675(i).
Farmers' Mut. Fire Ass'n v. Steed (Ga. App.) 93 S. E. 75—vi. 1829(g); vii. 2673(f).
Farmers' Mut. Fire Ins. Co. v. Hill, 45 Ind. App. 605, 91 N. E. 361—vii. 2665(c), 3037(a).
 v. Jackman, 73 N. E. 730, 35 Ind. App. 1—vii. 2464(b), 2649(p).
Farmers' Mut. Ins. Ass'n v. Stewart, 192 Ala. 23, 68 South. 254—vi. 449(d).
 v. Tankersley, 13 Ala. App. 524, 69 South. 410—vii. 2555(a), 2658(a), 2792(c), 2815(a), 3544(a).
Farmers' Mut. Life Protective Ass'n v. Elliott, 4 Ga. App. 342, 61 S. E. 493—vii. 2724(i).
Farmers' Nat. Bank v. Delaware Ins. Co., 94 N. E. 834, 83 Ohio St. 309—vii. 2483(f), 2610(i), 2663(b), 2690(d).
Farmers' State Bank v. Equitable Fidelity & Title Guaranty Co., 152 N. W. 512, 35 S. D. 385—vii. 3952(d).
 v. Smith, 36 N. D. 225, 162 N. W. 302—vii. 3726(d).
 v. Title Guaranty & Trust Co., 113 S. W. 1147, 133 Mo. App. 705—vii. 3320(b).
Farmers' United Tp. Mut. Hill Ass'n v. Dally, 98 Minn. 13, 107 N. W. 555—vi. 938(c), 978(b).
Farmers' & Breeders' Mut. Reserve Fund Live Stock Ins. Co. v. Derr, 59 Pa. Super. Ct. 600—vii. 2815(a).
Farmers' & Mechanics' Life Ass'n v. Caine, 224 Ill. 599, 79 N. E. 956—vii. 2465(b), 2604(e), 2704(b), 3870(d), 3872(d).
 123 Ill. App. 419—vii. 2465(b), 2604(c), 2704(b), 3870(d), 3872(d).
Farmers' & Merchants' Ins. Co. v. Bodge, 76 Neb. 31, 106 N. W. 1004, 110 N. W. 1018—vi. 1654(a), 1656(b), 1679(k); vii. 2664(b), 2692(e).
 v. Cuff, 29 Okl. 105, 116 Pac. 435, 35 L. R. A. (N. S.) 892—vii. 3019(e).
Farmers' & Merchants' Irr. Co. v. U. S. Fidelity & Guaranty Co., 77 Neb. 144, 108 N. W. 156—vi. 610(c).
Farmers' & Merchants' Mut. Life Ass'n v. Mason (Ind. App.) 116 N. E. 852—vi. 628(a), 998(e), 2267(e); vii. 2699(b), 2708(c), 2726(n).
Farmers' & Merchants' State Bank v. United States Fidelity & Guaranty Co., 28 S. D. 315, 133 N. W. 247, 36 L. R. A. (N. S.) 1152—vi. 635(d), 846(i); vii. 3320(b).
Farmers' & Threshers' Mut. Ins. Co. v. Koons, 120 Ill. App. 303—vi. 1873(b).
Farner v. Massachusetts Mut. Acc. Ass'n, 67 Atl. 927, 219 Pa. 71, 123 Am. St. Rep. 621—vii. 3157(a), 3168(e).
Farnsley's Adm'r v. Philadelphia Life Ins. Co., 161 S. W. 1111, 156 Ky. 699—vii. 3255(i).
Farra v. Braman, 171 Ind. 529, 86 N. E. 843—vi. 698(f); vii. 3736(h), 3758(q), 3767(s).
 (Ind. App.) 82 N. E. 926—vi. 698(f), 803(e), 1097(a); vii. 3722(b), 3749(n), 3755(q), 3758(q).
 (Ind. App.) 84 N. E. 155—vi. 698(f), 803(e); vii. 3722(b), 3749(n), 3755(q), 3758(q).
Farragher v. Knights and Ladies of Security, 159 Pac. 3, 98 Kan. 601—vi. 1957(g).
Farrell v. Farmers' & Merchants' Ins. Co., 120 N. W. 929, 84 Neb. 72—vii. 3382(b), 3490(c).
Farren v. Maine Cent. R. Co., 90 Atl. 497, 112 Me. 81, 52 L. R. A. (N. S.) 203—vii. 3899(c).
Farrenkoph v. Holm, 237 Ill. 94, 86 N. E. 702—vi. 800(c), 806(f); vii. 2559(b), 3735(g).
 142 Ill. App. 336—vii. 3735(g).
Farwell v. Home Ins. Co., 136 F. 93, 68 C. C. A. 557—vi. 861(d).
Faso v. La Cerdese Commodore Vito La Mantia Society, 156 N. Y. Supp. 1090, 93 Misc. Rep. 163—vi. 703(h).
Fass v. Liverpool, London & Globe Fire Ins. Co., 105 S. C. 364, 89 S. E. 1040—vii. 3641(i), 3959(b).
Faubel v. Eckhart, 151 Wis. 155, 138 N. W. 615—vii. 3773(s).
Faulk v. Fraternal Mystic Circle, 88 S. E. 431, 171 N. C. 301—vi. 706(h); vii. 3964(e).
Faurot v. Swan, 155 Mich. 284, 118 N. W. 955—vi. 1013(a), 1016(b).
Favors v. Bankers' Health & Life Ins. Co., 89 S. E. 1048, 18 Ga. App. 522—vi. 1048(h).
Fay v. Aetna Life Ins. Co., 268 Mo. 373, 187 S. W. 861—vii. 3304(g).
Federal Casualty Co. v. Taylor, 53 Ind. App. 565, 102 N. E. 146—vi. 1964(a).
Federal Ins. Co. v. Detroit Fire & Marine Ins. Co., 202 Fed. 648, 121 C. C. A. 58—vii. 3901(d).
 v. Hiter, 164 Ky. 743, 176 S. W. 210, L. R. A. 1915E, 575—vi. 636(e); vii. 3033(i).
Federal Life Ins. Co. v. Arnold, 46 Ind. App. 114, 90 N. E. 493, 91 N. E. 357—vi. 2407(g), 2408(g).
 v. Flanagan, 134 Ill. App. 595—vii. 2755(b).
 v. Hoskins (Tex. Civ. App.) 185 S. W. 607—vi. 616(f).

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 (Ind. App.) 82 N. E. 943—vi. 577(f), 613(e), 632(c), 691(a); vii. 2757(b), 3941(c).
 (Ind. App.) 85 N. E. 796—vi. 577(f); vii. 3941(c).
- v. Petty**, 177 Ind. 256, 97 N. E. 1011—vii. 2757(b).
- v. Risinger**, 46 Ind. App. 146, 91 N. E. 535—vi. 128(g), 1028(f); vii. 3943(d).
- v. Warren**, 181 S. W. 331, 167 Ky. 740—vi. 2267(e), 2413(h).
- Federal Union Surety Co. v. Flemister**, 95 Ark. 389, 130 S. W. 574—vi. 654(d); vii. 2777(e), 2811(m).
- Feeney v. National Council Knights and Ladies of Security**, 172 Ill. App. 51—vi. 1956(f), 2096(a).
- Feinberg v. New York Life Ins. Co.**, 256 Pa. 61, 100 Atl. 538—vi. 1969(f), 2108(g), 2144(j).
- Feinman v. United States Grand Lodge Order Brith Abraham**, 87 Misc. Rep. 327, 149 N. Y. Supp. 862—vi. 1969(f).
- Feldblum v. Congregation Bikur Cholim**, 131 App. Div. 854, 116 N. Y. Supp. 289—vi. 715(n), 717(n).
- Feliciana Bank & Trust Co. v. Union Cent. Life Ins. Co.**, 69 South. 91, 137 La. 674—vi. 1110(g).
- Felix v. Fidelity Mut. Life Ins. Co.**, 64 Atl. 903, 216 Pa. 95—vii. 3260(n), 3265(o).
- Fellman v. Royal Ins. Co.**, 184 Fed. 577, 106 C. C. A. 557—vii. 3989(k).
- 185 Fed. 689, 107 C. C. A. 637—vii. 3989(k).
- Fenn v. Northwestern Nat. Life Ins. Co.**, 90 Kan. 34, 133 Pac. 159—vii. 2706(c), 2709(d).
- Fenton v. Cascade Mut. Fire Ass'n**, 60 Wash. 389, 111 Pac. 343—vi. 1738(f), 1881(f).
- v. Iowa State Traveling Men's Ass'n**, 139 Iowa, 166, 117 N. W. 251—vii. 3205(i).
- Ferdenando v. Milwaukee Mechanics' Ins. Co.**, 81 Wash. 244, 142 Pac. 693—vii. 3409(d), 3496(e), 3543(e).
- Ferencz v. Greek Catholic Union**, 54 Pa. Super. Ct. 642—vii. 3868(c).
- Ferguson v. Grand Lodge of Iowa Legion of Honor**, 174 Iowa, 61, 156 N. W. 176—vi. 707(i).
- v. Lumbermen's Ins. Co.**, 45 Wash. 209, 88 Pac. 128—vi. 735(b).
- v. Northern Assur. Co.**, 26 S. D. 346, 128 N. W. 125—vi. 351(d), 458(i), 628(a), 848(a), 850(b).
- v. Phoenix Mut. Life Ins. Co.**, 84 Vt. 350, 79 Atl. 997, 35 L. R. A. (N. S.) 844—vii. 2837(d), 2863(b).
- Ferguson v. Providence-Washington Ins. Co.**, 137 Fed. 1018, 70 C. C. A. 62—vii. 2893(h).
- (D. C.) 125 Fed. 141—vii. 2893(h).
- Ferlage v. Supreme Tribe of Ben Hur**, 153 Ky. 645, 156 S. W. 139—vi. 700(f).
- Ferrandini v. Bankers' Life Ass'n**, 51 Wash. 442, 99 Pac. 6—vi. 1964(a), 1965(b), 1969(f).
- Ferrar v. Western Assur. Co.**, 30 Cal. App. 489, 159 Pac. 609, 611—vi. 335(b), 428(i); vii. 2796(f).
- Ferretti v. Prudential Ins. Co.**, 49 Misc. Rep. 489, 97 N. Y. Supp. 1007—vii. 3741(k).
- Ferris v. Court of Honor**, 116 N. W. 448, 152 Mich. 322—vii. 3257(m).
- v. Loyal Americans of the Republic**, 116 N. W. 445, 152 Mich. 314—vii. 3265(o), 3471(c).
- Feuerstein v. German Union Fire Ins. Co. of Baltimore**, 126 N. Y. Supp. 201, 141 App. Div. 456—vi. 1175(a).
- Few v. Supreme Lodge, K. P.**, 136 Ga. 181, 71 S. E. 130—vi. 469(e), 496(o), 505(e), 507(f).
- F. E. & J. L. Thorp v. Aetna Ins. Co.**, 72 Atl. 690, 75 N. H. 251—vi. 638(g), 733(b), 758(m).
- Fidelity Deposit Co. v. Champion Ice Mfg. & Cold Storage Co.**, 133 Ky. 74, 117 S. W. 393—vii. 3337(d).
- Fidelity Ins. Co. v. Atlantic Coast Line R. Co.**, 80 S. E. 1069, 165 N. C. 136—vii. 3893(a).
- Fidelity Mut. Life Ins. Co. v. Beck**, 84 Ark. 57, 104 S. W. 533, 1102—vi. 1951(b), 2142(h), 2183(b); vii. 2634(f).
- v. Blain**, 107 N. W. 877, 144 Mich. 218—vii. 3265(o).
- v. Russell**, 75 Ark. 25, 86 S. W. 814—vi. 663(b), 677(a), 2269(f); vii. 2508(d).
- v. Click**, 124 S. W. 764, 93 Ark. 162—vi. 2432(e).
- v. Dean (Okl.)**, 156 Pac. 304—vii. 2768(a).
- v. Elmore**, 111 Miss. 137, 71 South. 305—vi. 2096(a).
- v. Goza**, 13 Ga. App. 20, 78 S. E. 735—vi. 2271(g); vii. 2726(n).
- v. Miazza**, 93 Miss. 18, 46 South. 817, 136 Am. St. Rep. 534—vi. 654(d), 1953(c), 1956(f), 2061(k), 2131(e), 2142(h).
- 93 Miss. 422, 48 South. 1017—vi. 2103(d), 2144(j), 2146(k).
- v. Oliver**, 111 Miss. 133, 71 South. 302—vi. 2259(a), 2411(g).
- v. Zapp (Tex. Civ. App.)**, 160 S. W. 139—vii. 3286(f), 3864(b).
- Fidelity Phoenix Fire Ins. Co. v. Abilene Dry Goods Co. (Tex. Civ. App.)**, 159 S. W. 172—vii. 3042(c), 3662(d).

- Fidelity Phoenix Fire Ins. Co. v. Cleveland** (Okl.) 156 Pac. 638—vi. 791(d); vii. 3700(g).
- v. Friedman**, 117 Ark. 71, 174 S. W. 215—vii. 3411(f), 3490(c), 3889(c).
- v. Hilliard**, 65 Fla. 443, 62 South. 585—vi. 864(g).
- v. O'Bannon** (Tex. Civ. App.) 178 S. W. 731—vi. 1331(c), 1733(d); vii. 3089(g).
- v. Ray**, 196 Ala. 425, 72 South. 98—vii. 2521(c), 2665(c), 2680(h).
- v. Sadau** (Tex. Civ. App.) 167 S. W. 334—vii. 3384(d), 3412(a), 3514(b), 3561(d).
- (Tex. Civ. App.) 178 S. W. 559—vii. 3347(a), 3355(d), 3412(a), 3549(b).
- Fidelity Title & Trust Co. v. Illinois Life Ins. Co.**, 63 Atl. 51, 213 Pa. 415—vi. 686(e).
- Fidelity & Casualty Co. v. Bank of Timmons-ville**, 139 Fed. 101, 71 C. C. A. 299—vi. 2439(c); vii. 3321(b), 3579(e).
- v. Cooper**, 126 S. W. 111, 137 Ky. 544—vii. 3204(i), 3495(e), 3531(a).
- v. Dierks Lumber & Coal Co.**, 114 S. W. 55, 133 Mo. App. 637—vi. 864(g), 934(o).
- v. Dulany**, 91 Atl. 574, 123 Md. 486—vii. 3037(a), 3042(c), 3531(a), 3562(d).
- v. Fayetteville Wagon, Wood & Lumber Co.**, 94 Ark. 90, 125 S. W. 653—vi. 677(a).
- v. First Bank of Fallis**, 142 Pac. 312, 42 Okl. 662—vii. 3035(a), 3042(c).
- v. Fischer** (Supp.) 101 N. Y. Supp. 545—vi. 935(o).
- v. Fresno Flume & Irr. Co.**, 161 Cal. 466, 119 Pac. 646, 37 L. R. A. (N. S.) 322—vi. 458(j), 934(o).
- v. Hart**, 142 Ky. 25, 133 S. W. 996—vi. 632(c); vii. 3303(f), 3464(d), 3531(a).
- v. Joiner** (Tex. Civ. App.) 178 S. W. 806—vii. 3290(b), 3304(g).
- v. J. W. Crowds Drug Co.** (Tex. Civ. App.) 166 S. W. 1186—vi. 921(e).
- v. Martin**, 163 Ky. 12, 173 S. W. 307, L. R. A. 1917F, 924—vi. 795(h); vii. 3335(c).
- v. Meyer**, 106 Ark. 91, 152 S. W. 995, 44 L. R. A. (N. S.) 493—vi. 636(e), 2002(h); vii. 2559(b), 3174(g), 3201(h), 3887(c).
- v. Morrison**, 129 Ill. App. 360—vii. 3156(a), 3163(c), 3172(f), 3208(k).
- v. Palmer**, 91 Conn. 410, 99 Atl. 1052—vi. 864(g), 878(s).
- v. Southern Ry. News Co.**, 101 S. W. 900, 31 Ky. Law Rep. 55—vii. 2767(d), 3330(a).
- 103 S. W. 297, 31 Ky. Law Rep. 725—vii. 2767(d), 3330(a).
- Fidelity & Casualty Co. v. Stacey's Ex'rs**, 143 Fed. 271, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, 6 Ann. Cas. 955—vii. 3156(a), 3160(a), 3207(j).
- v. Thompson**, 154 Fed. 484, 83 C. C. A. 324, 11 L. R. A. (N. S.) 1069, 12 Ann. Cas. 181—vii. 3195(f).
- v. Tyler Cotton Oil Co.** (Tex. Civ. App.) 184 S. W. 304—vi. 921(e).
- v. Walton**, 24 Okl. 671, 104 Pac. 909—vi. 439(c).
- v. Williams**, 21 Colo. App. 539, 122 Pac. 815—vii. 3032(i).
- Fidelity & Deposit Co. v. Colorado Ice & Storage Co.**, 103 Pac. 383, 45 Colo. 443—vi. 2435(a), 2448(b), 2449(c); vii. 3323(b).
- v. Commonwealth Trust Co.**, 119 N. Y. Supp. 598, 65 Misc. Rep. 88—vi. 914(a).
- v. Guthrie Nat. Bank**, 87 Pac. 300, 17 Okl. 397—vi. 2435(a), 2439(c).
- v. J. G. McCrory Co.**, 177 App. Div. 493, 164 N. Y. Supp. 561—vi. 851(d); vii. 2820(c).
- v. Johnston**, 117 La. 880, 42 South. 357—vi. 1069(e), 1100(b); vii. 3701(g).
- v. Maile**, 177 Mich. 231, 142 N. W. 1087—vi. 2451(c).
- Fidelity & Guaranty Co. of New York v. Western Bank**, 94 S. W. 3, 29 Ky. Law Rep. 639—vi. 2437(b), 2439(c), 2451(c); vii. 3579(e).
- Fields v. German American Ins. Co.**, 140 Mo. App. 158, 120 S. W. 697—vi. 1822(e), 1824(e); vii. 2622(a), 2665(c), 2670(e), 3413(b).
- v. Queen Ins. Co.**, 140 Mo. App. 168, 120 S. W. 700—vi. 1822(e), 1824(e); vii. 2622(a), 2665(c), 2670(e), 3413(b).
- Fienglas v. New Amsterdam Casualty Co.** (N. Y. Mun. Ct.) 151 N. Y. Supp. 371—vii. 3042(c).
- Filley v. Illinois Life Ins. Co.**, 91 Kan. 220, 137 Pac. 793, L. R. A. 1915D, 130—vii. 3736(h).
- 93 Kan. 193, 144 Pac. 257, L. R. A. 1915D, 134—vi. 57(f); vii. 3736(h), 3755(g).
- Filmore v. Metropolitan Life Ins. Co.**, 82 Ohio St. 208, 92 N. E. 26, 28 L. R. A. (N. S.) 675, 137 Am. St. Rep. 778—vii. 3153(h), 3155(h).
- Finch v. Bond**, 158 Ky. 389, 165 S. W. 400—vi. 56(f).
- Finkbohner v. Glens Falls Ins. Co.**, 6 Cal. App. 379, 92 Pac. 318—vi. 637(f), 1486(c), 1715(a), 1736(e).
- Finley v. New Brunswick Fire Ins. Co.** (C. C.) 193 Fed. 195—vii. 2807(k).
- v. Western Empire Ins. Co.**, 125 Pac. 1012, 69 Wash. 673—vi. 459(j), 607(a); vii. 2807(k), 2809(l).
- Finleyson Bros. v. Liverpool & London & Globe Ins. Co.**, 16 Ga. App. 51, 84 S. E. 311—vi. 1829(g); vii. 2476(b).

- Finn v. Eminent Household of Columbian Woodmen*, 163 Ky. 187, 173 S. W. 349—vii. 3781(u).
- Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122—vi. 691(a), 698(f); vii. 3722(b), 3755(q), 3758(q), 3762(r), 3767(s), 3769(s), 3773(s).
- Fire Ass'n of Philadelphia v. American Cement Plaster Co.*, 37 Tex. Civ. App. 629, 84 S. W. 1115—vi. 1355(f); vii. 2532(i).
- v. Appel*, 80 N. E. 952, 76 Ohio St. 1—vii. 3627(s), 3670(j).
- v. Cornett Bros.*, 142 Pac. 317, 42 Okl. 703—vi. 1829(g).
- v. Evansville Brewing Ass'n (Fla.)* 75 South. 196—vi. 1379(h); vii. 3027(g), 3700(g).
- v. La Grange & Lockhart Compress Co.*, 50 Tex. Civ. App. 172, 109 S. W. 1134—vii. 2541(m), 2622(a), 3893(a).
- v. Patton*, 15 N. M. 304, 107 Pac. 679, 27 L. R. A. (N. S.) 420—vii. 3915(j).
- v. Perry (Tex. Civ. App.)* 185 S. W. 374—vi. 1745(i).
- v. Powell (Tex. Civ. App.)* 188 S. W. 47—vi. 747(g).
- v. Richards (Tex. Civ. App.)* 179 S. W. 926—vii. 3364(e), 3966(c).
- v. Schellenger*, 83 N. J. Eq. 144, 90 Atl. 240—vii. 3893(a).
- v. Strayhorn (Tex. Civ. App.)* 165 S. W. 901—vii. 3052(c), 3838(b).
- v. Taylor*, 76 Kan. 392, 91 Pac. 1070—vi. 636(e), 643(k); vii. 3656(p).
- v. Wells*, 83 N. J. Eq. 140, 90 Atl. 244—vii. 3893(a), 3911(h).
- 84 N. J. Eq. 484, 94 Atl. 619, L. R. A. 1916A, 1280, Ann. Cas. 1917A, 1296—vii. 3911(h).
- v. Yeagley*, 34 Ind. App. 387, 72 N. E. 1035—vii. 2545(o), 2621(a), 2650(r), 2777(e), 3539(d), 3557(a).
- Fireman's Fund Ins. v. Kelley (Ky.)* 116 S. W. 790—vii. 2781(f).
- Fireman's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co.*, 2 Cal. App. 690, 84 Pac. 253—vi. 1283(g); vii. 3932(a), 3934(b).
- v. Finklestein*, 73 N. E. 814, 164 Ind. 376—vi. 220(c); vii. 3118(a), 3403(a).
- v. Globe Nav. Co.*, 234 Fed. 273, 148 C. C. A. 175—vii. 3901(d).
- 236 Fed. 618, 149 C. C. A. 614—vi. 636(e), 639(b), 640(i), 1565(m); vii. 2673(f), 2920(a), 2929(a).
- v. Hellner*, 49 So. 297, 159 Ala. 447, 17 Ann. Cas. 793—vii. 2791(b), 2811(n).
- v. Lyon (Tex. Civ. App.)* 171 S. W. 801—vii. 2610(i), 2777(e).
- Fireman's Fund Ins. Co. v. Palatine Ins. Co.*, 150 Cal. 252, 88 Pac. 907—vi. 755(j); vii. 3099(a), 3861(h).
- v. Searcy*, 163 S. W. 1103, 157 Ky. 749—vi. 403(j).
- Firemen's Ins. Co. v. Boland*, 30 Ohio Cir. Ct. R. 811—vi. 1228(b).
- v. Jesse French Piano & Organ Co. (Tex. Civ. App.)* 187 S. W. 691—vii. 3059(c).
- v. Larey*, 188 S. W. 7, 125 Ark. 93, L. R. A. 1917A, 29, Ann. Cas. 1917B, 1225—vi. 1730(b).
- First Nat. Bank v. Aetna Ins. Co.*, 188 Mich. 251, 153 N. W. 1063—vi. 1331(c).
- v. Caledonian Ins. Co.*, 188 Mich. 254, 153 N. W. 1064—vi. 1331(c).
- v. German American Ins. Co.*, 23 N. D. 139, 134 N. W. 873, 38 L. R. A. (N. S.) 213—vi. 1832(a), 1835(b); vii. 2540(m), 3015(c).
- v. Maikranz*, 44 Pa. Super. Ct. 225—vii. 3548(b), 3560(c), 3986(j).
- v. Maryland Casualty Co.*, 162 Cal. 61, 121 Pac. 321, Ann. Cas. 1913C, 1170—vi. 637(f); vii. 3033(i), 3042(c).
- v. United States Fidelity & Guaranty Co. of Baltimore*, 137 N. W. 742, 150 Wis. 601—vi. 635(d), 2451(c); vii. 3014(c), 3323(b).
- First Nat. Life Assur. Society of America v. Farquhar*, 135 Pac. 619, 75 Wash. 667—vi. 1011(d).
- First Texas State Ins. Co. v. Bell (Tex. Civ. App.)* 184 S. W. 277—vii. 3273(b).
- v. Capers (Tex. Civ. App.)* 183 S. W. 794—vii. 2715(h).
- v. Hare (Tex. Civ. App.)* 180 S. W. 282—vii. 3458(a).
- v. Herndon (Tex. Civ. App.)* 184 S. W. 283—vii. 3458(a).
- v. Jimenez (Tex. Civ. App.)* 163 S. W. 656—vii. 3255(l), 3257(m), 3265(o), 3887(c).
- v. Jones (Tex. Civ. App.)* 167 S. W. 9—vii. 3203(h).
- Fish v. Metropolitan Life Ins. Co.*, 73 N. J. Law, 619, 64 Atl. 109—vi. 2168(h).
- 75 N. J. Law, 822, 69 Atl. 176—vii. 2563(c), 2577(g).
- Fishblate v. Fidelity & Casualty Co. of New York*, 140 N. C. 589, 53 S. E. 354—vi. 1991(g), 2096(a), 2185(d); vii. 2579(g).
- Fischer v. Midland Casualty Co.*, 189 Ill. App. 486—vii. 3207(j).
- Fisher v. Sun Ins. Co.*, 74 W. Va. 694, 83 S. E. 729, L. R. A. 1915C, 619—vi. 732(b), 1903(j); vii. 2779(f).
- v. Supreme Lodge Knights and Ladies of Honor*, 190 Mo. App. 606, 176 S. W. 269—vi. 435(l); vii. 3532(b).

- Fisher v. Travelers' Ins. Co.*, 124 Tenn. 450, 138 S. W. 316, Ann. Cas. 1912D, 1246—vi. 610(c); vii. 3213(k), 3378(e), 3456(i), 3526(g).
- Fisk v. Fire Ass'n of Philadelphia*, 158 N. W. 947, 192 Mich. 243—vii. 3491(c), 3561(d).
- Fitzger Brewing Co. v. American Bonding Co. of Baltimore*, 115 Minn. 78, 131 N. W. 1067—vii. 3968(f).
- Fitzgerald v. Metropolitan Life Ins. Co.*, 90 Vt. 291, 98 Atl. 498—vi. 449 (d), 1950(a), 1951(b), 1952(c), 1979(j), 2008(b).
- v. Rawlings Implement Co.*, 79 Atl. 915, 114 Md. 470, Ann. Cas. 1912A, 650—vi. 264(d), 1080(b), 1110(g); vii. 3788(a).
- Fitzpatrick v. Knights of Columbus*, 143 App. Div. 540, 128 N. Y. Supp. 366—vi. 636(e), 2348(d), 2368(l).
- 144 App. Div. 936, 129 N. Y. Supp. 1122—vi. 636(e), 2368 (l).
- 206 N. Y. 726, 100 N. E. 1127 —vi. 636(e), 2348(d).
- v. North American Accident Ins. Co.*, 18 Cal. App. 264, 123 Pac. 209 —vii. 3968(f), 3989(k).
- Fitzsimmons-Kreider Milling Co. v. Ohio Millers' Mut. Fire Ins. Co.*, 158 Ill. App. 174—vii. 2523(c), 2683(b).
- Flakne v. Minnesota Farmers' Mut. Ins. Co.*, 105 Minn. 479, 117 N. W. 785—vi. 838(c).
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- 141 N. Y. Supp. 1119, 157 App. Div. 885—vi. 2296(f).
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- v. Westchester Fire Ins. Co.*, 207 Mass. 337, 93 N. E. 646—vi. 1526(d), 1717(b); vii. 3941(c).
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- Flynn v. Hanover Fire Ins. Co.*, 121 N. Y. Supp. 621, 67 Misc. Rep. 117 —vii. 3077(m).
- v. Orient Ins. Co.*, 77 N. H. 431, 92 Atl. 737—vii. 3477(a), 3963(d), 3966(c).
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- Formark v. Equitable Fire Ass'n, 23 S. D. 102, 120 N. W. 777—vii. 2531(i).
- Forney v. Fidelity Mut. Life Ins. Co., 124 Pac. 406, 87 Kan. 397—vi. 2398(c); vii. 2769(a).
- Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224—vi. 614(e), 704(h), 706(i), 717(n); vii. 2832(c), 2841(f).
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- Foryciarz v. Prudential Ins. Co., 158 N. Y. Supp. 834, 95 Misc. Rep. 306—vi. 263(b), 643(k), 1080(b), 1084(d); vii. 2748(g), 3741(k), 3805(i).
- Fosmark v. Equitable Fire Ass'n, 23 S. D. 102, 120 N. W. 777—vii. 2537(k), 2622(a), 2651(s), 3548(b).
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- Foster v. Home Ins. Co., 143 Fed. 307, 74 C. C. A. 445—vi. 1610(f).
- v. Missouri Pac. Ry. Co., 128 S. W. 36, 143 Mo. App. 547—vii. 3893(a).
- v. North American Acc. Ins. Co., 176 Iowa, 399, 158 N. W. 401—vii. 3303(f).
- v. Pioneer Mut. Ins. Ass'n, 79 Pac. 793, 37 Wash. 288—vii. 2510(e), 2555(a).
- Fountain v. Connecticut Fire Ins. Co., 158 Cal. 760, 112 Pac. 546, 139 Am. St. Rep. 214—vi. 1610(f), 1612(f).
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- v. Security Mut. Life Ins. Co. (Ga. App.) 93 S. E. 118—vi. 2395(b).
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- Fox v. Queen Ins. Co., 124 Ga. 948, 53 S. E. 271—vi. 158(a), 163(h), 1373(c).
- Frain v. Modern Woodmen of America, 60 Colo. 585, 155 Pac. 330—vii. 2688(b), 3138(d).
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- v. Switchmen's Union of North America, 87 Wash. 634, 152 Pac. 512—vi. 610(c).
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- Frankel v. Massachusetts Bonding & Ins. Co. (Mo. App.) 177 S. W. 775—vii. 3033(i).
- v. United States Casualty Co. (Sup.) 115 N. Y. Supp. 631—vi. 1933(b).
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- v. Lynch, 156 Ill. App. 485—vi. 408(a), 477(h).
- Frank I. Abbott Lumber Co. v. Home Ins. Co., 72 So. 841, 140 La. 130—vii. 3889(c).
- Franklin v. Continental Casualty Co., 184 Ill. App. 259—vii. 3172(g), 3175(h), 3184(b), 3199(h).
- Franklin Life Ins. Co. v. American Nat. Bank, 84 S. W. 789, 74 Ark. 1—vi. 2051(a), 2294(e).
- v. Boykin, 10 Ga. App. 345, 73 S. E. 545—vi. 612(e).
- v. Commissioner of Insurance, 124 N. W. 522, 159 Mich. 636—vi. 2263(b).
- v. McAfee, 90 S. W. 216, 28 Ky. Law Rep. 676—vi. 487(k); vii. 2717(h), 2773(c).
- v. Morrell, 84 Ark. 511, 106 S. W. 680—vi. 652(b); vii. 2837(d), 2863(b).
- Frank Parmelee Co. v. Aetna Life Ins. Co., 166 Fed. 741, 92 C. C. A. 403—vii. 3582(g).
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- Fraternal Bankers of America v. Wire, 150 Mo. App. 765, 129 S. W. 765—vii. 4001(b).
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- Fraternal Relief Ass'n v. Edwards, 9 Ga. App. 43, 70 S. E. 265—vi. 543(a), 706(h), 708(j); vii. 3239(d), 3244(h).

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v. Steele (1904) 114 Ill. App. 194—vi. 578(h), 2026(d).
v. Teutsch, 170 Ill. App. 47—vi. 803 (e), 808(h); vii. 3755(g), 3767(s).
Fraternal Union of America v. Zeigler, 145 Ala. 287, 39 South. 751—vi. 708 (j), 711(i), 712(i), 715(n); vii. 3234(c).
Fraternities Acc. Order v. Armstrong, 56 S. E. 565, 106 Va. 746—vi. 700(f).
Frazell v. Life Ins. Co., 153 N. C. 60, 68 S. E. 912—vi. 1039(a).
Frazier v. Metropolitan Life Ins. Co., 161 Mo. App. 709, 141 S. W. 936—vi. 1969(f), 1991(g), 2098(b), 2185(d), 2254 (b); vii. 3472(d).
Frecking v. Germania Fire Ins. Co. (Ind. App.) 81 N. E. 217—vi. 446(b), 454(g), 459(j); vii. 3707(i).
Fredman v. Consolidated Fire & Marine Ins. Co., 104 Minn. 76, 116 N. W. 221, 124 Am. St. Rep. 608—vi. 860(d).
Freed v. American Fire Ins. Co., 90 Miss. 72, 43 So. 947, 11 L. R. A. (N. S.) 368, 122 Am. St. Rep. 307—vii. 3898(b).
Freeman v. Farmers' Mut. Fire & Lightning Ins. Co., 97 S. W. 225, 121 Mo. App. 532—vi. 1871(b); vii. 3040(b).
Freemyer v. Industrial Mut. Indemnity Co., 101 Ark. 61, 141 S. W. 508—vi. 581(j).
Frees v. National Ben Franklin Fire Ins. Co., 148 N. Y. Supp. 790, 163 App. Div. 57—vii. 3409(d), 3435(b).
Freitas v. Freitas, 159 Pac. 611, 31 Cal. App. 16—vii. 3815(b).
French v. Columbia Life & Trust Co., 156 Pac. 1042, 80 Or. 412—vi. 2267(e).
v. Delaware Ins. Co., 180 S. W. 55, 167 Ky. 176—vi. 1375(f).
v. Fidelity & Casualty Co., 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011—vi. 628(a), 632(c), 638(g), 1940(f), 1979(j), 1980 (j), 2096(a), 2110(i), 2117(l), 2127(c), 2144(j), 2150(c), 2439 (c); vii. 2634(f), 3157(a), 3200 (h), 3959(b).
v. Modern Woodmen of America, 194 Ill. App. 438—vi. 2156(a).
v. Provident Savings Life Assur. Soc., 205 Mass. 424, 91 N. E. 577—vii. 3769(s).
v. State Farmers' Mut. Hail Ins. Co., 29 N. D. 426, 151 N. W. 7, L. R. A. 1915D, 766—vi. 732(b), 884(u); vii. 2555(a), 2580(h).
French Mut. General Society of Mutual Insurance against Theft v. United States Fidelity & Guaranty Co. of Baltimore City (D. C.) 203 Fed. 558—vii. 3932(a), 3937(b).
Frenz v. Hume (D. C.) 141 Fed. 481—vii. 2956(e), 2957(f), 2961(h), 2967(j).
Frese v. Mutual Life Ins. Co. of New York, 11 Cal. App. 387, 105 Pac. 265—vi. 118(c); vii. 2276(i), 2660(b), 2831 (b).
Freund v. Freund, 75 N. E. 925, 218 Ill. 189, 109 Am. St. Rep. 283—vii. 3761(r), 3767(s), 3769(s), 3772(s), 3773(s), 3776(t), 117 Ill. App. 565—vii. 3761(r), 3767(s), 3769(s), 3772(s), 3773 (s), 3776(t).
Frick v. Hartford Life Ins. Co. (Iowa) 159 N. W. 247—vi. 692(b).
v. Millers' Nat. Ins. Co. (Mo.) 184 S. W. 1161—vi. 1812(n); vii. 2467 (e).
v. Svea Fire & Life Ins. Co., 67 Atl. 747, 218 Pa. 420—vii. 3085(e), 3390(h).
v. United Firemen's Ins. Co., 67 Atl. 743, 218 Pa. 409—vii. 3085(e), 3390(h).
Fricke v. United States Indemnity Soc., 61 Atl. 431, 78 Conn. 188—vii. 3301(f).
Friedland v. Commonwealth Fire Ins. Co., 143 App. Div. 570, 128 N. Y. Supp. 705—vi. 543(a), 566(j).
Friedman v. Knights of Modern Macca-bees, 170 Ill. App. 33—vii. 3685(d).
Friend v. Southern States Life Ins. Co. (Okla.) 160 Pac. 457, L. R. A. 1917B, 208—vi. 636(e), 2259(a), 2281(a).
Frierson v. United States Casualty Co., 100 S. C. 162, 84 S. E. 535—vi. 1969 (f); vii. 3461(c).
Fries-Breslin Co. v. Bergen (C. C.) 168 Fed. 360—vi. 341(g).
176 Fed. 76, 99 C. C. A. 384—vi. 341(g).
v. Star Fire Ins. Co. (C. C.) 150 Fed. 611—vi. 1402(e), 1902(i), 1903(j).
154 Fed. 35, 83 C. C. A. 147—vi. 1402(e), 1902(i), 1903(j).
Frink v. National Mut. Fire Ins. Co., 74 S. E. 33, 90 S. C. 544, 'Ann. Cas. 1913D, 221—vii. 2793(d).
Frisbie v. Fidelity & Casualty Co., 112 S. W. 1024, 133 Mo. App. 30—vii. 3032 (i).
Fritz v. Pennsylvania Fire Ins. Co., 85 N. J. Law. 171, 88 Atl. 1065, 50 L. R. A. (N. S.) 35—vii. 2793(d).
Frost v. Frost, 88 N. E. 446, 202 Mass. 100, 27 L. R. A. (N. S.) 184, 132 Am. St. Rep. 476—vi. 1110 (g); vii. 3787(a).
v. North British & Mercantile Ins. Co., 60 Atl. 803, 77 Vt. 407—vii. 3502(h), 3503(h), 3531(a), 3590 (e).
Frye v. Equitable Life Assur. Society of United States, 89 Atl. 57, 111 Me. 287—vi. 2417(i); vii. 2514(g).
Fuches v. Mutual Life Ins. Co. (Sup.) 164 N. Y. Supp. 105—vii. 3754(p).
Fugina v. Northwestern Nat. Life Ins. Co., 144 N. W. 989, 155 Wis. 480—vii. 2706(c), 2777(e).

- Fuhrman v. Sun Ins. Office, 180 Mich. 439, 147 N. W. 618, Ann. Cas. 1916A, 466—vi. 193(e), 1340(g); vii. 3417(e).
- Fuller v. Supreme Council Royal Arcanum (Ind. App.) 115 N. E. 372—vi. 813 (k).
- Fulton v. Insurance Co. of North America, 69 C. C. A. 198, 136 Fed. 182—vii. 2880(b).
- (D. C.) 127 Fed. 413—vii. 2880 (b).
- v. Metropolitan Casualty Ins. Co., 19 Ga. App. 127, 91 S. E. 228—vii. 3156(a).
- Funk v. Anchor Fire Ins. Co., 171 Iowa, 331, 153 N. W. 1048—vi. 162 (g), 1763(g); vii. 2521(c).
- v. Fire Ass'n of Philadelphia, 157 Ill. App. 602—vii. 3504(h), 3528 (h), 3655(p).
- v. Shawnee Fire Ins. Co., 108 Pac. 832, 82 Kan. 525—vi. 1064(a).
- 83 Kan. 800, 108 Pac. 1135—vi. 1064(a).
- Funke Estate v. Law Union & Crown Ins. Co., 97 Neb. 412, 150 N. W. 262—vi. 632(c).
- Fuos v. Dietrich (Tex. Civ. App.) 101 S. W. 291—vi. 1091(f), 1100(b).
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- Furey v. Metropolitan Life Ins. Co., 49 Pa. Super. Ct. 592—vii. 3472(d).
- Furlong & Meloy v. Aachen & Munich Fire Ins. Co. (Iowa) 113 N. W. 1089—vi. 756(l); vii. 3122(e).
- v. American Cent. Fire Ins. Co., 113 N. W. 1087, 136 Iowa, 499—vii. 3122(c).
- v. North British & Mercantile Ins. Co., 136 Iowa. 468, 113 N. W. 1084—vi. 756(l); vii. 3122(c).
- Furry's Adm'r v. General Acc. Ins. Co., 68 Atl. 655, 80 Vt. 526, 15 L. R. A. (N. S.) 206, 130 Am. St. Rep. 1012, 13 Ann. Cas. 515—vi. 637(f); vii. 3303(g).
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- Gadsden v. Crafts, 88 S. E. 423, 171 N. C. 288—vii. 3329(e).
- Gaffey v. St. Paul Fire & Marine Ins. Co., 164 App. Div. 381, 149 N. Y. Supp. 859—vii. 3585(a).
- 221 N. Y. 113, 116 N. E. 778—vii. 3585(a).
- Gage v. Connecticut Fire Ins. Co., 127 Pac. 407, 34 Okl. 744—vii. 3076 (m), 3660(b), 3828(d).
- v. Dettling, 143 N. Y. Supp. 767, 82 Misc. Rep. 370—vi. 2348(d).
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- Gaines v. Fidelity & Casualty Co., 81 N. E. 169, 188 N. Y. 411, 11 Ann. Cas. 71—vi. 2065(a).
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- Gall v. Sovereign Camp of Woodmen of the World, 166 Mich. 690, 132 N. W. 468—vi. 2064(l).
- Gallagher v. Fidelity & Casualty Co. of New York, 148 N. Y. Supp. 1016, 163 App. Div. 556—vii. 3157(a).
- v. Metropolitan Life Ins. Co., 67 Misc. Rep. 115, 121 N. Y. Supp. 638—vi. 449(d), 454(g).
- Gallfher v. State Mut. Life Ins. Co., 150 Ala. 543, 43 So. 833, 124 Am. St. Rep. 83—vii. 2726(n).
- Gallop v. Royal Neighbors of America, 167 Mo. App. 85, 150 S. W. 1118—vi. 698(f), 2003(b).
- Galvin v. Knights of Father Mathew, 155 S. W. 45, 169 Mo. App. 496—vi. 698(f), 2229(a), 2245(g); vii. 2495(o), 2683(b), 2772(b), 2777(e).
- Gamble v. Metropolitan Life Ins. Co., 78 S. E. 875, 95 S. C. 196—vii. 2777 (e).
- Gamble-Robinson Co. v. Massachusetts Bonding & Ins. Co., 113 Minn. 38, 129 N. W. 131—vi. 2451(c).
- Gambrill v. United States Health & Accident Ins. Co., 83 S. C. 236, 65 S. E. 231—vii. 2657(v).
- Gans v. Aetna Life Ins. Co., 161 App. Div. 250, 146 N. Y. Supp. 453—vi. 901(b).
- 214 N. Y. 326, 108 N. E. 443, L. R. A. 1915F, 703—vii. 3229(b).
- Garcelon v. Commercial Travelers' Easterns Acc. Ass'n, 195 Mass. 531, 81 N. E. 201, 10 L. R. A. (N. S.) 961—vii. 3216(m), 3220(m), 3223(m).
- Gardner v. Continental Ins. Co., 125 Ky. 464, 101 S. W. 908, 31 Ky. Law Rep. 89—vi. 1388(g); vii. 2558(a), 2744(c).
- v. Hermann, 116 Minn. 161, 133 N. W. 558—vi. 344(i).
- v. Inter-Ocean Life & Casualty Co., 93 Kan. 810, 145 Pac. 844—vii. 2460(a), 2614(j), 2702(b).
- v. Metropolitan Life Ins. Co., 114 N. E. 717, 225 Mass. 439—vi. 2205(a), 2254(b).
- v. North State Mut. Life Ins. Co., 79 S. E. 806, 163 N. C. 367, 48 L. R. A. (N. S.) 714, Ann. Cas. 1915B, 652—vi. 535(b), 1953(c), 2009(d), 2101(d); vii. 2467(c), 2520(c).
- v. United Surety Co., 125 N. W. 264, 110 Minn. 291, 26 L. R. A. (N. S.) 1004—vi. 455(h); vii. 3181(b).

- Garfinkel v. Alliance Life Ins. Co., 140 Ill. App. 380—vi. 247(b), 253(f); vii. 2625(a), 2633(e).
- Garlick v. Metropolitan Life Ins. Co., 95 N. Y. Supp. 645, 109 App. Div. 175—vii. 2768(a).
- Garner v. Milwaukee Mechanics' Ins. Co., 73 Kan. 127, 84 Pac. 717, 4 L. R. A. (N. S.) 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459—vi. 1715(a), 1734(e).
- Garrebrant v. Continental Ins. Co., 75 N. J. Law, 577, 67 Atl. 90, 12 L. R. A. (N. S.) 443—vi. 1699(f); vii. 3644(j), 3654(p).
- Garretson v. Western Life Indemnity Co., 175 Iowa, 172, 157 N. W. 160—vii. 3934(b), 3942(d).
- Garrett v. Garrett, 159 Pac. 1050, 31 Cal. App. 173—vi. 696(d); vii. 3761(r), 3769(s).
- Garrity v. Catholic Order of Foresters, 243 Ill. 411, 90 N. E. 753—vi. 2212(e), 2245(g), 2254(b).
148 Ill. App. 189—vi. 2212(e), 2245(g).
- Gartsee v. Citizens' Ins. Co., 30 Pa. Super. Ct. 602—vii. 2676(g), 3350(a).
- Garvey v. Phoenix Preferred Acc. Ins. Co., 108 N. Y. Supp. 186, 123 App. Div. 106—vi. 632(c); vii. 3195(f), 3200(h).
- Gash v. Home Ins. Co., 153 Ill. App. 31—vi. 629(a), 1673(h), 1686(p); vii. 3544(a).
- Gaskill v. Northern Assur. Co., 73 Wash. 668, 132 Pac. 643—vi. 862(f); vii. 2521(c), 2555(a).
- Gassaway v. Browning (Tex. Civ. App.) 175 S. W. 481—vii. 3698(f).
- Gate City Fire Ins. Co. v. Thornton, 63 S. E. 638, 5 Ga. App. 585—vi. 1387(e).
- Gately-Haire Co. v. Niagara Fire Ins. Co., 176 Ind. App. 921, 162 N. Y. Supp. 473—vii. 2823(d).
116 N. E. 1015, 221 N. Y. 162—vii. 2820(c).
- Gatzweiler v. Milwaukee Electric Ry. & Light Co., 136 Wis. 34, 116 N. W. 633, 18 L. R. A. (N. S.) 211, 128 Am. St. Rep. 1057, 16 Ann. Cas. 633—vii. 3904(e).
- Gauger v. American Patriots, 263 Ill. 604, 105 N. E. 755—vi. 698(f); vii. 3150(f).
184 Ill. App. 490—vi. 698(f); vii. 3150(f).
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- Gaugler v. Chicago, M. & P. S. Ry. Co. (D. C.) 197 Fed. 79—vii. 3899(b).
- Gavin v. Des Moines Life Ins. Co., 149 Iowa, 152, 126 N. W. 906—vii. 3244(h), 3265(o), 3268(p).
- Gaynor v. Travelers' Ins. Co., 12 Ga. App. 601, 77 S. E. 1072—vii. 3159(a), 3172(g), 3207(k), 3211(k), 3212(k), 3213(k).
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- Geddes v. Ann Arbor Railroad Employes' Relief Ass'n, 178 Mich. 486, 144 N. W. 828—vi. 2344(d), 2350(e).
- Gegare v. Fox River Land & Loan Co., 140 N. W. 305, 152 Wis. 548—vi. 336(c).
- General Acc. Fire & Life Assur. Corporation v. Homely, 109 Md. 93, 71 Atl. 524—vii. 3176(a), 3200(b), 3312(i).
- v. Lacy (Tex. Civ. App.) 151 S. W. 1170—vii. 3890(c).
- v. Louisville Home Telephone Co., 175 Ky. 96, 193 S. W. 1031, L. R. A. 1917D, 952—vi. 632(c), 2454(f).
- v. Stedman (Tex. Civ. App.) 153 S. W. 692—vii. 3303(g).
- v. Stratton, 178 S. W. 1060, 165 Ky. 754—vi. 177(a), 1437(h).
- v. Walker, 99 Miss. 404, 55 South. 51—vii. 3966(c).
- General Acc. Fire & Life Ins. Co. v. Shields, 9 Ala. App. 214, 62 South. 400—vii. 3173(g).
- General Acc. Ins. Co. v. Hayes, 52 Tex. Civ. App. 272, 113 S. W. 990—vii. 3303(f), 3311(i), 3534(b).
- General Acc. Life & Fire Assur. Corporation v. Richardson, 163 S. W. 482, 157 Ky. 503—vii. 2559(b), 2777(e).
- General Accident & Life Assur. Corporation v. Meredith, 141 Ky. 92, 132 S. W. 191—vii. 3157(a), 3169(e), 3174(g).
- General Ry. Signal Co. v. Title Guaranty & Surety Co., 139 App. Div. 925, 123 N. Y. Supp. 1117—vi. 607(a); vii. 3906(f).
203 N. Y. 407, 96 N. E. 734—vi. 607(a); vii. 3906(f).
- Genna v. Continental Casualty Co., 167 Ill. App. 413—vii. 3168(e), 3173(g).
- Genrow v. Modern Woodmen of America, 114 N. W. 1009, 151 Mich. 250—vi. 2071(a).
- George A. Hormel & Co. v. American Bonding Co., 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513—vi. 635(d), 637(f); vii. 3582(g).
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- v. Shaw (Tex. Civ. App.) 197 S. W. 316—vii. 3207(j).
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- v. Harris, 52 S. E. 88, 124 Ga. 114—vii. 3103(b).
- v. Lanier, 1 Ga. App. 186, 57 S. E. 910—vi. 824(a).

- Georgia Home Ins. Co. v. Hoskins, 71 Fla. 282, 71 South. 285—vi. 1779(j).
- v. Kelley (Ky.) 113 S. W. 882—vi. 337(c), 848(a), 850(b).
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- Georgia Life Ins. Co. v. Easter, 189 Ala. 472, 66 So. 514, L. R. A. 1915C, 456—vii. 3163(c).
- v. Friedman, 105 Miss. 789, 63 South. 214—vi. 1822(e).
- v. McCranie, 78 S. E. 1115, 12 Ga. App. 855—vii. 3257(m), 3261(n), 3887(c).
- Geraghty v. Washtenaw Mut. Fire Ins. Co., 108 N. W. 1102, 145 Mich. 635—vi. 747(g); vii. 2621(a).
- Gerlach v. Grain Shippers' Mut. Fire Ins. Ass'n, 156 Iowa, 333, 136 N. W. 691—vii. 3585(a), 3893(a).
- v. Metropolitan Life Ins. Co. (Sup.) 112 N. Y. Supp. 1095—vi. 2156(a), 2182(a).
- German Alliance Ins. Co. v. Newbern, 25 Okl. 489, 106 Pac. 826, 28 L. R. A. (N. S.) 337—vii. 3392(i).
- German-American Ins. Co. v. Brown, 87 S. W. 135, 75 Ark. 251—vii. 3015(c), 3035(a), 3387(f), 3432(m).
- v. Cuff, 29 Okl. 114, 116 Pac. 438—vii. 3019(e).
- v. Darrin, 103 Pac. 87, 80 Kan. 578—vi. 422(f), 445(b), 458(j), 527(i), 854(a), 1814(a).
- v. Fuller, 26 Okl. 722, 110 Pac. 763—vi. 1819(c), 1822(e), 1828(f), 1829(g).
- v. Harper & Wilson, 86 S. W. 817, 75 Ark. 98—vii. 2665(c), 2670(e).
- v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77—vii. 2460(a), 2464(b), 2504(c), 2521(c), 2542(n), 2544(o), 2614(i), 2658(a), 2665(c), 2771(b), 3027(g), 3028(g), 3035(a), 3037(a), 3042(c), 3043(e).
- v. Lee (Okl.) 151 Pac. 642—vi. 734(b), vii. 2617(k).
- v. McBee, 31 Ohio Cir. Ct. R. 469—vi. 1685(n); vii. 3049(a), 3096(g), 3624(q).
- 85 Ohio St. 161, 97 N. E. 378—vii. 3049(a), 3096(g), 3100(a).
- v. Messenger, 25 Colo. App. 153, 136 Pac. 478—vi. 636(e), 734(b).
- v. Shaddix (Tex. Civ. App.) 194 S. W. 1178—vi. 1687(p).
- v. Yellow Poplar Lumber Co., 84 S. W. 551, 27 Ky. Law Rep. 105—vii. 2607(g).
- German-American Trust Co. v. Ten Winkel (Colo.) 160 Pac. 188—vii. 3774(s), 3776(u).
- German Baptist Tri-County Mut. Protective Ass'n of Cass, Miami and Howard Counties v. Conner (Ind. App.) 115 N. E. 804—vii. 3027(g).
- German Fire Ins. Co. v. Duncan, 130 S. W. 804, 140 Ky. 27—vi. 1737(e); vii. 3081(c).
- v. Gibbs, Wilson & Co., 92 S. W. 1068, 42 Tex. Civ. App. 407—vi. 351(e), 355(h), 607(a), 612(d); vii. 3492(c), 3504(h), 3586(a), 3588(b), 3657(p), 3712(k), 3715(m), 3716(m).
- 96 S. W. 760, 42 Tex. Civ. App. 407—vi. 351(e), 355(h), 607(a), 612(d); vii. 3492(c), 3504(h), 3586(a), 3588(b), 3657(p), 3712(k), 3715(m), 3716(m).
- v. Greenwald, 51 Ind. App. 469, 99 N. E. 1011—vi. 1848(k); vii. 2532(i), 2622(a).
- v. Herbertson, 49 Colo. 217, 112 Pac. 690—vii. 2630(d), 2649(p).
- v. Walker (Tex. Civ. App.) 146 S. W. 606—vi. 756(k).
- German Ins. Co. v. Beville (Tex. Civ. App.) 126 S. W. 31—vi. 1820(d), 1821(e), 1829(g).
- v. Goodfriend, 97 S. W. 1098, 30 Ky. Law Rep. 218—vi. 365(b), 375(e), 463(a), 501(d), 1788(d); vii. 3014(c), 3042(c).
- v. Hazard Bank, 126 Ky. 730, 104 S. W. 725, 31 Ky. Law Rep. 1126—vii. 3644(j), 3649(l), 3826(b), 3830(f).
- German Mut. Fire Ins. Co. v. Weikel, 155 S. W. 373, 153 Ky. 288—vii. 2790(a), 2810(l).
- German Savings & Loan Society v. Commercial Union Assur. Co., Limited, of London, Eng., 187 Fed. 758, 109 C. C. A. 506—vii. 3025(f), 3028(g).
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- v. Fred G. Clarke Co., 82 Atl. 974, 116 Md. 622, 39 L. R. A. (N. S.) 829, Ann. Cas. 1913D, 488—vii. 2801(h), 2808(l).
- Germania Fire Ins. Co. v. Barringer, 43 Okl. 279, 142 Pac. 1026—vii. 2622(a), 2653(b).
- v. McChristy (Tex. Civ. App.) 101 S. W. 822—vii. 3561(d).
- v. Turley, 179 S. W. 1059, 167 Ky. 57, Ann. Cas. 1917C, 931—vi. 1720(b).
- v. Werner, 76 Ohio St. 543, 81 N. E. 980, 12 L. R. A. (N. S.) 456, 118 Am. St. Rep. 891—vi. 1679(k), 1887(d); vii. 3098(g).
- Germania Life Ins. Co. v. Bouldin, 100 Miss. 660, 56 South. 609—vi. 345(b), 557(l), 615(f), 632(c), 1038(a).
- v. Klein, 137 Pac. 73, 25 Colo. App. 326—vi. 1935(d), 1956(f), 2026(d), 2156(a).
- v. Lauer, 123 Ky. 727, 97 S. W. 363, 30 Ky. Law Rep. 3, 7 L. R. A. (N. S.) 1053—vii. 2467(c), 2478(d), 2694(g).
- v. Wirtz (Mich.) 162 N. W. 981—vii. 3779(u).

- Geronime v. German Roman Catholic Aid Ass'n, 127 Minn. 247, 149 N. W. 291—vi. 2202(c).
- Gertz v. Clover Leaf Casualty Co., 197 Ill. App. 462—vii. 3195(f).
- Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co., 109 Me. 274, 83 Atl. 801, 42 L. R. A. (N. S.) 135, Ann. Cas. 1913E, 738—vi. 85(a), 154(i), 173 (e); vii. 3067(e), 3079(a).
- Gibbs v. Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11—vi. 698(f), 798 (b), 900(a); vii. 3750(n), 3762(r).
- Gibson v. Casualty Co. of America, 140 N. Y. Supp. 1045, 156 App. Div. 144—vii. 3163(c).
- v. Georgia Life Ins. Co., 17 Ga. App. 43, 86 S. E. 335—vii. 3033(i).
- v. Iowa Legion of Honor (Iowa) 159 N. W. 639—vi. 614(e), 707(i), 1033(h), 2356(h), 2378(p); vii. 3531(a).
- v. Pioneer Life Ins. Co., 168 S. W. 818, 181 Mo. App. 302—vi. 449 (d); vii. 3887(c).
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- 146 App. Div. 497, 131 N. Y. Supp. 792—vi. 2254(b); vii. 3783(u).
- 55 Misc. Rep. 98, 105 N. Y. Supp. 244—vi. 409(k), 1717 (n), 2215(g); vii. 2467(c). 2694 (g).
- 199 N. Y. 103, 92 N. E. 111, 20 Ann. Cas. 928—vi. 2205 (a).
- Giffin v. Grand Lodge, A. O. U. W., 99 Neb. 589, 157 N. W. 113, L. R. A. 1916D, 1168—vi. 312(b).
- Gifford v. Workmen's Ben. Ass'n, 105 Me. 17, 72 Atl. 680, 17 Ann. Cas. 1173—vi. 703(h), 704(h), 2338(b), 2395 (b); vii. 2717(h).
- Gilbane v. Fidelity & Casualty Co., 163 Fed. 673, 90 C. C. A. 265—vi. 922(e).
- Gilchrist v. Mystic Workers of the World (Mich.) 163 N. W. 10—vii. 3146 (f).
- Gilchrist Transp. Co. v. Phenix Ins. Co., 170 Fed. 279, 95 C. C. A. 475—vi. 637 (f), 1422(c).
- Gilkey v. Sovereign Camp, W. O. W. (Mo. App.) 178 S. W. 875—vii. 3143 (f), 3152(f).
- Gill v. Manhattan Life Ins. Co., 11 Ariz. 232, 95 Pac. 89—vi. 677(a); vii. 3965 (e), 3979(g), 3997(l).
- Gillen v. New York Life Ins. Co., 178 Mo. App. 89, 161 S. W. 667—vi. 2411 (g); vii. 2863(b), 2866(d).
- Gilles v. United States Casualty Co. (Sup.) 114 N. Y. Supp. 54—vii. 3456 (i).
- Gillespie v. Scottish Union & National Ins. Co., 61 W. Va. 169, 56 S. E. 213, 11 L. R. A. (N. S.) 143—vii. 3700(g), 3915(j).
- Gillham v. Estes, 158 Ill. App. 211—vii. 3788(a).
- Gillis v. Dabney (Sup.) 150 N. Y. Supp. 453—vi. 2395(b).
- Gillis v. Duluth Casualty Ass'n, 133 Minn. 238, 158 N. W. 252—vii. 3220 (m), 3304(g).
- Gilman v. Commonwealth Ins. Co., 92 Atl. 721, 112 Me. 528, L. R. A. 1915C, 758—vi. 1600(b), 1603(b); vii. 3699(g).
- Gilmore v. Continental Casualty Co., 58 Wash. 203, 108 Pac. 447—vi. 2302(a), 2319(i).
- v. Modern Brotherhood of America, 186 Mo. App. 445, 171 S. W. 629—vi. 434(l).
- v. Modern Protective Ass'n, 171 Ill. App. 525—vi. 68(m); vii. 2562(b).
- Gilroy v. Supreme Court L. O. F., 75 N. J. Law, 584, 67 Atl. 1037, 14 L. R. A. (N. S.) 632—vi. 2174(b); vii. 2831 (b), 3679(c).
- Giniso v. Calabrian American Citizens' Mut. Benefit Ass'n, 121 N. Y. Supp. 209, 66 Misc. Rep. 162—vi. 2338(b).
- Ginners' Mut. Underwriters v. Wiley & House (Tex. Civ. App.) 147 S. W. 629—vi. 913(a), 1506(a), 1837(b), 1848 (k); vii. 3094(g).
- Gioia v. Metropolitan Life Ins. Co., 161 N. Y. Supp. 234, 97 Misc. Rep. 380—vii. 2561(b).
- Girard Fire & Marine Ins. Co. v. Bankard, 107 Md. 538, 69 Atl. 415—vii. 4001 (b).
- Gish v. Insurance Co. of North America, 16 Okl. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826—vi. 1814(a); vii. 2498(a), 2500(a), 2502(b), 2620(a), 2658(a), 2781(f).
- Glaser v. Home Ins. Co., 93 N. Y. Supp. 524, 47 Misc. Rep. 89—vii. 3123(c), 3560(c).
- Glaspy v. United Brotherhood, 163 Ill. App. 78—vi. 2245(g); vii. 2496(o), 2500(a).
- Glasscock v. Liverpool & London & Globe Ins. Co. (Tex. Civ. App.) 188 S. W. 281—vii. 2800(g).
- Glassner v. Johnston, 133 Wis. 485, 113 N. W. 977—vii. 2849(j).
- Glazer v. Home Ins. Co., 98 N. Y. Supp. 979, 113 App. Div. 235—vii. 2772(b), 3359(b), 3383(b), 3384(d), 3385(e), 3516(b), 3524(f), 3558(b), 3559(c), 3561(d).
- 96 N. Y. Supp. 136, 48 Misc. Rep. 515—vii. 2772(b), 3359 (b), 3383(b), 3384(d), 3385(e), 3516(b), 3524(f), 3558(b), 3559(c), 3561(d).
- 82 N. E. 727, 190 N. Y. 6—vii. 2772(b), 3359(b), 3383(b), 3384(d), 3385(e), 3516(b), 3524(f), 3558(b), 3559(c), 3561 (d).

- Gleason v. Canterbury Mut. Fire Ins. Co., 64 Atl. 187, 73 N. H. 583—vi. 693(c); vii. 3364(e), 3381(a), 3490(c).
- v. Prudential Fire Ins. Co., 127 Tenn. 8, 151 S. W. 1030—vi. 51(c), 124(e), 163(h), 864(g), 1047(g), 1869(a), 1874(d); vii. 2810(m), 2811(m), 3352(b), 3516(c).
- Glenn v. Colonial Assur. Co., 44 Pa. Super. Ct. 208—vii. 3392(i).
- v. Jefferson Fire Ins. Co., 44 Pa. Super. Ct. 212—vii. 3392(i).
- Glens Falls Ins. Co. v. Michael, 74 N. E. 964, 79 N. E. 905, 167 Ind. 659, 8 L. R. A. (N. S.) 708—vi. 636(e), 765(a); vii. 2630(d), 2665(c), 2670(e).
- v. Walker (Tex. Civ. App.) 166 S. W. 122—vii. 2810(l).
- Glidden v. United States Fidelity & Guaranty Co., 84 N. E. 143, 198 Mass. 109—vi. 2437(b), 2439(c), 2441(e).
- Globe Fire Ins. Co. v. Limburger (Tex. Civ. App.) 193 S. W. 222—vii. 2807(k), 2820(c).
- Globe Mut. Life Ins. Ass'n v. March, 118 Ill. App. 261—vi. 1956(f), 2428(c); vii. 3447(d), 3544(a).
- v. Meyer, 118 Ill. App. 155—vi. 495(o), 507(f), 664(b), 687(f), 2142(h), 2179(f).
- Globe Nav. Co. v. Maryland Casualty Co., 81 Pac. 826, 39 Wash. 299—vii. 3332(a).
- Globe & Rutgers Fire Ins. Co. v. Alaska-Portland Packers' Ass'n, 205 Fed. 32, 123 C. C. A. 340, 49 L. R. A. (N. S.) 374—vi. 1858(r).
- v. Chicago & A. R. Co., 174 Mo. App. 542, 160 S. W. 907—vii. 3908(g).
- v. David Moffat Co., 154 Fed. 13, 83 C. C. A. 91—vi. 563(f), 564(g), 592(h), 642(i), 560(b), 733(b), 839(d).
- v. Emil Willbrandt Surgical Mfg. Co., 123 Ill. App. 262—vii. 2811(n).
- v. Hamilton (Ind. App.) 116 N. E. 597—vi. 632(c), 735(b); vii. 2532(i).
- v. Indiana Reduction Co., 62 Ind. App. 528, 113 N. E. 425—vii. 2521(c), 2643(l).
- v. Robbins & Myers Co., 96 N. Y. Supp. 378, 109 App. Div. 530—vi. 935(o).
- v. Sayle, 107 Miss. 169, 65 South. 125—vii. 4007(f).
- Globe & Rutgers Ins. Co. v. Johnson (Ky.) 127 S. W. 765—vii. 3544(a), 3561(d), 3635(d), 3974(g).
- Glover v. Liverpool & London & Globe Ins. Co., 193 Mo. App. 480, 186 S. W. 583—vii. 3389(c).
- Glyn v. Title Guarantee & Trust Co., 117 N. Y. Supp. 424, 132 App. Div. 859—vii. 3327(d), 3342(f).
- G. Ober & Sons Co. v. Phillips Burttoff Mfg. Co., 40 South. 278, 145 Ala. 625—vii. 3715(m).
- Goddard v. Casualty Co. of America, 167 Fed. 750, 93 C. C. A. 212—vii. 3964(e).
- v. Northwestern Mut. Fire Ass'n, 85 Wash. 585, 148 Pac. 893—vi. 1869(a); vii. 3074(k).
- Godfrey v. Atlantic Horse Ins. Co., 169 N. C. 238, 84 S. E. 339—vii. 2478(d), 2683(b).
- Godwin v. National Council Knights & Ladies of Security, 148 S. W. 980, 166 Mo. App. 289—vi. 68(m), 2398(c); vii. 2706(c), 2715(b).
- Goebel v. German-American Ins. Co., 96 Atl. 627, 127 Md. 419—vii. 2521(c).
- Goertz v. Continental Life Ins. & Inv. Co., 95 Wash. 358, 163 Pac. 938—vi. 2142(h).
- Goff v. Mutual Life Ins. Co., 59 South. 28, 131 La. 98—vi. 1951(b), 1952(c), 1953(c), 2113(k), 2183(b).
- v. Supreme Lodge Royal Achates, 90 Neb. 578, 134 N. W. 239, 37 L. R. A. (N. S.) 1191—vi. 813(k), 1939(f), 1940(f), 1969(f).
- Goldberg v. Crown Mut. Fire Ins. Co., 61 Pa. Super. Ct. 360—vi. 686(e).
- v. Massachusetts Bonding & Ins. Co., 160 N. Y. Supp. 1089, 97 Misc. Rep. 10—vi. 1448(j).
- v. Provident Washington Ins. Co., 87 S. E. 1077, 144 Ga. 783—vi. 3415(c), 3616(m).
- Goldberger v. United States Grand Lodge, Order Brith Abraham, 136 N. Y. Supp. 13, 77 Misc. Rep. 136—vi. 2356(h), 2378(p).
- Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co., 184 S. W. 999, 267 Mo. 524—vii. 4007(f).
- Goldman v. Fidelity & Deposit Co., 104 N. W. 80, 125 Wis. 390—vi. 2439(c); vii. 3323(b), 3580(e).
- Goldschmidt v. Mutual Life Ins. Co., 119 N. Y. Supp. 233, 134 App. Div. 475—vii. 3261(n).
- Goldstein v. New York Life Ins. Co., 176 App. Div. 813, 162 N. Y. Supp. 1088—vi. 416(d), 844(g), 2007(a).
- v. Pacific Home Mut. Fire Ins. Co., 74 Or. 247, 145 Pac. 267—vii. 2490(k).
- Goldstone v. Columbia Life & Trust Co., 33 Cal. App. 119, 164 Pac. 416—vii. 2570(e).
- Goodes v. Order of United Commercial Travelers, 174 Mo. App. 330, 156 S. W. 995—vii. 3157(a), 3172(g), 3174(g), 3184(c), 3185(c).
- Goodman v. Georgia Life Ins. Co., 189 Ala. 130, 66 South. 649—vii. 3719(o).
- Goodwin v. Union Ins. Co., 163 Mich. 41, 127 N. W. 790—vi. 1743(h); vii. 3438(e).

- Goorberg v. Western Assur. Co., 150 Cal. 510, 89 Pac. 130, 10 L. R. A. (N. S.) 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801—vi. 1924(w); vii. 2692 (e), 2772(b).
- Gordon v. Etna Indemnity Co. (Sup.) 116 N. Y. Supp. 558—vii. 3042 (c).
- v. American Patriots (Tex. Civ. App.) 141 S. W. 331—vi. 621 (d).
- v. Mechanics' & Traders' Ins. Co., 120 La. 441, 45 South. 384, 15 L. R. A. (N. S.) 827, 124 Am. St. Rep. 434, 14 Ann. Cas. 886—vi. 1747(a).
- v. Prudential Ins. Co., 231 Pa. 404, 80 Atl. 882—vi. 469(e), 507(f).
- v. St. Paul Fire & Marine Ins. Co. (Mich.) 163 N. W. 956—vii. 2521(c), 3396(k).
- v. Ware Nat. Bank, 65 C. C. A. 580, 132 Fed. 444—vi. 271(j).
- Gorge Hotel Co. v. Liverpool & London & Globe Ins. Co., 122 App. Div. 152, 106 N. Y. Supp. 732—vii. 2807 (k), 2809(l).
- Gorman v. Metropolitan Life Ins. Co., 143 N. Y. Supp. 1063, 158 App. Div. 682—vii. 2525(d), 2768(a).
- Gorsch v. Niagara Fire Ins. Co., 68 Misc. Rep. 344, 123 N. Y. Supp. 877—vi. 1375(f), 1736(e).
- v. Northern Assur. Co. (Sup.) 131 N. Y. Supp. 670—vii. 2621(a).
- Gorton v. Milwaukee Mechanics' Ins. Co., 115 Mo. App. 69, 90 S. W. 747—vii. 2476(b), 2601(d), 2602(d).
- Gosch v. Firemen's Ins. Co., 33 Pa. Super. Ct. 496—vi. 925(g); vii. 2801 (h).
- Gottfredson v. German Commercial Acc. Co., 218 Fed. 582, 134 C. C. A. 310, L. R. A. 1915D, 312—vi. 632(c); vii. 3165(d).
- Gottlieb v. Abraham Lincoln Mut. Life Ins. Co., 73 Atl. 1057, 225 Pa. 102, 133 Am. St. Rep. 856—vi. 2259(a).
- Gould, In re, 102 N. E. 693, 215 Mass. 480, Ann. Cas. 1914D, 372—vii. 3319 (a).
- Gould v. Brock, 221 Pa. 38, 69 Atl. 1122—vi. 114(h), 546(c).
- v. John Hancock Mut. Life Ins. Co., 99 N. Y. Supp. 833, 114 App. Div. 312—vii. 3819(c).
- v. Maine Farmers' Mut. Fire Ins. Co., 114 Me. 416, 96 Atl. 732, L. R. A. 1917A, 604—vi. 184(a), 185(b), 1849(l); vii. 3701(g).
- Gourlay v. Insurance Co. of North America, 181 Mich. 286, 148 N. W. 258—vi. 1075(g).
- Governale v. Interstate Fire Ins. Co., 141 La. 133, 74 South. 791—vi. 1823 (e).
- Goyt v. National Council Knights and Ladies of Security, 178 Ill. App. 377—vii. 3775(t).
- Grabinski v. United States Annuity & Life Ins. Co., 33 S. D. 300, 145 N. W. 553—vi. 1043(f).
- Grace v. Phoenix Ins. Co., 94 Miss. 201, 48 South. 298, 22 L. R. A. (N. S.) 732—vi. 1375(d).
- Grady v. Home Fire & Marine Ins. Co., 63 Atl. 173, 27 R. I. 435, 4 L. R. A. (N. S.) 288—vii. 3606(e), 3607(g), 3626 (s).
- Graf v. National Surety Co., 131 N. Y. Supp. 548, 146 App. Div. 782—vi. 1600(b).
- 126 N. Y. Supp. 616, 70 Misc. Rep. 243—vi. 1600(b).
- Gragg v. Home Ins. Co., 28 Ky. Law Rep. 988, 90 S. W. 1045—vi. 1069(e); vii. 3350(a).
- 139 Ky. 472, 32 Ky. Law Rep. 988, 107 S. W. 321—vi. 1862 (b); vii. 2490(k), 2668(d), 2670(e), 2781(f).
- v. Northwestern Nat. Ins. Co., 126 S. W. 766, 140 Mo. App. 685—vii. 3660(b), 3839(b).
- Gragg & Gragg v. Northwestern Nat. Ins. Co., 111 S. W. 1184, 132 Mo. App. 405—vii. 3094(g), 3095(g), 3603(d).
- Graham v. German American Ins. Co., 79 N. E. 930, 75 Ohio St. 374, 15 L. R. A. (N. S.) 1055, 9 Ann. Cas. 79—vii. 3605(e), 3606(e).
- v. Insurance Co. of North America, 220 Mass. 230, 107 N. E. 915—vii. 3033(i).
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- v. Security Mut. Life Ins. Co., 62 Atl. 681, 72 N. J. Law, 298—vii. 2462(b), 2620(a), 2659(a), 2777(e).
- v. Union Casualty & Surety Co., 120 Mo. App. 671, 97 S. W. 614—vii. 3871(d).
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- Grand Camp Colored Woodmen, Forest of Arkansas, v. Ware, 107 Ark. 102, 153 S. W. 1114—vi. 2373(n).
- Grand Circle Women of Woodcraft v. Rausch, 134 Pac. 141, 24 Colo. App. 304—vii. 3153(h).
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- Grand Fraternity v. Green, 62 Tex. Civ. App. 366, 131 S. W. 442—vii. 3255(l), 3265(o).
- v. Keatley, 4 Boyce (Del.) 308, 88 Atl. 553—vi. 660(i), 1951(b), 1954(d), 1990(g), 2096(a).
- v. Melton, 102 Tex. 399, 117 S. W. 788—vii. 3257(m), 3265(o).
- (Tex. Civ. App.) 111 S. W. 967—vii. 3255(l), 3257(m), 3265(o).

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- Grand Lodge A. O. U. W. v. Banister, 96 S. W. 742, 80 Ark. 190—vii. 3257(m), 3264(o), 3265(o).
- v. Brown, 125 N. W. 400, 160 Mich. 437—vi. 812(j); vii. 3766(r), 3775(t), 3819(c).
- v. Burns, 80 Atl. 157, 84 Conn. 356—vi. 704(h), 709(k), 711(l), 712(l), 2254(b); vii. 2552(v), 2694(g).
- v. Conner, 116 Me. 224, 100 Atl. 1022—vi. 698(f), 800(c); vii. 3748(n).
- v. Crandall, 102 Pac. 843, 80 Kan. 332—vi. 701(g); vii. 2717(h).
- v. Davidson, 127 Ark. 133, 191 S. W. 961, L. R. A. 1917C, 914—vii. 2683(b).
- v. Denzer, 129 Ky. 202, 110 S. W. 882, 33 Ky. Law Rep. 643—vi. 700(f); vii. 3765(r).
- v. Edwards, 27 Ky. Law Rep. 469, 85 S. W. 701—vi. 683(c); vii. 3137(c).
- 89 Atl. 147, 111 Me. 359—vi. 698(f); vii. 3767(s), 3776(u), 3819(c).
- v. Ehlman, 246 Ill. 555, 92 N. E. 962—vi. 808(h); vii. 3748(n).
- v. Haddock, 82 Pac. 583, 72 Kan. 35, 1 L. R. A. (N. S.) 1064—vi. 717(n), 2215(g).
- v. Hall, 76 N. E. 1029, 37 Ind. App. 371—vi. 1964(a).
- v. Jones, 47 Tex. Civ. App. 533, 106 S. W. 184—vii. 3765(r).
- v. McFadden, 111 S. W. 1172, 213 Mo. 269—vii. 3755(q), 3762(r), 3765(r), 3769(s), 3772(s), 3775(t).
- v. McKay, 149 Mich. 90, 112 N. W. 730—vi. 809(i).
- v. Massachusetts Bonding & Ins. Co., 38 R. I. 276, 94 Atl. 859—vi. 564(g), 2439(c).
- v. Oetzel, 139 Ill. App. 4—vi. 632(c), 709(k), 717(n), 2215(g).
- v. O'Malley, 89 S. W. 68, 114 Mo. App. 191—vii. 3732(f), 3762(r), 3765(r), 3770(s).
- v. Smith, 92 Pac. 710, 76 Kan. 509—vi. 701(g); vii. 2715(h), 2727(p).
- v. Taylor, 44 Colo. 373, 99 Pac. 570—vi. 1964(a), 1965(b), 2395(b), 2432(e).
- v. Wood, 113 Ark. 502, 168 S. W. 1070—vii. 3255(l), 3263(o).
- Grand Lodge, Brotherhood of Railroad Trainmen v. Daly, 31 Ohio Cir. Ct. R. 391—vi. 698(f).
- v. Kennedy (Tex. Civ. App.) 188 S. W. 447—vi. 2395(b).
- Grand Lodge, Colored Knights of Pythias v. Horace (Tex. Civ. App.) 191 S. W. 398—vii. 3271(a).
- v. Jones, 100 Miss. 467, 56 South. 458—vi. 701(g), 2338(b), 2354(g), 2398(c), 2400(d).
- v. Mackey (Tex. Civ. App.) 104 S. W. 907—vii. 3749(n), 3776(t).
- v. Seay, 106 Miss. 264, 63 South. 571—vii. 3272(b).
- v. Smith, 89 Miss. 718, 42 South. 89, 119 Am. St. Rep. 719—vii. 3734(g).
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- Grand Lodge Knights of Pythias v. Barnard, 9 Ga. App. 71, 70 S. E. 678—vi. 797(a), 806(f).
- v. Whitehead, 112 S. W. 190, 87 Ark. 115—vi. 2428(c).
- Grand Lodge of Wisconsin of Order of Hermann's Sons v. Lemke, 102 N. W. 911, 124 Wis. 483—vi. 805(f).
- Grand Pacific Hotel Co. v. Michigan Commercial Ins. Co., 243 Ill. 110, 90 N. E. 244—vi. 637(f); vii. 3071(h).
- 148 Ill. App. 143—vi. 637(f); vii. 3071(h).
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- Granger v. Empire State Surety Co., 116 N. Y. Supp. 973, 132 App. Div. 437—vii. 3320(b).
- v. Providence Washington Ins. Co., 200 Fed. 730, 119 C. C. A. 174—vi. 1235(a).
- (D. C.) 192 Fed. 674—vi. 1235(a); vii. 2987(e).
- Granite City Lime & Cement Co. v. Hanover Fire Ins. Co., 194 Ill. App. 68—vii. 3839(b).
- Grant v. Faires, 97 Atl. 1060, 253 Pa. 232—vii. 3724(b), 3767(s), 3778(u).
- v. Independent Order of Sons and Daughters of Jacob, 97 Miss. 182, 52 South. 698—vi. 268(g).
- v. Mutual Protective League, 192 Ill. App. 4—vi. 2023(a).
- Grattan v. Prudential Ins. Co., 108 N. W. 821, 98 Minn. 491—vi. 2302(a).
- Grattan's Estate, In re. 78 N. J. Eq. 225, 78 Atl. 813—vii. 3802(g).

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- Graves v. Knights of the Maccabees of the World, 112 N. Y. Supp. 948, 128 App. Div. 660—vi. 632(c), 637(f), 712(l), 2214(f), 2251(j).
- 92 N. E. 792, 199 N. Y. 397, 139 Am. St. Rep. 912—vi. 637(f), 712(l), 2214(f), 2251(j).
- v. Order of United Commercial Travelers, 162 N. W. 425, 165 Wis. 427—vii. 3458(b), 3462(d), 3466(e).
- Gray v. Blackwood, 112 Ark. 332, 165 S. W. 958—vi. 457(j).
- v. Merchants' Ins. Co., 125 Ill. App. 370—vii. 3341(e), 3590(e), 3838(b).
- v. Reliable Ins. Co., 110 Pac. 728, 26 Okl. 592—vii. 3364(e), 3403(a).
- v. Reynolds, 55 N. J. Eq. 501, 37 Atl. 461—vii. 2810(m).
- v. Sovereign Camp. W. O. W., 47 Tex. Civ. App. 609, 106 S. W. 176—vi. 812(j), 2067(b); vii. 3767(s).
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- Great American Co-op. Fire Ass'n v. Jenkins, 76 S. E. 159, 11 Ga. App. 784—vii. 3464(d), 3534(b), 3544(a), 3667(g).
- Great Camp, Knights of the Modern Maccabees v. Deem, 107 N. W. 447, 143 Mich. 652—vii. 3819(c).
- Great Eastern Casualty Co. v. Boli (Tex. Civ. App.) 187 S. W. 686—vii. 3042(c).
- v. Haynie, 16 Ga. App. 643, 85 S. E. 938—vii. 3949(d), 4001(b).
- v. Reed, 17 Ga. App. 613, 87 S. E. 904—vii. 2509(e), 2658(a), 3449(f), 3496(e), 3538(d), 3561(d).
- v. Robins, 111 Ark. 607, 164 S. W. 750—vii. 3289(b), 3294(c).
- v. Smith (Tex. Civ. App.) 174 S. W. 687—vi. 2096(a), 2110(i).
- v. Thomas (Tex. Civ. App.) 178 S. W. 603—vi. 615(f), 862(f).
- Great Hive, Ladies of Modern Maccabees v. Hodge, 130 Ill. App. 1—vi. 442(a), 1949(l), 3677(b).
- Great Northern Exp. Co. v. National Surety Co., 113 Minn. 162, 129 N. W. 127, 31 L. R. A. (N. S.) 775—vi. 2451(c); vii. 3323(b).
- Great Southern Fire Ins. Co. v. Burns & Billington, 118 Ark. 22, 175 S. W. 1161, L. R. A. 1916B, 1252, Ann. Cas. 1917B, 497—vi. 1774(g); vii. 3889(c).
- Great Western Life Ins. Co. v. Snively, 206 Fed. 20, 124 C. C. A. 154, 46 L. R. A. (N. S.) 1056—vii. 2757(b).
- v. Sparks, 38 Okl. 395, 132 Pac. 1092, 49 L. R. A. (N. S.) 724—vi. 1964(a).
- Greiff v. Equitable Life Assur. Soc., 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659—vi. 120(d).
- Green v. Grand United Order of Odd Fellows (Tex. Civ. App.) 163 S. W. 1068, 1071—vi. 821(o).
- v. Green, 144 S. W. 1073, 147 Ky. 608, 39 L. R. A. (N. S.) 370, Ann. Cas. 1913D, 683—vii. 3736(h).
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- v. Knights and Ladies of Security, 144 S. W. 1076, 147 Ky. 614—vii. 3736(h).
- v. National Annuity Ass'n, 90 Kan. 523, 135 Pac. 586—vi. 1933(b), 1940(f), 2117(l); vii. 2552(o).
- v. National Casualty Co., 87 Wash. 237, 151 Pac. 509—vi. 637(f), 645(m); vii. 3165(d), 3309(h).
- v. Security Mut. Life Ins. Co., 159 Mo. App. 277, 140 S. W. 325—vi. 566(j), 1020(c); vii. 2849(j).
- v. Star Fire Ins. Co., 190 Mass. 586, 77 N. E. 649—vi. 446(b), 461(a); vii. 2792(c), 2801(h), 3379(e), 3710(j).
- v. Supreme Council of Royal Arcanum, 144 App. Div. 761, 129 N. Y. Supp. 791—vi. 703(h), 708(j), 711(l), 714(m), 717(n).
- 206 N. Y. 591, 100 N. E. 411—vi. 714(m).
- (Sup.) 124 N. Y. Supp. 398—vi. 649(a), 650(b), 708(j), 711(l), 714(m), 717(n), 1023(c).
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- 83 Or. 662, 163 Pac. 820—vi. 374(d), 378(g), 616(f).
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- Greenough v. Phoenix Ins. Co., 92 N. E. 447, 206 Mass. 247, 138 Am. St. Rep. 383—vi. 1854(o); vii. 3364(e), 3383(c), 3410(e), 3561(d).
- Greenwaldt v. United States Health & Accident Ins. Co., 52 Misc. Rep. 353, 102 N. Y. Supp. 157—vi. 2400(d); vii. 2748(g).
- Greenwich Ins. Co. v. State, 74 Ark. 72, 84 S. W. 1025—vi. 737(b), 1607(d); vii. 3523(f).

- Greenwood v. Royal Neighbors of America, 118 Va. 329, 87 S. E. 581—vi. 636(e), 2108(g).
- Greer v. Supreme Tribe of Ben Hur, 195 Mo. App. 336, 190 S. W. 72—vii. 3154(h).
- Gregan v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 83 Or. 278, 163 Pac. 588—vi. 864(g).
- Gregoric v. Prudential Ins. Co., 165 Ill. App. 570—vi. 688(f); vii. 3272(b).
- Gregory v. Sovereign Camp, W. O. W., 104 S. C. 471, 89 S. E. 391—vi. 799(b).
- Greiner v. Commercial Mut. Fire Ins. Co., 49 Pa. Super. Ct. 391—vi. 684(d).
- v. Safety Mut. Fire Ins. Co., 49 Pa. Super. Ct. 387—vi. 684(d).
- Grell v. Sam Houston Life Ins. Co. (Tex. Civ. App.) 157 S. W. 757—vi. 641(i), 681(c).
- Grems v. Traver, 164 App. Div. 968, 149 N. Y. Supp. 1085—vi. 246(a), 1087(e); vii. 3755(q), 3797(d).
- 87 Misc. Rep. 644, 148 N. Y. Supp. 200—vi. 246(a), 1087(e); vii. 3755(q), 3797(d).
- Gresham v. Norwich Union Fire Ins. Soc., 163 S. W. 214, 157 Ky. 402—vi. 403(j).
- Grey v. Independent Order of Foresters (Mo. App.) 196 S. W. 779—vi. 649(a).
- Griesa v. Mutual Life Ins. Co., 169 Fed. 509, 94 C. C. A. 635—vii. 2841(f), 2856(l).
- Griffin v. Zuber, 52 Tex. Civ. App. 288, 113 S. W. 961—vi. 635(d); vii. 3320(b).
- Griffin's Adm'r v. Equitable Assur. Soc., 84 S. W. 1164, 119 Ky. 856, 27 Ky. Law Rep. 313—vi. 299(b), 686(e), 1041(d); vii. 3867(c).
- Griffith v. Anchor Fire Ins. Co., 120 N. W. 90, 143 Iowa, 88—vii. 3479(b), 3488(a), 3522(f).
- v. Frankfort General Ins. Co., 159 N. W. 19, 34 N. D. 540—vii. 2768(d), 3590(e), 3594(j).
- v. Merchants' Life Ass'n of Burlington, 141 Iowa, 414, 119 N. W. 694, 133 Am. St. Rep. 177—vi. 2368(l).
- v. Metropolitan Life Ins. Co., 36 App. D. C. 8—vi. 684(d), 2156(a).
- v. Supreme Council of Royal Arcanum, 182 Mo. App. 644, 166 S. W. 324—vii. 2464(b), 2495(o), 2706(c), 2708(c).
- Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642—vi. 271(j); vii. 2464(b).
- Grimme v. General Council of Fraternal Aid Ass'n, 167 Mich. 240, 132 N. W. 497—vii. 3268(p).
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- Groffinger v. Metropolitan Life Ins. Co., 183 Ill. App. 618—vi. 1952(c), 1956(f), 1979(j); vii. 2559(b), 2690(d).
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- Gross v. Colonial Assur. Co., 56 Tex. Civ. App. 627, 121 S. W. 517—vi. 1832(a), 1856(q).
- v. Commercial Casualty Ins. Co. (N. J.) 101 Atl. 169—vii. 3290(b).
- v. Globe & Rutgers Fire Ins. Co., 79 S. E. 138, 140 Ga. 531—vii. 3984(i).
- Gross Co. v. Westchester Fire Ins. Co., 88 Misc. Rep. 327, 151 N. Y. Supp. 945—vii. 3417(d).
- Grossbaum Ceramic Art Syndicate v. German Ins. Co., 62 Atl. 1107, 213 Pa. 506—vi. 406(l).
- Grossman v. Lindemann, 123 N. Y. Supp. 108, 67 Misc. Rep. 437—vii. 3805(i).
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- Gruen v. Standard Life & Accident Ins. Co., 169 Mo. App. 161, 152 S. W. 407—vii. 2831(b).
- Grunauer v. Westchester Fire Ins. Co., 62 Atl. 418, 72 N. J. Law, 289, 3 L. R. A. (N. S.) 107—vi. 1736(e).
- Gruwell v. National Council, Knights & Ladies of Security, 126 Mo. App. 496, 104 S. W. 884—vi. 61(h), 593(i), 631(b), 698(f), 2336(a), 2344(d), 2428(c).
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- Guardian Fire Ins. Co. of Pennsylvania v. Central Glass Co., 194 Fed. 851, 114 C. C. A. 639—vii. 3886(a).
- Guarraia v. Metropolitan Life Ins. Co. (N. J.) 101 Atl. 298—vi. 1950(a), 1979(j), 2103(d); vii. 3531(a).
- Gueringer v. Fidelity & Deposit Co. (Mo. App.) 184 S. W. 936—vi. 1822(e); vii. 3409(d).
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- Gump v. National Union Fire Ins. Co., 34 Ohio Cir. Ct. R. 36—vi. 1626(b), 1699(f).
- Guntrum v. Prudential Ins. Co., 159 N. Y. Supp. 1006, 173 App. Div. 512—vii. 2715(h).
- Guptill v. Pine Tree State Mut. Fire Ins. Co., 109 Me. 323, 84 Atl. 529—vi. 849(b); vii. 2539(l), 2580(h), 2622(a), 2639(j).

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- Guthrie Laundry Co. v. Northern Assur. Co., 17 Okl. 571, 87 Pac. 649, 10 Ann. Cas. 936—vi. 744(f).
- Guthrie's Ex'r. v. Guthrie, 159 S. W. 710, 155 Ky. 146—vii. 3736(h).
- Gutkowsky v. Grand Lodge, Progressive Order of the West, 194 Ill. App. 452—vi. 413(c), 610(c).
- Guy v. United States Casualty Co., 66 S. E. 437, 151 N. C. 465—vii. 3442(a), 3462(d).

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- Haas v. Mutual Life Ins. Co., 84 Neb. 682, 121 N. W. 996, 26 L. R. A. (N. S.) 747, 19 Ann. Cas. 58—vi. 101(c), 636(e), 2259(a), 90 Neb. 808, 134 N. W. 937, Ann. Cas. 1913E, 919—vi. 658(g), 2408(g); vii. 2757(b), 2834(d).
- Haas Tobacco Co. v. American Fidelity Co., 178 App. Div. 267, 165 N. Y. Supp. 230—vii. 3582(g).
- Haberfeld v. Mayer, 256 Pa. 151, 100 Atl. 587—vii. 3732(f), 3788(a).
- Haberly v. Haberly, 27 Cal. App. 139, 149 Pac. 53—vi. 819(m).
- Hackett v. Cash, 196 Ala. 403, 72 South. 52—vi. 1849(l); vii. 3915(j).
- Hadley v. Travelers' Ins. Co., 68 Misc. Rep. 359, 125 N. Y. Supp. 88—vi. 864(g).
- Hagar v. Grand Lodge, A. O. U. W., 150 Pac. 528, 96 Kan. 221—vii. 3722(b).
- Hager v. Kentucky Title Co., 119 Ky. 850, 85 S. W. 183—vi. 12(j), 62(i).
- Hagerman v. Mutual Life Ins. Co., 45 Colo. 459, 103 Pac. 276—vi. 1094(g).
- Hagins v. Aetna Life Ins. Co., 51 S. E. 683, 72 S. C. 216—vi. 2281(a), 55 S. E. 323, 75 S. C. 225—vi. 2310(e).
- Hagstrom v. American Fidelity Co., 163 N. W. 670, 137 Minn. 391—vii. 3572(c).
- Hague v. Hague's Ex'rs, 30 Ohio Cir. Ct. R. 628—vii. 3731(e).
- Hahn v. Supreme Lodge of Pathfinder, 136 Ky. 823, 125 S. W. 259—vi. 280(b), 289(j); vii. 3775(t).
- Hakspacher v. Aetna Beneficial Ass'n, 55 Pa. Super. Ct. 410—vii. 3294(c).
- Hale v. Michigan Farmers' Mut. Fire Ins. Co., 111 N. W. 1068, 148 Mich. 453—vi. 1870(b).
- Haley v. Supreme Court of Honor, 139 Ill. App. 478—vi. 706(h), 2043(f), 2215(g).
- Hall v. Allemannia Fire Ins. Co., 161 N. Y. Supp. 1091, 175 App. Div. 289—vii. 3590(f).
- v. Ayers' Guardian, 105 S. W. 911, 32 Ky. Law Rep. 288—vi. 691(a), 698(f), 820(n); vii. 3731(e).
- v. Continental Ins. Co., 84 S. W. 519, 27 Ky. Law Rep. 99—vi. 1066(c).
- v. Dakota Mut. Life Ins. Co., 37 S. D. 342, 158 N. W. 449—vii. 2699(b).
- v. Fraternal Union, 130 Ga. 820, 61 S. E. 977—vi. 632(c).
- v. General Acc. Assur. Corporation, 16 Ga. App. 66, 85 S. E. 600—vi. 633(c); vii. 3198(h).
- v. Prudential Ins. Co., 72 Misc. Rep. 525, 130 N. Y. Supp. 355—vi. 1037(a), 1043(e); vii. 3793(c).
- v. Royal Fraternal Union, 130 Ga. 820, 61 S. E. 977—vi. 826(c).
- Hall & Hawkins v. National Fire Ins. Co., 92 S. W. 402, 115 Tenn. 513, 112 Am. St. Rep. 870, 5 Ann. Cas. 777—vii. 3027(g).
- Haller v. Haller, 45 Pa. Super. Ct. 409—vii. 3775(t).
- Halsey v. American Central Life Ins. Co., 167 S. W. 951, 258 Mo. 659—vi. 2322(m).
- Hamann v. Nebraska Underwriters' Ins. Co., 82 Neb. 429, 118 N. W. 65—vi. 1486(c), 1827(f).
- Hamburg-Bremen Fire Ins. Co. v. Ohio Valley Dry Goods Co.'s Trustee, 169 S. W. 724, 160 Ky. 252, Ann. Cas. 1916B, 944—vi. 1427(a), 1716(a).
- v. Swift, 62 Tex. Civ. App. 78, 130 S. W. 670—vi. 1712(m); vii. 3839(b).
- Hamilton v. Darley, 266 Ill. 542, 107 N. E. 798—vi. 658(g); vii. 3731(e).
- v. Fireman's Fund Ins. Co. (Tex. Civ. App.) 177 S. W. 173—vi. 1332(d), 1716(b); vii. 2690(d).
- Hammill v. Order of United Commercial Travelers, 178 App. Div. 338, 164 N. Y. Supp. 815—vii. 3442(a).
- Hammond v. International R. Co., 134 App. Div. 995, 119 N. Y. Supp. 1127—vi. 830(a).
- 63 Misc. Rep. 437, 116 N. Y. Supp. 854—vi. 830(a).
- v. Knox, 125 App. Div. 9, 109 N. Y. Supp. 367—vi. 961(p), 968(s), 970(t); vii. 2801(h), 2811(m).
- 194 N. Y. 555, 87 N. E. 1120—vi. 961(p), 968(s), 970(t); vii. 2801(h), 2811(m).
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- Hancock Mut. Life Ins. Co. v. Bedford, 36 R. I. 116, 89 Atl. 154—vii. 3755(q), 3762(r), 3770(s).
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- v. Fidelity & Casualty Co. (Iowa) 161 N. W. 114—vii. 3533(b).
- v. Travelers' Protective Ass'n (Iowa) 161 N. W. 125—vii. 3533(b).
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- Hann v. Supreme Ruling of Fraternal Mystic Circle, 140 N. Y. Supp. 666, 155 App. Div. 665—vi. 698(f), 2056(f).
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- v. Huff (Tex. Civ. App.) 175 S. W. 465—vii. 3531(a), 3548(b).
- v. Turner (Tex. Civ. App.) 147 S. W. 625—vi. 408(a), 1869(a).
- Hanrahan v. Metropolitan Life Ins. Co., 72 N. J. Law, 504, 63 Atl. 280—vi. 1948(k), 1950(a), 2158(b).
- Hansell-Elcock Co. v. Frankfort Marine Accident & Plate Glass Ins. Co., 177 Ill. App. 500—vii. 2801(h), 3989(k).
- Hanson v. Aetna Life Ins. Co., 113 N. W. 114, 78 Neb. 421—vi. 2432(e).
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- Hardenbergh v. Employers' Liability Assur. Corporation, 141 N. Y. Supp. 502, 80 Misc. Rep. 522—vii. 3037(a), 3042(c).
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- Hardinger v. Modern Brotherhood of America, 72 Neb. 860, 101 N. W. 983, 103 N. W. 74—vii. 3257(m), 3263(o), 3264(o).
- Hardy v. Aetna Life Ins. Co., 153 N. C. 286, 67 S. E. 767—vi. 273(n), 290(k).
- 154 N. C. 430, 70 S. E. 828—vi. 257(g), 290(k), 446(b), 456(b), 505(e); vii. 2504(c).
- v. Masonic Ben. Ass'n, 103 Miss. 108, 60 South. 48—vi. 552(h).
- v. Phoenix Mut. Life Ins. Co., 167 N. C. 22, 83 S. E. 5—vi. 2071(a).
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- Harland v. Liverpool & London & Globe Ins. Co., 192 Mo. App. 198, 180 S. W. 998—vii. 2690(d).
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- Harms v. Fidelity & Casualty Co., 157 S. W. 1046, 172 Mo. App. 241—vi. 2185(d); vii. 3275(c), 3871(d).
- Harowitz v. Concordia Fire Ins. Co., 168 S. W. 163, 129 Tenn. 691—vii. 2741(b), 3606(e), 3662(d), 3887(c).
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- v. Harris, 44 Tex. Civ. App. 152, 97 S. W. 504—vii. 3776(u).
- v. Hartford Fire Ins. Co. (Mo. App.) 191 S. W. 1037—vii. 3059(c).
- v. Knights and Ladies of Honor, 108 S. W. 130, 129 Mo. App. 163—vi. 434(l), 2159(c), 2168(h).

- Harris v. National Council Junior Order United American Mechanics**, 168 N. C. 357, 84 S. E. 405—vi. 1969(f).
- v. North American Ins. Co.**, 190 Mass. 361, 77 N. E. 493, 4 L. R. A. (N. S.) 1137—vi. 355(h), 1297(q), 1511(e), 1605(c), 1626(b), 1666(f), 1673(h), 1685(o), 1687(p); vii. 2479(e), 2504(c), 2611(i), 2775(d).
- v. Phoenix Accident & Sick Benefit Ass'n**, 149 Mich. 285, 112 N. W. 935—vii. 399(k).
- v. St. Paul Fire & Marine Ins. Co. (Sup.)** 126 N. Y. Supp. 118—vi. 1283(f).
- v. Security Life Ins. Co. of America**, 154 S. W. 68, 248 Mo. 304, Ann. Cas. 1914C, 648—vi. 2428(c); vii. 2658(a), 2757(b).
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- 63 Misc. Rep. 93, 118 N. Y. Supp. 401—vi. 1021(c).
- v. Philadelphia Contributionship for Insurance of Houses from Loss by Fire (C. C.)** 171 Fed. 178—vii. 2789(a).
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- 80 Vt. 148, 66 Atl. 787, 15 L. R. A. (N. S.) 206, 130 Am. St. Rep. 1012, 13 Ann. Cas. 515—vii. 3802(g).
- Harrison & Smith Co. v. Hamblin (Mo. App.)** 144 S. W. 882—vi. 5(a).
- Hart v. American Fidelity Co. (Sup.)** 121 N. Y. Supp. 605—vii. 3042(c).
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- v. Knights of Maccabees of the World**, 119 N. W. 679, 83 Neb. 423—vii. 3472(d).
- v. Life & Annuity Ass'n**, 86 Kan. 318, 120 Pac. 363, Ann. Cas. 1913C, 672—vi. 717(n); vii. 3964(d).
- v. Springfield Fire & Marine Ins. Co.**, 66 South. 558, 136 La. 114—vii. 3591(f), 3625(q), 3661(b), 3889(c).
- Hartford Fire Ins. Co. v. Adams (Tex. Civ. App.)** 158 S. W. 231—vi. 1819(d), 1820(d).
- v. Asher**, 100 S. W. 233, 30 Ky. Law Rep. 1053—vii. 3651(l), 3674(m).
- Hartford Fire Ins. Co. v. Brown**, 60 Fla. 83, 53 South. 838—vii. 2506(d), 2508(d).
- v. Chenault**, 126 S. W. 1098, 137 Ky. 753—vi. 1638(j), 1639(k).
- v. Dorroh**, 63 Tex. Civ. App. 560, 133 S. W. 465—vi. 632(c), 1783(a), 1856(q); vii. 3125(c).
- v. Downey**, 223 Fed. 707, 139 C. C. A. 237—vi. 1774(g).
- v. Enoch**, 96 S. W. 393, 79 Ark. 475—vi. 148(c), 1389(j); vii. 2622(a), 2733(a), 3537(d), 3839(b).
- v. Farris**, 116 Va. 880, 83 S. E. 377—vi. 1815(b), 1819(d), 1820(d).
- v. Hammond**, 41 Colo. 323, 92 Pac. 686—vii. 3523(f).
- v. Henderson Brewing Co.**, 182 S. W. 852, 168 Ky. 715—vii. 3059(c).
- v. Hollis**, 58 Fla. 268, 50 South. 985—vi. 1760(g), 1814(a), 1829(g), 1901(h), 1906(j).
- 64 Fla. 89, 59 South. 785—vi. 1912(n).
- v. Liddell Co.**, 130 Ga. 8, 60 S. E. 104, 124 Am. St. Rep. 157—vi. 1774(g), 1779(j).
- v. McClain**, 85 S. W. 699, 27 Ky. Law Rep. 461—vi. 154(i), 189(a), 1192(b), 1348(c), 1356(f), 1360(i).
- v. Mathis (Okl.)** 157 Pac. 134—vii. 3556(a).
- v. Northern Trust Co.**, 127 Ill. App. 355—vi. 637(f); vii. 3020(e).
- v. Phres (Tex. Civ. App.)** 165 S. W. 565—vii. 3071(h), 3125(c), 3126(d).
- v. Stephens**, 18 Ariz. 339, 161 Pac. 684—vi. 632(c); vii. 2801(h).
- v. Tewes**, 132 Ill. App. 321—vi. 632(c); vii. 2793(d), 2796(e), 2801(h), 2807(k), 2808(l).
- v. Walker (Tex. Civ. App.)** 153 S. W. 398—vi. 1821(d).
- v. Whitman**, 79 N. E. 459, 75 Ohio St. 312, 9 Ann. Cas. 218—vi. 391(b), 427(h), 431(j), 442(a), 444(a), 461(a).
- v. Wimbish**, 12 Ga. App. 712, 78 S. E. 265—vii. 3033(i).
- v. Wright**, 58 Tex. Civ. App. 237, 125 S. W. 363—vi. 1190(a, e), 1399(e), 1410(h); vii. 2542(n), 2546(p).
- Hartford Life Ins. Co. v. Sherman**, 223 Ill. 329, 78 N. E. 923—vii. 3588(b), 3872(d).
- 123 Ill. App. 202—vii. 3588(b), 3872(d).
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- Harth Bros. Grain Co. v. Continental Ins. Co.**, 102 S. W. 242, 31 Ky. Law Rep. 180—vii. 3648(l), 3657(p).
- Hartigan v. Casualty Co. of America**, 161 N. Y. Supp. 145, 97 Misc. Rep. 464—vii. 3343(g).

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- Hartman & Daniels v. Hollowell, 126 Iowa, 643, 102 N. W. 524—vi. 67(l), 360(k).
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- Hartung v. Northwestern Mut. Life Ins. Co., 174 Mo. App. 289, 156 S. W. 980—vii. 3737(i), 3945(a).
- Hartwig v. Aetna Life Ins. Co. of Hartford, Conn., 158 N. W. 280, 164 Wis. 20—vi. 412(b), 482(i), 507 (f).
- v. American Ins. Co. of Newark, N. J., 154 N. Y. Supp. 801, 169 App. Div. 60—vii. 3700(g).
- Hartzell v. Maryland Casualty Co., 163 Ill. App. 221—vii. 3982(h).
- Harvey v. Fidelity & Casualty Co., 119 C. C. A. 221, 200 Fed. 925—vii. 3964 (e), 3965(e).
- Harvick v. Modern Woodmen of America, 158 Ill. App. 570—vi. 68(m), 677 (a), 688(f), 1951(b), 2026(d), 2033(i); vii. 2467(c), 2694(g), 2769(a), 2781(f).
- Harwood v. National Union Fire Ins. Co., 156 S. W. 475, 170 Mo. App. 298—vi. 1855(g); vii. 2646(o), 2694(g).
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- Hatch v. United States Casualty Co., 197 Mass. 101, 83 N. E. 398, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290—vi. 632(c), 638(q); vii. 3176(a), 3347(a), 3362(d), 3456(a), 3464(d).
- Hatcher v. Equitable Life Assur. Society, 68 S. E. 581, 134 Ga. 652—vi. 2417(i).
- v. National Annuity Ass'n. 153 Mo. App. 538, 134 S. W. 1—vi. 825(b), 177 Mo. App. 278, 164 S. W. 188—vii. 3271(a).
- v. Sovereign Fire Assur. Co., 71 Wash. 79, 127 Pac. 588—vii. 3362(d), 3481(c), 3483(d).
- Hathaway v. Mutual Life Ins. Co. of New York (C. C.) 99 Fed. 534—vi. 2263(b).
- Haughton v. Aetna Life Ins. Co., 165 Ind. 32, 73 N. E. 592—vi. 552 (h), 1979(j), 2132(f); vii. 3467 (b), 165 Ind. 32, 74 N. E. 613—vi. 1979(j).
- (Ind. App.) 72 N. E. 652—vi. 552(h), 2132(f); vii. 3467(b).
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- Hause v. Standard Acc. Ins. Co., 172 Mich. 59, 137 N. W. 694—vii. 2625(a).
- Haven v. Home Ins. Co., 149 Mo. App. 291, 130 S. W. 73—vi. 654(d), 799(b); vii. 3759(r).
- Havlicek v. Western Bohemian Fraternal Ass'n (Minn.) 163 N. W. 985—vi. 2395(b); vii. 2718(i).
- Havlik v. St. Paul Fire & Marine Ins. Co., 127 N. W. 248, 87 Neb. 427—vii. 3432(m), 3532(b).
- Hawkins v. Duberry, 101 Miss. 17, 57 South. 919—vi. 819(m).
- v. Lone Star Ins. Union (Tex. Civ. App.) 146 S. W. 1041—vi. 2344 (d), 2350(e), 2400(d); vii. 2724(l).
- Hawthorne v. German Alliance Ins. Co., 181 Ill. App. 88—vi. 397(d), 403(j), 505(e).
- Hay v. Meridian Life & Trust Co., 57 Ind. App. 536, 101 N. E. 651—vi. 118(c), 993(b), 2410(g), 2411(g); vii. 3287(f).
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- v. People's Mut. Benev. Ass'n, 55 S. E. 623, 143 N. C. 256—vi. 2395 (b); vii. 2709(d).
- Hay & Bros. v. Union Fire Ins. Co., 167 N. C. 82, 83 S. E. 241, Ann. Cas. 1916A, 1129—vii. 2810(m).
- Haycock v. Sovereign Camp, W. O. W., 162 Wis. 116, 155 N. W. 923—vi. 2344 (d); vii. 2552(v).
- Hayden v. Franklin Life Ins. Co., 136 Fed. 285, 69 C. C. A. 423—vi. 694(c), 2263(b).
- v. Modern Brotherhood of America, 173 Iowa, 395, 155 N. W. 830—vii. 3770(s).
- Hayes v. New York Life Ins. Co., 135 N. Y. Supp. 1116, 150 App. Div. 927—vi. 2408(g).
- 124 N. Y. Supp. 792, 68 Misc. Rep. 558—vi. 636(e), 2318(k), 2408(g).
- 104 N. E. 1122, 211 N. Y. 9—vi. 2408(g).
- v. Penn Mut. Life Ins. Co., 111 N. E. 168, 222 Mass. 382—vi. 864(g).
- Hayes Pump & Planter Co. v. Assurance Co. of America, 182 Ill. App. 380—vii. 3586(a).
- Haynes v. City Nat. Bank, 121 Pac. 182, 30 Okl. 614—vii. 3949(d).

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- Hays v. General Assembly American Benev. Ass'n, 104 S. W. 1141, 127 Mo. App. 195—vii. 3294(c), 3299(e), 3531(a).
- Haystead v. Mutual Life Ins. Co., 103 Pac. 53, 54 Wash. 695—vi. 2057(g).
- Haywood v. Grand Lodge of Texas K. P. (Tex. Civ. App.) 138 S. W. 1194—vi. 633(c), 636(e), 698(f), 1015(b), 2354(g), 2428(c).
- Hazard v. Western Commercial Travelers' Ass'n, 54 Tex. Civ. App. 110, 116 S. W. 625—vii. 3819(c).
- Hazel v. Golden Eagle Ass'n, 161 N. Y. Supp. 91, 96 Misc. Rep. 703—vi. 2378(p).
- Head v. New York Life Ins. Co., 241 Mo. 403, 147 S. W. 827—vi. 566(h, j), 2263(b), 2409(g); vii. 3586(a).
- Head Camp, Pacific Jurisdiction, W. O. W., v. Bohanna, 59 Colo. 545, 151 Pac. 428—vii. 2699(b).
- v. Irish, 23 Colo. App. 85, 127 Pac. 918—vi. 706(h), 708(j), 2041(e).
- v. Sloss, 49 Colo. 177, 112 Pac. 49, 31 L. R. A. (N. S.) 831—vii. 3239(d).
- v. Woods, 81 Pac. 261, 34 Colo. 1—vi. 708(j), 2375(o).
- Heagany v. National Union, 106 N. W. 700, 143 Mich. 186—vii. 3131(a).
- Healey Ice Mach. Co. v. Green (C. C.) 181 Fed. 890—vii. 3714(l).
- Healy v. Metropolitan Life Ins. Co., 37 App. D. C. 240—vi. 2096(a), 2142(h); vii. 2755(b), 3472(d), 3475(f).
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- Hearsh v. German Fire Ins. Co., 130 Mo. App. 457, 110 S. W. 23—vi. 884(u); vii. 2683(b).
- Heath v. Bankers' Life Ass'n, 132 Pac. 147, 89 Kan. 634—vii. 3265(o).
- v. New York Safety Reserve Fund, 129 N. Y. Supp. 1128, 145 App. Div. 904—vi. 717(n).
- 125 N. Y. Supp. 852, 69 Misc. Rep. 452—vi. 717(n).
- v. North American Life Ins. Co., 132 Pac. 148, 89 Kan. 637—vii. 3265(o).
- Heaton v. St. Paul Fire & Marine Ins. Co., 132 Pac. 1007, 89 Kan. 840—vii. 3042(c).
- Hecker v. Commercial State Bank, 35 N. D. 12, 159 N. W. 97—vi. 181(b), 1069(e).
- Heffernan v. Prudential Ins. Co., 88 Misc. Rep. 93, 150 N. Y. Supp. 644—vi. 2252(a); vii. 2692(e).
- Hefner v. Fidelity & Casualty Co. (Tex. Civ. App.) 160 S. W. 330—vii. 3290(b), 3312(i), 3356(a).
- Hegna v. Modern Brotherhood of America, 118 Minn. 368, 136 N. W. 1035—vii. 3142(e).
- Heilbrunn v. German Alliance Ins. Co., 140 App. Div. 557, 125 N. Y. Supp. 374—vi. 1526(d); vii. 3353(c), 3972(f).
- 140 App. Div. 936, 126 N. Y. Supp. 1131—vi. 1526(d); vii. 3353(c).
- 150 App. Div. 670, 135 N. Y. Supp. 769—vi. 791(d).
- 151 App. Div. 937, 135 N. Y. Supp. 1117—vi. 791(d).
- 202 N. Y. 610, 95 N. E. 823—vii. 3972(f).
- Heilig v. Aetna Life Ins. Co., 152 N. C. 358, 67 S. E. 927, 20 Ann. Cas. 1290—vii. 3964(e), 3965(e), 3972(g).
- Heine v. Lancaster County Mut. Ins. Co., 49 Pa. Super. Ct. 501—vi. 1535(j).
- Heintz v. Continental Casualty Co., 105 N. Y. Supp. 519, 121 App. Div. 75—vi. 2092(b).
- Heinz v. Peoria Life Ins. Co., 183 Ill. App. 35—vii. 2849(j).
- Helbig v. Citizens' Ins. Co., 84 N. E. 897, 234 Ill. 251—vi. 437(a), 456(h), 459(i), 460(i), 495(o); vii. 2808(l), 3986(j).
- 120 Ill. App. 58—vi. 460(j), 509(g); vii. 2807(k), 2811(n).
- Helm v. Anchor Fire Ins. Co., 132 Iowa. 177, 109 N. W. 605—vi. 1325(m); vii. 2516(a), 2550(t).
- Helmbold v. Independent Order of Puritans, 61 Pa. Super. Ct. 164—vi. 700(f), 2012(f).
- Helmer v. Title Guaranty & Surety Co., 104 Pac. 783, 55 Wash. 558—vii. 3329(e), 3989(k).
- Hendee Co. v. Insurance Co. of Pennsylvania, 149 N. W. 147, 158 Wis. 521—vii. 2790(a).
- Henderson v. Abbeville Greenwood Mut. Ins. Ass'n, 81 S. E. 171, 96 S. C. 430—vi. 632(c), 1865(d).
- v. McMaster, 104 S. C. 268, 88 S. E. 645—vi. 1009(b).
- v. Maryland Casualty Co., 29 Pa. Super. Ct. 398—vii. 3841(b).
- Henderson v. Modern Woodmen of America, 163 Mo. App. 186, 146 S. W. 102—vii. 3769(s).
- Henderson v. Standard Fire Ins. Co., 143 Iowa, 572, 121 N. W. 714—vii. 2464(b), 2506(d), 2542(n), 2663(b), 2740(b).
- Henderson Lighting & Power Co. v. Maryland Casualty Co., 69 S. E. 234, 153 N. C. 275, 30 L. R. A. (N. S.) 1105—vi. 632(c); vii. 3331(a).
- Hendrickson v. Grand Lodge A. O. U. W., 120 Minn. 36, 138 N. W. 946—vii. 2552(v), 2683(b), 2688(b).
- Henegan v. Colonial Life Ins. Co., 63 Pa. Super. Ct. 616—vi. 2144(j).

- Henry v. Green Ins. Co. (Tex. Civ. App.) 103 S. W. 836—vi. 1824(e).
v. Thompson, 78 N. J. Eq. 142, 78 Atl. 14—vi. 1079(a), 1094(g).
- Henry A. Hitner's Sons Co. v. American Credit Indemnity Co., 239 Fed. 689, 152 C. C. A. 523—vii. 3338(e).
- Henry Clay Fire Ins. Co. v. Barkley, 169 S. W. 747, 160 Ky. 153—vi. 1325(m); vii. 3088(f).
- Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co. (C. C.) 157 Fed. 285—vii. 3025(f).
- Henry Vogt Mach. Co. v. Lingenfelder, 99 S. W. 358, 30 Ky. Law Rep. 654—vii. 3714(l).
- Henton v. Sovereign Camp, Woodmen of the World, 87 Neb. 552, 127 N. W. 869, 138 Am. St. Rep. 500—vi. 68(m), 2404(e).
- Hepner v. United States Grand Lodge Order Brith Abraham, 123 N. Y. Supp. 819, 68 Misc. Rep. 340—vii. 3749(n).
- Heralds of Liberty v. Bowen, 8 Ga. App. 325, 68 S. E. 1008—vi. 56(f), 683(c); vii. 4001(b).
- Herbo-Phosa Co. v. Philadelphia Casualty Co., 84 Atl. 1093, 34 R. I. 567—vii. 3334(b).
- Herdie v. Maryland Casualty Co., 149 Fed. 198, 79 C. C. A. 156—vii. 3195(f).
(D. C.) 146 Fed. 396—vii. 3195(f).
- Herman v. Connecticut Mut. Life Ins. Co., 105 N. E. 450, 218 Mass. 181, Ann. Cas. 1916A, 822—vi. 1101(b), 1105(d), 1110(g), 1111(h).
- Hermann v. Court of Honor, 193 Ill. App. 366—vi. 2154(e); vii. 2467(c).
- Herpolsheimer v. Citizens' Ins. Co., 79 Neb. 685, 113 N. W. 152—vii. 3036(a).
- Hersam v. Aetna Life Ins. Co., 114 N. E. 711, 225 Mass. 425—vii. 3737(i).
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- Hess v. Hanover Fire Ins. Co., 38 Pa. Super. Ct. 151—vii. 3561(d).
- v. Hartford Fire Ins. Co., 38 Pa. Super. Ct. 158—vii. 3485(e), 3511(a), 3514(b), 3557(a).
- Hess' Adm'r v. Segenfelder, 127 Ky. 348, 32 Ky. Law Rep. 225, 105 S. W. 476, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343—vi. 247(b), 253(f), 258(h), 261(i), 273(n), 280(b), 290(k), 798(b).
- Hetzel v. Knights and Ladies of Golden Precept, 106 N. W. 157, 129 Iowa, 655—vi. 1015(b), 2375(o).
- Heubner v. Metropolitan Life Ins. Co., 146 Ill. App. 282—vi. 2105(f); vii. 3742(k).
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- Hewson v. Royal Highlanders, 97 Neb. 774, 151 N. W. 312—vii. 3229(b).
- Hexom v. Knights of Maccabees of the World, 140 Iowa, 41, 117 N. W. 19—vi. 2214(f), 2242(f); vii. 2467(c), 2681(h), 2688(b).
- Heyl v. Aetna Ins. Co., 38 South. 118, 144 Ala. 549—vi. 1530(g).
- Hibbler Mach. Supply Co., In re (D. C.) 192 r.ed. 741—vi. 1747(a).
- Hickey v. Ministers' Casualty Union, 133 Minn. 215, 158 N. W. 45—vii. 3200(h).
- Hickman v. Ohio State Life Ins. Co., 110 N. E. 542, 92 Ohio St. 87—vii. 3216(m).
- Hicks v. Metropolitan Life Ins. Co., 196 Mo. App. 162, 190 S. W. 661—vi. 451(f), 1974(g), 2144(j).
- v. Northwestern Aid Ass'n, 117 Tenn. 203, 96 S. W. 962—vi. 1021(c), 2378(p); vii. 3281(e).
- v. Northwestern Mut. Life Ins. Co. of Milwaukee, 166 Iowa, 532, 147 N. W. 883, L. R. A. 1915A, 872—vii. 2863(b), 2865(b).
- Higgins v. Supreme Castle of Highland Nobles, 120 N. W. 137, 83 Neb. 504—vi. 1969(f); vii. 2559(b).
- Higham v. Iowa State Travelers' Ass'n (C. C.) 183 Fed. 845—vii. 4001(b).
- Higson v. North River Ins. Co., 152 N. C. 206, 67 S. E. 509—vi. 632(c), 1387(f); vii. 3366(h), 3531(a), 3561(d), 3662(d).
- Hilburn v. Phenix Ins. Co., 108 S. W. 576, 129 Mo. App. 670—vi. 762(b), 1388(g); vii. 3117(a), 3403(a), 3432(m).
- 140 Mo. App. 355, 124 S. W. 63—vi. 1712(m); vii. 2521(c), 2622(a), 3087(f), 3094(g), 3405(b), 3531(a).
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- 50 Or. 159, 91 Pac. 542—vii. 3257(m), 3456(i), 3498(e).
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- v. Baker, 205 Mass. 303, 91 N. E. 380, 137 Am. St. Rep. 440—vii. 2810(m), 2811(m).
- v. Bankers' Life Ins. Co., 112 N. Y. Supp. 120—vi. 2423(k).
- v. Business Men's Acc. Ass'n (Mo. App.) 189 S. W. 587—vi. 54(e), 2096(a).
- v. Hill, 130 Ill. App. 278—vii. 3722(b), 3765(r).

- Hill v. Maryland Casualty Co.*, 12 Cal. App. 461, 107 Pac. 707—vi. 846 (i).
- v. Supreme Ruling of Fraternal Mystic Circle*, 164 Ill. App. 217—vi. 444(a); vii. 3440(a).
- v. Travelers' Ins. Co.*, 146 Iowa, 133, 124 N. W. 898, 28 L. R. A. (N. S.) 742—vi. 641(i); vii. 3288(a).
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- Hiller Co. v. Insurance Co., of North America*, 52 South. 104, 125 La. 938, 32 L. R. A. (N. S.) 453—vi. 1316(f); vii. 2735(a).
- Hilliard v. Wisconsin Life Ins. Co.*, 117 N. W. 999, 137 Wis. 208—vi. 2423(k); vii. 2863(b).
- Hilmer v. Western Travelers' Acc. Ass'n*, 125 N. W. 535, 86 Neb. 285, 27 L. R. A. (N. S.) 319—vi. 636(e); vii. 3442(a), 3462(d).
- Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co. (C. C.)* 157 Fed. 285—vii. 3025(f).
- Hilts v. United States Casualty Co.*, 176 Mo. App. 635, 159 S. W. 771—vi. 2117 (i), 2159(c); vii. 3201(h), 3303(f).
- Hindorff v. Sovereign Camp of Woodmen of the World*, 150 Iowa, 185, 129 N. W. 831—vii. 3945(a).
- Hines v. Modern Woodmen of America*, 41 Okl. 135, 137 Pac. 675, L. R. A. 1915A, 264—vi. 409(k); vii. 3750(n), 3758(q).
- v. New England Casualty Co.*, 172 N. C. 225, 90 S. E. 131, L. R. A. 1917B, 744—vi. 2110(i), 2144(j).
- Hinkle v. North River Ins. Co.*, 75 S. E. 54, 70 W. Va. 681—vii. 3047(a); 3050 (a), 3624(q).
- Hipp v. Fidelity Mut. Life Ins. Co.*, 128 Ga. 491, 57 S. E. 892, 12 L. R. A. (N. S.) 319—vi. 486(k), 489(l), 505(e), 901 (b), 2269(f).
- Hirsch v. Fidelitas Societe Anonyme D'Assurances & De Reassurances*, 99 N. Y. Supp. 517, 50 Misc. Rep. 582—vi. 1150(n), 1446(b); vii. 2621(a).
- v. Home Ins. Co.*, 38 R. I. 189, 94 Atl. 722—vii. 3654(p).
- Hirschman v. Fireman's Fund Ins. Co. of San Francisco, Cal. (City Ct. N. Y.)* 123 N. Y. Supp. 781—vii. 3393(i), 3432(m).
- Hitner's Sons' Co. v. American Credit Indemnity Co.*, 239 Fed. 689, 152 C. C. A. 523—vii. 3338(e).
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- v. Supreme Council Royal Arcanum*, 61 Atl. 982, 70 N. J. Eq. 607—vi. 386(n), 2171(a).
- Hoar v. Union Mut. Life Ins. Co.*, 118 App. Div. 416, 103 N. Y. Supp. 1059—vii. 3286(f).
- Hobson v. Occidental Mut. Ben. Ass'n*, 126 Pac. 642, 87 Kan. 515—vi. 2361(i).
- Hocking v. British American Assur. Co. of Toronto, Canada*, 62 Wash. 73, 113 Pac. 259, 36 L. R. A. (N. S.) 1155, Ann. Cas. 1912C, 965—vi. 629(a); vii. 3021 (f), 3023(f).
- Hodalski v. Hodalski*, 181 Ill. App. 158—vii. 3732(f), 3767(s).
- Hodge v. Franklin Ins. Co.*, 111 Minn. 321, 126 N. W. 1098—vii. 3409 (d), 3424(i).
- v. Mercantile Fire & Marine Ins. Co.*, 111 Minn. 540, 126 N. W. 1099—vii. 3409(d), 3424(j).
- Hodgson v. Preferred Acc. Ins. Co.*, 100 Misc. Rep. 155, 165 N. Y. Supp. 293—vi. 532(k); vii. 3157(a).
- Hodson v. Great Camp Knights of Modern Maccabees*, 47 Ind. App. 113, 93 N. E. 861—vii. 3257(m), 3263(o), 3265(o).
- Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866—vi. 1932 (a), 1933(b), 1940(f), 1950(a), 1952(b), 2113(k), 2144(j), 2163(e); vii. 2561(b).
- Hoette v. North American Union (Mo. App.)* 187 S. W. 790—vii. 3257(m), 3265 (o).
- Hoff v. Hoff*, 161 N. Y. Supp. 520, 175 App. Div. 40—vi. 683(c), 700 (f); vii. 3767(s).
- v. Supreme Lodge Knights of Pythias*, 161 N. Y. Supp. 1012, 98 Misc. Rep. 61—vi. 683(c), 700 (f); vii. 3767(s).
- Hoffman v. Metropolitan Life Ins. Co.*, 135 App. Div. 739, 119 N. Y. Supp. 978—vii. 3556(a).
- 141 App. Div. 713*, 126 N. Y. Supp. 436—vi. 2156(a).
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- Hogan, In re (D. C.)* 186 Fed. 537—vii. 3757(q).
- Hogl v. Aachen & Munich Ins. Co.*, 65 W. Va. 437, 64 S. E. 441, 131 Am. St. Rep. 972—vii. 3464(d), 3972(g).
- Hoke v. National Life & Accident Ins. Co.*, 108 Miss. 269, 60 South. 218—vi. 1953(c).
- Holcomb v. Grand Lodge, Brotherhood of Railroad Trainmen*, 188 S. W. 885, 171 Ky. 843, L. R. A. 1917B, 107—vii. 3289(b).
- Holden v. Metropolitan Life Ins. Co.*, 188 Mass. 212, 74 N. E. 337—vi. 680(b).
- v. Modern Brotherhood of America*, 151 Iowa, 673, 132 N. W. 329—vii. 3758(q), 3767(s), 3770(s).
- v. Prudential Ins. Co.*, 191 Mass. 153, 77 N. E. 309—vi. 687(e), 1974(g).
- Holder v. Prudential Ins. Co.*, 77 S. C. 299, 57 S. E. 853—vii. 2337(d).

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- v. Western Union Life Ins. Co., 58 Wash. 100, 107 Pac. 866—vi. 1952(c).
- Holland Laundry v. Travelers' Ins. Co., 166 App. Div. 621, 152 N. Y. Supp. 92—vii. 2768(d).
- Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co., 113 S. W. 217, 133 Mo. App. 57—vi. 1394(c), 1829(g); vii. 2555(a), 2569(e), 2781(f), 3531(a).
- Holleran v. Prudential Ins. Co., 159 N. Y. Supp. 284, 172 App. Div. 634—vi. 1102(c); vii. 2658(a), 3872(d).
- Hollin v. Essex Mut. Ben. Ass'n, 88 N. J. Law, 204, 96 Atl. 71—vi. 398(e), 531(j).
- Holloway v. Metropolitan Life Ins. Co., 154 N. Y. Supp. 194, 90 Misc. Rep. 697—vi. 2096(a).
- Hollstrom v. Forest City Ins. Co., 168 Ill. App. 214—vii. 2622(a), 2665(c), 2670(e).
- Holly v. London Assur. Corporation, 170 N. C. 4, 86 S. E. 694—vii. 3964(e).
- Hollywood Lumber & Coal Co. v. Dubuque Fire & Marine Ins. Co. (W. Va.) 92 S. E. 858—vi. 351(d), 449(d), 611(d); vii. 2796(f), 2803(i).
- Holmes v. Continental Casualty Co., 102 Me. 287, 65 Atl. 385—vii. 3303(g).
- Holt v. Supreme Lodge Knights of Pythias, 235 Fed. 885, 149 C. C. A. 197—vi. 714(m).
- Homann v. Allgemeiner Argeiter Bund, 184 Mich. 417, 151 N. W. 559—vi. 2382(r).
- Home Benefit Ass'n v. Jordan (Tex. Civ. App.) 191 S. W. 725—vi. 2350(e).
- v. Wester (Tex. Civ. App.) 146 S. W. 1022—vi. 64(j).
- Home Circle Soc. v. Hanley, 86 S. W. 641, 38 Tex. Civ. App. 547—vii. 3784(u).
- Home Circle Soc. No. 2 v. Shelton (Tex. Civ. App.) 85 S. W. 320—vi. 1946(j), 2127(c); vii. 2559(b), 2574(e), 2782(g).
- Home Fire Ins. Co. v. Driver, 87 Ark. 171, 112 S. W. 200—vi. 1421(c), 1818(c); vii. 3347(a), 3516(b).
- v. Kuhlman, 58 Neb. 488, 78 N. W. 936, 76 Am. St. Rep. 111—vii. 2664(b).
- v. Stancell, 94 Ark. 578, 127 S. W. 966—vi. 471(f), 487(k), 1869(a); vii. 2714(g), 3886(b).
- v. Wilson, 109 Ark. 324, 159 S. W. 1113—vii. 2598(c), 2617(k), 2639(j), 2658(a), 2668(d), 2670(e), 2692(e).
- 118 Ark. 442, 176 S. W. 688—vii. 2661(b).
- Home Ins. Co. v. Ballard, 32 Okl. 723, 124 Pac. 316—vi. 1818(c); vii. 2537(k), 2653(t), 3662(d).
- v. Bailew, 96 S. W. 878, 29 Ky. Law Rep. 1059—vii. 2476(b), 2777(e).
- v. Bridges, 189 S. W. 6, 172 Ky. 161, L. R. A. 1917C, 276—vi. 1699(f).
- v. Chattahoochee Lumber Co., 126 Ga. 334, 55 S. E. 11—vii. 2791(b), 2792(c), 2807(k), 2808(l), 2820(c), 2826(f).
- v. Clements, 90 S. W. 973, 28 Ky. Law Rep. 953—vi. 1869(a).
- v. Coker, 43 Okl. 331, 142 Pac. 1195, Ann. Cas. 1917C, 950—vi. 173(e), 1388(g).
- v. Continental Ins. Co., 89 App. Div. 1, 85 N. Y. Supp. 262—vii. 3935(b).
- 73 N. E. 65, 180 N. Y. 389, 105 Am. St. Rep. 772—vii. 3935(b).
- v. Crowder, 164 Ky. 792, 176 S. W. 344—vii. 2516(a), 3042(c).
- v. Gagen, 38 Ind. App. 680, 76 N. E. 927—vi. 1506(a), 1655(b), 1685(n); vii. 3043(d), 3403(a).
- v. Hamilton, 128 S. W. 273, 143 Mo. App. 237—vi. 935(o); vii. 2815(a), 2827(g).
- v. Mobley (Okl.) 157 Pac. 324—vi. 439(c); vii. 2521(c).
- v. Morrow, 39 South. 587, 145 Ala. 284—vi. 1858(r).
- v. M. Schiff's Sons, 64 Atl. 63, 103 Md. 648—vii. 3627(s), 3635(d), 3637(f), 3839(b).
- v. Myers, 107 S. W. 719, 32 Ky. Law Rep. 999—vi. 1045(g), 1078(i); vii. 2606(f).
- 111 S. W. 289, 33 Ky. Law Rep. 790—vi. 1045(g).
- v. North Little Rock Ice & Electric Co., 86 Ark. 538, 111 S. W. 994, 23 L. R. A. (N. S.) 1201—vi. 1647(o); vii. 2529(g).
- v. Overturf, 74 N. E. 47, 35 Ind. App. 361—vi. 1313(c), 1443(d); vii. 3077(m).
- v. Rogers, 60 Tex. Civ. App. 456, 128 S. W. 625—vi. 1821(e), 1824(e); vii. 3125(c), 3433(m).
- v. Union Trust Co. (R. I.) 100 Atl. 1010, L. R. A. 1917F, 375—vi. 918(c).
- v. Williams, 237 Fed. 171, 150 C. C. A. 317—vi. 1821(e), 1858(r).
- Home Life Ins. Co. v. Com., 89 S. W. 538, 28 Ky. Law Rep. 551—vi. 1012(d).
- v. Zuribowitz (R. I.) 87 Atl. 25—vii. 2860(m).
- Home Lodge Ass'n v. Queen Ins. Co., 21 S. D. 165, 110 N. W. 778—vii. 3028(g).

- Home Mixture Guano Co. v. Ocean Accident & Guarantee Corporation (C. C.) 176 Fed. 600—vi. 633(c); vii. 3316 (a).
- Home Mut. Fire Ins. Co. v. Pittman, 111 Miss. 420, 71 South. 739—vi. 615 (f), 1337(f); vii. 3066(e).
- Home Protective Ass'n v. Williams, 150 S. W. 11, 150 Ky. 134—vi. 700(f); vii. 3294(c).
- 151 S. W. 361, 151 Ky. 146, Ann. Cas. 1915A, 260—vi. 700 (f); vii. 3294(c).
- Home Sav. Bank v. Massachusetts Bonding & Ins. Co., 19 Ga. App. 352, 91 S. E. 494—vi. 10(g), 2439(c).
- Homestead Fire Ins. Co. v. Ison, 110 Va. 18, 65 S. E. 463—vi. 1797(a), 1820 (d), 1822(e), 1881(f); vii. 2792(c), 3356 (a).
- Homesteaders, The, v. Briggs (Tex. Civ. App.) 166 S. W. 95—vi. 2096(a).
- Hood Rubber Co. v. Atlantic Mut. Ins. Co. (C. C.) 161 Fed. 788—vii. 2983(b), 2987(e).
- 170 Fed. 939, 96 C. C. A. 99—vii. 2987(e).
- Hood & Sons v. Maryland Casualty Co., 92 N. E. 329, 206 Mass. 223, 30 L. R. A. (N. S.) 1192, 138 Am. St. Rep. 379—vii. 3314(a).
- Hooper v. Standard Life & Acc. Ins. Co., 166 Mo. App. 209, 148 S. W. 116—vii. 3176(a), 3200(h), 3201(h).
- Hoover v. Bankers' Life Ass'n, 155 Iowa, 322, 136 N. W. 117—vi. 445(b), 461(a), 482(i), 507(f), 1033(h), 2375(o).
- Hope Spoke Co. v. Maryland Casualty Co., 143 S. W. 85, 102 Ark. 1—vii. 3573(c).
- Hopkins v. American Fidelity Co., 158 Pac. 535, 91 Wash. 680—vi. 2454(new).
- v. Connecticut General Life Ins. Co., 158 N. Y. Supp. 79—vi. 436 (a), 529(j), 532(k), 622(e).
- 160 N. Y. Supp. 247, 174 App. Div. 23—vi. 436(a), 529(j), 532(k), 622(e).
- v. Northwestern Nat. Life Ins. Co., 41 Wash. 592, 83 Pac. 1019—vi. 1039(a); vii. 2839(d).
- Hormel & Co. v. American Bonding Co., 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513—vi. 635(d), 637(f). 2452(o), 2453(e); vii. 3582(g).
- Horn v. Dorchester Mut. Fire Ins. Co., 199 Mass. 534, 85 N. E. 853—vii. 2818 (b).
- Horne v. John Hancock Mut. Life Ins. Co., 53 Pa. Super. Ct. 330—vi. 1979 (j), 2110(i).
- Horrigian Contracting Co. v. Columbia Ins. Co., 4 Boyce (Del.) 454, 89 Atl. 210—vii. 4016(i).
- Horstmann v. Capitol Life Ins. Co., 194 Mo. App. 434, 184 S. W. 1164—vii. 2700(b).
- Horwitz v. United States Fidelity & Guaranty Co., 95 Wash. 455, 164 Pac. 77—vi. 1325(m), 1822(e); vii. 3531 (a), 3955(a).
- Hotchkiss v. Supreme Lodge K. P., 178 Mo. App. 137, 165 S. W. 1120—vi. 2378 (p), 2430(d).
- Hottner v. Aachen & Munich Fire Ins. Co., 31 Pa. Super. Ct. 461—vii. 3364 (e), 3496(e).
- Houff & Holler v. German-American Ins. Co., 110 Va. 585, 66 S. E. 831—vi. 1814 (a), 1818(c), 1821(d), 1823(e), 1824(e).
- Houge v. St. Paul Fire & Marine Ins. Co. (Iowa) 156 N. W. 862—vi. 926(h).
- Houle v. Societe St. Jean Baptiste, 116 N. W. 1076, 153 Mich. 357—vi. 2338 (b), 2378(p).
- Houlihan v. Preferred Acc. Ins. Co., 127 App. Div. 630, 111 N. Y. Supp. 1048—vi. 637(f); vii. 3306(g).
- 196 N. Y. 337, 89 N. E. 927, 25 L. R. A. (N. S.) 1261—vi. 637 (f); vii. 3306(g).
- 197 N. Y. 532, 90 N. E. 1160—vi. 637(f); vii. 3306(g).
- Houran v. Aetna Ins. Co., 183 Mich. 418, 150 N. W. 137—vi. 142(g), 1715(a), 1779(j).
- House v. Modern Woodmen of America, 165 Iowa, 607, 146 N. W. 817—vi. 708(j).
- v. Security Fire Ins. Co., 145 Iowa, 462, 121 N. W. 509—vi. 374(d), 449(d), 1734(e); vii. 2484(g), 2646(o).
- v. Siegle, 121 Ark. 236, 180 S. W. 747—vi. 942(c).
- Houseman v. Globe & Rutgers Fire Ins. Co., 78 W. Va. 586, 89 S. E. 269—vi. 1828(f); vii. 3548(b), 3668 (g).
- v. Home Ins. Co., 78 W. Va. 203, 88 S. E. 1048, L. R. A. 1917A, 299—vi. 1181(g), 1382(k); vii. 3532(b).
- Howard v. German American Ins. Co. of New York, 77 Or. 360, 151 Pac. 477—vi. 1373(c).
- v. Horticultural Fire Relief of Oregon, 77 Or. 349, 150 Pac. 270, 151 Pac. 476—vi. 1373(c).
- Howe v. Fidelity Trust Co., 89 S. W. 521, 28 Ky. Law Rep. 485—vii. 3776(t).
- v. Hagan, 97 N. Y. Supp. 86, 110 App. Div. 392—vi. 1102(c), 1110 (g); vii. 3815(b).
- Howell v. John Hancock Mut. Life Ins. Co., 107 App. Div. 200, 95 N. Y. Supp. 87—vi. 2433(f).
- 186 N. Y. 556, 78 N. E. 1105—vi. 2433(f).
- Howle v. Eminent Household of Columbian Woodmen, 118 Ark. 226, 176 S. W. 313—vii. 3143(f), 3150(f).
- Howton v. Sovereign Camp, W. O. W., 162 Ky. 432, 172 S. W. 687—vi. 698(f), 2432(e).

- H. P. Hood & Sons v. Maryland Casualty Co.**, 92 N. E. 329, 206 Mass. 223, 30 L. R. A. (N. S.) 1192, 138 Am. St. Rep. 379—vii. 3314(a).
- Hronish v. Home Ins. Co.**, 33 S. D. 428, 146 N. W. 588—vi. 529(j); vii. 2668(d).
- Hubbard v. Modern Brotherhood of America (Mo. App.)** 193 S. W. 911—vii. 2514(g).
- v. State Life Ins. Co.**, 129 Iowa, 13, 105 N. W. 332—vi. 416(d).
- Huber v. Martin**, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400—vi. 120(d), 124(e).
- Hudson v. Glens Falls Ins. Co.**, 147 N. Y. Supp. 1117, 162 App. Div. 934—vi. 173(e); vii. 2521(c), 3654(p).
- 112 N. E. 728**, 218 N. Y. 133, L. R. A. 1917A, 482—vi. 173(e); vii. 2521(c), 3654(p).
- Hudson River Telephone Co. v. Aetna Life Ins. Co.**, 123 N. Y. Supp. 1121, 138 App. Div. 931—vii. 3331(a), 3332(a).
- 121 N. Y. Supp. 565**, 66 Misc. Rep. 329—vii. 3331(a), 3332(a).
- Huestess v. South Atlantic Life Ins. Co.**, 70 S. E. 403, 88 S. C. 31—vi. 1969(f); vii. 2520(c), 2550(t), 2559(b), 2779(f).
- Huestis v. Prudential Life Ins. Co.**, 127 App. Div. 903, 111 N. Y. Supp. 461—vi. 1102c.
- Huff v. Century Fire Ins. Co.**, 136 Iowa, 464, 113 N. W. 1078—vii. 2742(c).
- v. Sovereign Camp Woodmen of the World**, 85 Mo. App. 96—vii. 3239(d).
- Huffaker's Ex'r v. Michigan Mut. Life Ins. Co.**, 156 S. W. 1038, 154 Ky. 56—vi. 118(c).
- Huggins v. Home Mut. Fire Ins. Co.**, 107 Miss. 650, 65 So. 646—vi. 974(w).
- Hughes v. Central Acc. Ins. Co.**, 71 Atl. 923, 222 Pa. 462—vi. 632(c); vii. 3356(a), 3461(c), 3531(a), 3561(d).
- v. Hartford Fire Ins. Co.**, 87 S. E. 1042, 144 Ga. 740—vi. 1835(b).
- v. Modern Woodmen of America**, 145 N. W. 387, 124 Minn. 458—vii. 3758(q), 3769(s).
- v. Royal Indemnity Co. (Mun. Ct.)**, 165 N. Y. Supp. 530—vii. 2793(d).
- Huguenin v. Continental Casualty Co.**, 77 S. E. 751, 94 S. C. 138—vii. 3174(g), 3409(d).
- Hulen v. National Fire Ins. Co. of Hartford, Conn.**, 80 Kan. 127, 102 Pac. 52—vi. 1621(l); vii. 2647(o).
- Hull v. Grand Lodge A. O. U. W.**, 105 S. W. 479, 32 Ky. Law Rep. 212—vi. 290(k); vii. 3749(n).
- Humble v. German Alliance Ins. Co.**, 85 Kan. 140, 116 Pac. 472, Ann. Cas. 1912D, 630—vi. 1394(c), 1402(e), 1837(c).
- 137 Pac. 980**, 91 Kan. 307—vi. 1394(c).
- 141 Pac. 243**, 92 Kan. 486—vi. 1394(c).
- Humboldt Fire Ins. Co. v. Ashby**, 57 Ind. App. 682, 108 N. E. 150—vii. 2521(c).
- v. W. H. Ashley Silk Co.**, 185 Fed. 54, 107 C. C. A. 274—vi. 1775(h), 1865(c); vii. 3124(c).
- Hume v. Frenz**, 150 Fed. 502, 80 C. C. A. 320—vii. 2956(e), 2957(f), 2961(h), 2967(j).
- Humes Const. Co. v. Philadelphia Casualty Co.**, 32 R. I. 246, 79 Atl. 1, Ann. Cas. 1912D, 906—vii. 2460(a), 3332(a).
- Hummel v. Supreme Conclave Improved Order Heptasophs**, 256 Pa. 164, 100 Atl. 589—vi. 807(g).
- Hummer v. Midland Casualty Co.**, 181 Mich. 386, 148 N. W. 413—vii. 3160(a), 3456(i), 3461(c), 3550(c).
- Humphrey v. Mutual Life Ins. Co.**, 151 Pac. 100, 86 Wash. 672—vi. 312(b), 1102(c).
- Hunt v. Iowa State Traveling Men's Ass'n (Iowa)**, 160 N. W. 284—vi. 698(f), 707(i).
- v. Preferred Accident Ins. Co.**, 172 Ala. 442, 55 South. 201—vi. 1937(d), 1952(b), 1967(c).
- v. Remsburg**, 83 Kan. 665, 112 Pac. 590, 32 L. R. A. (N. S.) 246, 21 Ann. Cas. 1267—vii. 3781(u).
- v. State Ins. Co.**, 66 Neb. 121, 92 N. W. 921—vii. 2658(a).
- v. United States Acc. Ass'n**, 146 Mich. 521, 109 N. W. 1042, 7 L. R. A. (N. S.) 938, 117 Am. St. Rep. 655, 10 Ann. Cas. 449—vii. 3216(m), 3218(m).
- Hunter v. Mutual Reserve Life Ins. Co.**, 76 N. E. 1072, 184 N. Y. 136, 30 L. R. A. (N. S.) 677, 6 Ann. Cas. 291—vii. 4011(h).
- 31 S. Ct. 127**, 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 636—vii. 4011(h).
- v. U. S. Fidelity & Guaranty Co.**, 167 S. W. 692, 129 Tenn. 572—vi. 635(d), 1939(f), 2435(a), 2451(c).
- Huntington, A. & B. S. Transp. Co. v. Western Assur. Co.**, 57 S. E. 140, 61 W. Va. 324—vii. 2892(h).
- Huppel & Sons v. Boston Fire Ins. Co.**, 104 N. Y. Supp. 659, 55 Misc. Rep. 125—vi. 1528(e).
- Hurd v. Northern Acc. Co.**, 125 N. W. 414, 160 Mich. 535—vii. 3175(h).
- Hurst Home Ins. Co. v. Deatley**, 175 Ky. 728, 194 S. W. 910, L. R. A. 1917E, 750—vi. 632(c), 1832(a), 1845(i).

Hutchins v. Globe Life Ins. Co., 126 Ark. 360, 190 S. W. 446—vi. 2310(e), 2433(f); vii. 2561(b).

Hutchinson v. National Life Ins. Co., 195 S. W. 66, 196 Mo. App. 510—vi. 2409(g), 2410(g).

v. Palmer, 40 So. 339, 147 Ala. 517—vi. 1002(e).

Hutson v. Prudential Ins. Co., 122 Ga. 847, 50 S. E. 1000—vii. 2504(c).

Hutton v. States Accident Ins. Co., 267 Ill. 267, 108 N. E. 296, L. R. A. 1915E, 127, Ann. Cas. 1916C, 577—vii. 3207(j).

186 Ill. App. 499—vii. 3156(a), 3160(a), 3207(j).

Hygienic Ice & Refrigerating Co. v. Philadelphia Casualty Co., 147 N. Y. Supp. 754, 162 App. Div. 190—vi. 2454(New); vii. 2768(d).

I

Ibs v. Hartford Life Ins. Co., 137 N. W. 289, 119 Minn. 113—vi. 2375(o), 2428(c), 2432(e).

121 Minn. 310, 141 N. W. 289, Ann. Cas. 1914C, 798—vi. 1024(d), 2281(a), 2296(f), 2348(d), 2378(p), 2432(e).

Ide v. Boston & M. R. R., 74 Atl. 401, 83 Vt. 66—vii. 3893(a).

Ideal Electric Co. v. Penn. Mutual Life Ins. Co., 189 Ill. App. 331—vi. 2120(n).

Ideal Pump & Mfg. Co. v. American Central Ins. Co., 167 Mo. App. 566, 152 S. W. 408—vi. 744(f).

Iles v. Mutual Reserve Life Ins. Co., 96 Pac. 522, 50 Wash. 49, 18 L. R. A. (N. S.) 902, 126 Am. St. Rep. 886—vii. 2726(n).

Illinois Bankers' Life Ass'n v. Dodson (Tex. Civ. App.) 189 S. W. 992—vi. 993(b); vii. 2703(b), 3890(c).

Illinois Commercial Men's Ass'n v. Parks, 179 Fed. 794, 103 C. C. A. 286—vii. 3172(g), 3203(h).

v. Perrin, 139 Ill. App. 543—vi. 1024(l).

v. Tinsman, 139 Ill. App. 307—vii. 3213(l), 3215(l).

Illinois Life Ins. Co. v. Connell, 70 S. E. 107, 8 Ga. App. 683—vii. 3453(i).

v. De Lang, 124 Ky. 569, 99 S. W. 616, 30 Ky. Law Rep. 753—vi. 1978(i), 2146(k).

v. Kennedy, 191 Ill. App. 29—vi. 496(a), 1010(d).

v. McKay, 64 S. E. 1131, 6 Ga. App. 285—vi. 994(c), 2259(a), 2316(j).

v. Wortham (Ky.) 119 S. W. 802—vi. 2408(g), 2432(e).

Illinois Surety Co. v. Hildebrand (Supp.) 126 N. Y. Supp. 651—vi. 920(d).

Illinois Surety Co. v. Mattone, 122 N. Y. Supp. 928, 138 App. Div. 173—vii. 3336(d), 3812(a).

v. Paoli, 121 N. Y. Supp. 340, 66 Misc. Rep. 60—vi. 922(f); vii. 2814(p).

Imperial Elevator Co. v. Bennett, 127 Minn. 256, 149 N. W. 372—vii. 3714(l).

Independent Life Ins. Co. v. Evans, 172 S. W. 105, 162 Ky. 150—vii. 3588(b).

v. Rider, 150 S. W. 649, 150 Ky. 505, 42 L. R. A. (N. S.) 560—vi. 686(e), 1984(a); vii. 2755(b).

Independent Order of Foresters v. Cunningham, 127 Tenn. 521, 156 S. W. 192—vi. 347(b), 607(a), 2199(a), 2344(d); vii. 2495(o).

Independent Order of Sons and Daughters of Jacob of America v. Enoch, 108 Miss. 302, 66 South. 744—vi. 2380(q).

v. Moncrief, 96 Miss. 419, 50 South. 558—vi. 2348(d).

v. Wilkes, 98 Miss. 179, 53 South. 493, 52 L. R. A. (N. S.) 817—vi. 129(h).

Independent Transp. Co. v. Canton Ins. Office (D. C.) 173 Fed. 564—vi. 1176(b), 1235(a); vii. 2952(b), 2953(c).

Indiana Life Endowment Co. v. Carnithan, 62 Ind. App. 567, 109 N. E. 851—vii. 2846(h).

v. Patterson, 55 Ind. App. 291, 103 N. E. 817—vii. 3310(i).

v. Reed, 54 Ind. App. 450, 103 N. E. 77—vii. 2847(h), 3288(b), 3312(i).

Indiana Nat. Life Ins. Co. v. McGinnis, 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192—vi. 2330(q); vii. 2463(b), 2755(b), 2837(d), 3755(q), 3767(s).

180 Ind. 701, 101 N. E. 295—vi. 2330(q); vii. 2463(b), 2755(b), 2837(d), 3755(q), 3767(s).

(Ind. App.) 99 N. E. 751—vi. 2330(q); vii. 2463(b), 2755(b), 2837(d), 3755(q), 3767(s).

(Ind. App.) 99 N. E. 756—vi. 2330(q); vii. 2463(b), 2755(b); 2837(d), 3755(q), 3767(s).

Indiana & Ohio Live Stock Ins. Co. v. Keiningham (Tex. Civ. App.) 161 S. W. 384—vi. 688(f), 733(b).

v. Krenek (Tex. Civ. App.) 144 S. W. 1181—vii. 3031(i).

v. Smith (Tex. Civ. App.) 157 S. W. 755—vi. 1318(g).

Indrapura, The (D. C.) 171 Fed. 929—vii. 3901(d).

238 Fed. 853—vi. 1589(l).

Industrial Mut. Indemnity Co. v. Armstrong, 93 Ark. 84, 124 S. W. 236—vii. 3889(c).

- Industrial Mut. Indemnity Co. v. Hawkins**, 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029—vi. 633(c); vii. 3291(b).
- v. Perkins**, 81 Ark. 87, 98 S. W. 709—vi. 493(n), 495(o).
87 Ark. 70, 112 S. W. 176—vi. 495(o).
- v. Thompson**, 83 Ark. 574, 104 S. W. 200, 10 L. R. A. (N. S.) 1064, 119 Am. St. Rep. 149—vii. 2503(b), 2715(h), 3872(d).
- v. Watt**, 95 Ark. 456, 130 S. W. 532—vii. 3265(o).
- Ingersoll v. Mutual Life Ins. Co.**, 156 Ill. App. 568—vi. 632(c), 658(g), 2277(k), 2281(a), 2395(b), 2417(i).
- v. Pond**, 60 S. E. 738, 108 Va. 179—vi. 1118(k).
- v. United Surety Co.**, 126 N. Y. Supp. 391, 141 App. Div. 527—vii. 3064(b), 3127(d).
- Ingle v. Batesville Grocery Co.**, 117 S. W. 241, 89 Ark. 378—vi. 627(a).
- Insurance Com'r v. People's Fire Ins. Co.**, 68 N. H. 51, 44 Atl. 82—vii. 2810(m).
- Insurance Co. of North America v. Cochran** (Okl.) 159 Pac. 247—vii. 3382(b), 3544(a).
- v. De Loach & Co.**, 61 S. E. 406, 3 Ga. App. 807—vi. 641(i); vii. 2622(a).
- v. Erickson**, 39 South. 495, 50 Fla. 419, 2 L. R. A. (N. S.) 512, 111 Am. St. Rep. 121, 7 Ann. Cas. 495—vi. 1369(a), 1375(f), 1376(g).
- v. Little**, 34 Okl. 449, 125 Pac. 1098—vii. 2651(s), 2653(t).
- v. O'Bannon** (Tex. Civ. App.) 170 S. W. 1055—vi. 636(e), 1715(a).
- v. Willey**, 212 Mass. 75, 98 N. E. 677—vii. 2982(b), 2984(c).
- v. Wisconsin Cent. Ry. Co.**, 134 Fed. 794, 67 C. C. A. 300—vii. 2798(f).
- Insurance Co. of Tennessee v. Waller**, 95 S. W. 811, 116 Tenn. 1, 115 Am. St. Rep. 763, 7 Ann. Cas. 1078—vi. 1375(d).
- International Brotherhood of Maintenance of Way Employés v. Duncan** (Tex. Civ. App.) 194 S. W. 956—vi. 1031(g); vii. 2715(h), 3776(u).
- International Ferry Co. v. American Fidelity Co.**, 129 N. Y. S. 1129, 145 App. Div. 906—vi. 397(d), 442(a), 1043(f).
101 N. E. 160, 207 N. Y. 350—vi. 397(d), 442(a), 1043(f).
- International Life Ins. Co. v. Nix**, 11 Ga. App. 664, 75 S. E. 1058—vi. 1038(a), 1050(i).
- International Order of Twelve, Knights and Daughters of Tabor, v. Brown** (Tex. Civ. App.) 190 S. W. 251—vii. 4007(f).
- International Order of Twelve, Knights and Daughters of Tabor, v. Reynolds** (Tex. Civ. App.) 195 S. W. 330—vi. 797(a), 799(b).
- v. Wilson** (Tex. Civ. App.) 151 S. W. 320—2203(d).
- International Salt Co. v. Tennant**, 141 Ill. App. 30—vi. 1445(f); vii. 3531(a).
- International Savings & Trust Co. v. Kleber**, 29 Pa. Super. Ct. 200—vi. 968(s).
- v. Stenger**, 31 Pa. Super. Ct. 294—vi. 956(l).
- v. Tillotson**, 34 Pa. Super. Ct. 521—vi. 1870(b).
- International Travelers' Ass'n v. Bosworth** (Tex. Civ. App.) 156 S. W. 346—vii. 3175(h), 3289(b), 3966(c).
- v. Branum** (Tex. Civ. App.) 169 S. W. 389—vii. 3157(a), 3173(g), 3886(b), 3952(d).
- v. Peterson** (Tex. Civ. App.) 183 S. W. 1196—vii. 3181(b).
- v. Powell** (Tex. Civ. App.) 196 S. W. 957—vi. 693(c); vii. 3472(d), 3518(c), 3890(c), 3949(d).
- v. Rogers** (Tex. Civ. App.) 163 S. W. 421—vii. 3174(g), 3302(f).
- v. Votaw** (Tex. Civ. App.) 197 S. W. 237—vi. 636(e), 677(a); vii. 3223(m), 3886(b), 3949(d).
- Inter-Southern Life Ins. Co. v. Boyd** (Ky.) 124 S. W. 333—vii. 3250(i), 3267(o).
- Interstate Business Men's Acc. Ass'n v. Atkinson**, 177 S. W. 254, 165 Ky. 532, L. R. A. 1915E, 656—vi. 637(f); vii. 3181(b), 3246(h).
- v. Ford**, 161 Ky. 163, 170 S. W. 525—vii. 3159(a), 3212(k), 3255(l), 3265(o).
- Interstate Casualty Co. v. Wallins Creek Coal Co.**, 176 S. W. 217, 164 Ky. 778, L. R. A. 1915F, 958—vii. 3332(a).
- Interstate Fire Ins. Co. v. McFall**, 114 Va. 207, 76 S. E. 293—vi. 363(a), 368(c), 375(e), 463(a); vii. 3076(l).
- v. Nelson**, 105 Miss. 437, 62 South. 425—vi. 1858(r); vii. 2818(b).
- Interstate Life Assur. Co. v. Dalton**, 165 Fed. 176, 91 C. C. A. 210, 23 L. R. A. (N. S.) 722—vi. 1011(d); vii. 3150(f).
- Iowa Life Ins. Co. v. Haughton** (Ind. App.) 85 N. E. 127—vi. 632(c), 636(e), 1946(j), 1969(f), 2142(h); vii. 2831(b).
- (Ind. App.) 85 N. E. 127—vi. 1969(f), 2178(d); vii. 2555(a), 2559(b), 2580(h), 2775(d).
- 46 Ind. App. 467**, 87 N. E. 702—vi. 632(c), 636(e), 1946(j), 1969(f), 2178(d); vii. 2555(a), 2580(h), 2775(d).
- Iowa Mut. Tornado Ins. Ass'n v. Gilbertson**, 129 Iowa, 653, 106 N. W. 153—vi. 946(f).

- Iowa State Traveling Men's Ass'n v. Ruge, 242 Fed. 762, 155 C. C. A. 350—vi. 564(g), 715(n); vii. 3183(b), 3237(d).
- Irons v. United States Life Ins. Co., 108 S. W. 904, 128 Ky. 640, 33 Ky. Law Rep. 46, 129 Am. St. Rep. 318—vi. 273(n), 308(h); vii. 3789(a), 3804(h), 3812(a).
- Irwin v. Insurance Co. of North America, 16 Cal. App. 143, 116 Pac. 294—vii. 3960(b).
- v. Westchester Fire Ins. Co., 133 App. Div. 920, 118 N. Y. Supp. 1115—vi. 202(b), 1783(a); vii. 2622(a), 2641(k).
- 58 Misc. Rep. 441, 109 N. Y. Supp. 612—vi. 202(b), 1783(a); vii. 2622(a), 2641(k).
- Isaac H. Blanchard Co. v. Hamblin, 162 Mo. App. 242, 144 S. W. 880—vi. 5(a); vii. 2815(a).
- Israelson v. Williams, 166 App. Div. 25, 151 N. Y. Supp. 679—vii. 2572(e).
- Itzkowitz v. Grand Lodge Independent Western Star Order (N. Y. Mun. Ct.) 161 N. Y. Supp. 837—vii. 2579(g).
- Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N. S.) 866—vii. 2510(f), 2525(d), 2537(k), 2625(a), 2633(e).
- J**
- Jackson v. Brotherhood of American Yeomen, 167 Mo. App. 19, 150 S. W. 871—vii. 3755(a), 3769(s).
- v. Brothers and Sisters of Promise, 59 S. E. 11, 2 Ga. App. 761—vii. 3722(b).
- v. Life & Annuity Ass'n (Mo. App.) 195 S. W. 535—vii. 3356(a), 3447(d), 3514(b), 3533(b), 3550(c).
- v. Mutual Life Ins. Co., 186 Fed. 447, 108 C. C. A. 369—vi. 2259(a).
- v. Security Mut. Life Ins. Co., 233 Ill. 161, 84 N. E. 198—vi. 1038(a).
- 135 Ill. App. 86—vi. 1038(a).
- Jacob v. Jacob's Ex'r, 89 S. W. 246, 28 Ky. Law Rep. 327—vi. 819(m); vii. 3819(c).
- Jacobs v. Atlas Ins. Co., 148 Ill. App. 325—vi. 535(b), 537(c), 539(e), 823(a); vii. 2792(c), 2808(l).
- v. New York Cent. & H. R. R. Co., 94 N. Y. Supp. 954, 107 App. Div. 134—vii. 3927(n).
- 79 N. E. 1108, 186 N. Y. 586—vii. 3927(n).
- v. Queen Ins. Co., 183 Mich. 512, 150 N. W. 147—vi. 1427(a); vii. 2521(c), 2681(h).
- (Mich.) 161 N. W. 936—vii. 3617(m).
- Jacobs v. Strumwasser, 145 N. Y. Supp. 916, 84 Misc. Rep. 28—vii. 3755(g), 3787(a).
- Jacobson v. Liverpool & L. & G. Ins. Co., 83 N. E. 95, 231 Ill. 61—vi. 637(f), 838(c).
- 135 Ill. App. 20—vi. 637(f), 838(c).
- Jacoby v. Prudential Ins. Co., 94 Neb. 422, 143 N. W. 448—vi. 1978(i), 2064(l).
- Jaeger v. Grand Lodge of Order of Hermann's Sons, 135 N. W. 869, 149 Wis. 354, 39 L. R. A. (N. S.) 494—vi. 614(e), 706(h).
- Jagee v. Aetna Life Ins. Co., 96 S. W. 598, 123 Ky. 510, 29 Ky. Law Rep. 984—vi. 2411(g).
- Jaggi v. Prudential Ins. Co., 177 S. W. 1064, 191 Mo. App. 384—vii. 2715(h).
- Jagoe v. Aetna Life Ins. Co., 123 Ky. 510, 96 S. W. 598, 29 Ky. Law Rep. 984—vi. 662(a).
- Jakes v. North American Union, 186 Ill. App. 1—vii. 2506(d), 2706(c), 2709(d).
- James v. Franklin Life Ins. Co., 180 Ill. App. 632—vi. 662(a).
- v. Fraternity of Home Protectors, 54 Pa. Super. Ct. 375—vi. 2428(c).
- v. Insurance Co. of State of Illinois, 115 S. W. 478, 135 Mo. App. 247—vii. 3612(k), 3628(t), 3662(d), 3674(m).
- v. Merchants' Life & Casualty Co., 136 N. W. 582, 118 Minn. 146—vi. 2254(b).
- v. United States Casualty Co., 113 Mo. App. 622, 88 S. W. 125—vii. 3165(d), 3290(b), 3312(i), 3462(d).
- Janeway v. Norton (Ok.) 160 Pac. 908—vii. 3762(r), 3769(s).
- J. B. Clark & Sons v. Franklin Ins. Co., 130 La. 584, 58 South. 345—vi. 1818(c); vii. 3391(i), 3517(c).
- J. E. Davis Mfg. Co. v. Firemen's Fund Ins. Co. (D. C.) 210 Fed. 653—vii. 3641(i), 3644(j), 3648(l).
- v. Stuyvesant Ins. Co., 145 N. Y. Supp. 192, 160 App. Div. 74—vii. 3656(p), 3657(p).
- Jefferson v. New York Life Ins. Co., 151 Ky. 609, 152 S. W. 780—vi. 564(g), 2410(g), 2413(h).
- v. Supreme Tent of Knights of Maccabees of the World, 152 Ill. App. 242—vi. 1953(c), 2130(d).
- Jefferson Fire Ins. Co. v. Brackin, 79 S. E. 467, 140 Ga. 637—vii. 3949(d), 4006(e).
- (Ga.) 92 S. E. 930—vi. 1815(b).
- v. Greenwood (Tex. Civ. App.) 141 S. W. 319—vi. 457(i), 854(a); vii. 2820(c).
- Jefferson Mut. Ins. Co. v. Murry, 74 Ark. 507, 86 S. W. 813—vi. 1873(c), 1888(g); vii. 2727(o).

- Jefferson Realty Co. v. Employers' Liability Assur. Corporation, 149 S. W. 1011, 149 Ky. 741—vii. 3356(a).
- Jenkins v. Ancient Order of United Workmen, 93 Kan. 324, 144 Pac. 223—vi. 2344(d), 2432(e); vii. 2712(e).
- v. Hawkeye Commercial Men's Ass'n, 147 Iowa, 113, 124 N. W. 199, 30 L. R. A. (N. S.) 1181—vii. 3157(a), 3161(b), 3456(i), 3952(d).
- v. Morrow, 109 S. W. 1051, 131 Mo. App. 288—vi. 1083(c).
- Jenkner v. Supreme Tent, Knights of Maccabees of the World, 90 Atl. 73, 243 Pa. 281—vii. 3258(m), 3265(o).
- Jenks v. Liverpool, London & Globe Ins. Co., 92 N. E. 998, 206 Mass. 591—vii. 3066(e), 3409(d), 3434(a).
- Jennings v. Brotherhood Acc. Co., 44 Colo. 68, 96 Pac. 982, 18 L. R. A. (N. S.) 109, 130 Am. St. Rep. 109—vi. 632(c), 636(e); vii. 3288(b), 3303(g), 3356(a), 3447(d), 3464(d), 3959(b).
- v. National American (Mo. App.) 179 S. W. 789—vi. 54(e), 1965(b), 2239(c).
- Jensen v. Palatine Ins. Co., 81 Neb. 523, 116 N. W. 286—vii. 2659(a), 3414(c), 3531(o), 3839(b).
- Jerrils v. German-American Ins. Co., 108 Pac. 114, 82 Kan. 320, 28 L. R. A. (N. S.) 104, 20 Ann. Cas. 251—vii. 3627(s).
- Jewett v. Maytham, 64 Misc. Rep. 488, 118 N. Y. Supp. 635—vii. 3860(h).
- v. Northwestern Nat. Life Ins. Co., 149 Mich. 79, 112 N. W. 734—vi. 2304(b); vii. 2717(h).
- J. Frank & Co. v. New Amsterdam Casualty Co. (Cal.) 165 Pac. 927—vii. 2462(b), 2673(f), 2768(d), 3334(b), 3576(d).
- J. I. Kelley Co. v. St. Paul Fire & Marine Ins. Co., 56 Fla. 456, 47 South. 742, 16 Ann. Cas. 654—vi. 1760(g).
- Jiroch v. Travelers' Ins. Co., 145 Mich. 375, 108 N. W. 728—vii. 3200(h).
- Joffe & Maukowitz v. Niagara Fire Ins. Co., 116 Md. 155, 81 Atl. 281, 51 L. R. A. (N. S.) 1047, Ann. Cas. 1913C, 1217—vi. 1826(f), 1902(i), 1908(l).
- Johanson v. Grand Lodge A. O. U. W., 31 Utah, 45, 86 Pac. 494—vi. 68(m), 2375(o); vii. 2700(b), 2713(f).
- John B. Stevens & Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., 207 Fed. 757, 125 C. C. A. 295, 47 L. R. A. (N. S.) 1214—vii. 3331(a), 3574(c).
- John Church Co. v. Aetna Indemnity Co., 13 Ga. App. 826, 80 S. E. 1093—vi. 10(g), 851(d); vii. 3337(d).
- John Hancock Mut. Life Ins. Co. v. Bedford, 36 R. I. 116, 89 Atl. 154—vii. 3755(g), 3762(r), 3770(s).
- John Lee Clarke v. Fidelity & Deposit Co., 131 Pac. 468, 73 Wash. 62, 46 L. R. A. (N. S.) 931—vii. 3320(b).
- John Sommer Fauscet Co. v. Commercial Casualty Ins. Co., 99 Atl. 342, 89 N. J. Law, 693—vi. 1603(b).
- Johnson, Succession of, 38 So. 880, 115 La. 20—vii. 3733(g).
- Johnson v. Aetna Ins. Co., 51 S. E. 339, 123 Ga. 404, 107 Am. St. Rep. 92—vii. 2510(f), 2622(a).
- v. American Nat. Life Ins. Co., 134 Ga. 800, 68 S. E. 731—vi. 687(e), 1974(g), 2026(d), 2029(g).
- v. Bacon, 92 Miss. 156, 45 So. 858, —vii. 3787(a), 3797(d).
- v. Bankers' Life Co. (Mo. App.) 193 S. W. 993—vi. 2432(e).
- v. Bankers' Mut. Casualty Ins. Co., 129 Minn. 18, 151 N. W. 413, L. R. A. 1915D, 1199, Ann. Cas. 1916A, 154—vii. 3174(g), 3450(g), 3531(a).
- v. Bankers' Union of the World, 86 Neb. 48, 118 N. W. 1104—vi. 704(h), 1023(c).
- v. Button, 120 Va. 339, 91 S. E. 151—vi. 1047(g).
- v. Continental Casualty Co., 99 S. W. 473, 122 Mo. App. 369—vii. 3175(h), 3200(h), 3534(b).
- v. Continental Ins. Co., 119 Tenn. 598, 107 S. W. 688—vi. 1868(a), 1871(b), 1874(d), 1889(g); vii. 2476(b), 2702(b), 2705(b).
- v. Farmers' Ins. Co., 126 Iowa 565, 102 N. W. 502—vi. 1382(k), 1829(g), 1845(i), 1893(i); vii. 2521(c), 2622(a).
- v. Fidelity & Casualty Co., 184 Mich. 406, 151 N. W. 593, L. R. A. 1916A, 475—vi. 2324(n); vii. 3157(a), 3195(f), 3964(d).
- v. Franklin Ins. Co., 156 Pac. 567, 90 Wash. 631—vi. 1622(m).
- v. Fraternal Reserve Ass'n, 117 N. W. 1019, 136 Wis. 528—vi. 1976(h).
- v. Grand Lodge of A. O. U. W., 137 Pac. 1190, 91 Kan. 314, 50 L. R. A. (N. S.) 461—vii. 3790(b), 3819(c).
- 79 N. J. Law. 227, 75 Atl. 801—vi. 636(e), 2298(c).
- 81 N. J. Law. 511, 79 Atl. 333—vi. 636(e), 2298(c).
- 31 Utah. 45, 86 Pac. 494—vii. 2495(o).
- v. Hartford Fire Ins. Co., 157 N. Y. Supp. 893, 94 Misc. Rep. 163—vii. 3076(m).
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- v. Hawkeye Commercial Men's Ass'n, 171 Iowa, 425, 152 N. W. 561—vii. 3146(f), 3284(e).

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- v. Maryland Casualty Co., 60 Atl. 1009, 73 N. H. 259, 111 Am. St. Rep. 609—vi. 556(k); vii. 3462(d).
- v. Mennonite Mut. Fire Ins. Co., 100 Kan. 53, 163 Pac. 1074—vi. 368(c), 1685(o).
- 100 Kan. 450, 165 Pac. 275—vi. 1685(o).
- v. Mercantile Town Mut. Fire Ins. Co., 120 Mo. App. 80, 96 S. W. 697—vi. 1511(e), 1815(b), 1818 (c), 1819(c), 1823(e), 1824(e), 1829(g).
- v. Minnesota Farmers' Mut. Ins. Co., 150 N. W. 174, 128 Minn. 1—vii. 3588(b).
- v. Modern Brotherhood, 109 Minn. 288, 123 N. W. 819, 27 L. R. A. (N. S.) 446—vii. 2688(b).
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- v. Modern Woodmen of America, 160 Ill. App. 37—vi. 2400(d), 2406(f).
- v. Mutual Ben. Life Ins. Co., 143 Fed. 950, 75 C. C. A. 22—vi. 121(d), 1005(g), 2409(g).
- 157 N. C. 106, 72 S. E. 847—vi. 273(o).
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- v. Northern Minnesota Land & Investment Co., 168 Iowa, 340, 150 N. W. 596—vii. 3699(g), 3703(h).
- v. Policemen's Benevolent Ass'n, 2 Ohio App. 148, 34 Ohio Cir. Ct. R. 245—vi. 821(o).
- v. Reliance Ins. Co., 168 S. W. 914, 181 Mo. App. 443—vi. 1437(i); vii. 3089(g).
- v. Retail Merchants' Mut. Fire Ins. Co., 112 Minn. 418, 128 N. W. 462—vii. 2464(b), 2725(m).
- v. Rhode Island Ins. Co., 172 N. C. 142, 90 S. E. 124—vii. 2621(a).
- v. Royal Neighbors, 253 Ill. 570, 97 N. E. 1084—vi. 451(f); vii. 2524(d), 2552(v), 2559(b).
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- v. Stewart, 90 Atl. 349, 243 Pa. 485—vi. 179(c), 758(m), 771(e).
- v. Sun Fire Ins. Co., 60 S. E. 118, 3 Ga. App. 430—vi. 1336(f), 1829 (g), 1835(b), 1909(m).
- v. Supreme Court of I. O. F., 175 Ill. App. 554—vi. 2126(b).
- Johnson & Stroud v. Rhode Island Ins. Co., 172 N. C. 142, 90 S. E. 124—vi. 1889(h), 2510(f), 2521(c), 3035(j).
- Johnston v. Indiana & Ohio Live Stock Ins. Co., 94 Neb. 403, 143 N. W. 459—vi. 831(a).
- v. Phelps County Farmers' Mut. Ins. Co., 102 N. W. 72, 73 Neb. 50—vii. 3050(a).
- v. Scott, 137 N. Y. Supp. 243, 76 Misc. Rep. 641—vi. 1080(b).
- Jones v. Commercial Travelers' Mut. Accident Ass'n (Sup.) 114 N. Y. Supp. 589—vii. 2831(b), 3872(d).
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- v. Commonwealth Casualty Co., 255 Pa. 566, 100 Atl. 450—vi. 683 (c); vii. 3200(h), 3941(c).
- v. District Grand Lodge No. 18, G. U. O. O. F., 12 Ga. App. 273, 76 S. E. 279—vii. 4001(b).
- v. Holmes (Tex. Civ. App.) 195 S. W. 306—vi. 798(b); vii. 3774(s).
- v. Mangan, 151 Wis. 215, 138 N. W. 618, Ann. Cas. 1914B, 59—vi. 803(e), 805(f).
- v. Metropolitan Casualty Ins. Co., 144 Wis. 66, 128 N. W. 280, Ann. Cas. 1912A, 1091—vii. 3032(i).
- v. Modern Brotherhood of America, 153 Wis. 223, 140 N. W. 1059, Ann. Cas. 1914A, 88—vii. 2697 (h), 2734(a).
- v. New York Life Ins. Co., 122 Pac. 702, 32 Okl. 359—vi. 2290(c), 2301(h), 2428(c); vii. 2830(b).
- v. North Carolina Mutual & Provident Ass'n, 105 S. C. 427, 90 S. E. 30—vii. 3755(g), 3759(r).
- v. Orient Ins. Co., 184 Mo. App. 402, 171 S. W. 28—vii. 3123(c), 3641(i), 3657(p).
- v. Pennsylvania Casualty Co., 52 S. E. 578, 140 N. C. 262, 5 L. R. A. (N. S.) 932, 111 Am. St. Rep. 843—vii. 3184(b).
- v. Phoenix Ins. Co., 94 Kan. 235, 146 Pac. 354—vi. 1763(g).
- v. Provident Sav. Life Assur. Soc., 147 N. C. 540, 61 S. E. 388, 25 L. R. A. (N. S.) 803—vi. 993(b).
- v. Prudential Ins. Co., 173 Mo. App. 1, 155 S. W. 1106—vii. 2485(g), 2683(b).

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- v. Supreme Lodge, Knights of Honor*, 236 Ill. 113, 86 N. E. 191, 127 Am. St. Rep. 277—vi. 68 (m), 2430(d); vii. 2495(o), 2706 (c), 2777(e).
- 140 Ill. App. 227—vii. 2464(b).
- Jones & Pickett v. Michigan Fire & Marine Ins. Co.*, 61 South. 846, 132 La. 847—vi. 1760(g).
- Joplin v. National Live Stock Ins. Ass'n*, 61 Or. 544, 122 Pac. 897, 44 L. R. A. (N. S.) 569—vii. 2500(a), 3031(i).
- Jordan v. Hanover Fire Ins. Co.*, 66 S. E. 206, 151 N. C. 341—vi. 1376 (g); vii. 3537(d).
- v. Iowa Mut. Tornado Ins. Co.*, 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266—vi. 632(c), 696 (d); vii. 3033(j), 3035(a), 3042 (c).
- Journemen Butchers' Protective & Benevolent Ass'n v. Bristol*, 17 Cal. App. 576, 120 Pac. 787—vi. 803(e); vii. 3748 (n).
- Joyce v. St. Paul Fire & Marine Ins. Co. (Mo. App.)* 194 S. W. 745—vii. 3089(g), 3631(b), 3633(c), 3647(k), 3652 (m).
- Joyner & Long v. Scottish Fire Ins. Co.*, 155 N. C. 255, 71 S. E. 434—vii. 2808 (l).
- J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co.*, 18 N. D. 253, 119 N. W. 1048—vi. 124(e), 691(a), 692 (b), 693(c), 1874(c), 1881(f).
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- J. Sidney Smith & Son v. Phoenix Ins. Co.*, 168 S. W. 831, 181 Mo. App. 455—vi. 734(b); vii. 3898(b).
- J. S. Stearns Lumber Co. v. Travelers' Ins. Co.*, 159 Wis. 627, 150 N. W. 991—vii. 2768(d).
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- Judge v. Masonic Mut. Ben. Ass'n*, 30 Ohio Cir. Ct. R. 133—vi. 2378(p).
- Julian v. Guarantee Life Ins. Co.*, 159 Ala. 533, 49 South. 234—vi. 1011(d).
- Jump v. North British & Mercantile Ins. Co.*, 44 Wash. 596, 87 Pac. 928, 12 Ann. Cas. 257—vi. 1744(i).
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- J. W. Matthews & Co. v. Employers' Liability Assur. Corporation*, 127 App. Div. 195, 111 N. Y. Supp. 76—vi. 649(a); vii. 3320 (b).
- 195 N. Y. 593, 89 N. E. 1102—vi. 649(a); vii. 3320(b).

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- Kahmann & McMurry v. Aetna Ins. Co.*, 242 Fed. 20, 154 C. C. A. 612—vii. 2745(d), 2941(f), 2998(k).
- Kahn v. American Ins. Co.*, 137 Minn. 16, 162 N. W. 685—vi. 630(b); vii. 3076(k).
- v. London Assur. Corporation*, 173 S. W. 695, 187 Mo. App. 216—vii. 3122(c).
- Kalle & Co. v. Morton*, 141 N. Y. Supp. 374, 156 App. Div. 522—vii. 3837(a).
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- Kammer v. Supreme Lodge K. P.*, 91 S. C. 572, 75 S. E. 177—vi. 27(b); vii. 3240(e).
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- Kandar v. Aetna Indemnity Co.*, 30 Ohio Cir. Ct. R. 260—vii. 2558(a), 2769(a).
- Kane v. Knights of Columbus*, 79 Atl. 63, 84 Conn. 96—vi. 63(j), 65 (k), 708(j), 709(k), 711(l), 715 (n), 1021(c), 1033(h).
- v. Supreme Tent Knights of Macca-bees of the World*, 87 S. W. 547, 113 Mo. App. 104—vii. 3260(n), 3265(o), 3677(b).
- Kansas City Life Ins. Co. v. Blackstone (Tex. Civ. App.)* 143 S. W. 702—vi. 1932(a), 1950(a), 2036(a), 2176(c); vii. 2484(g), 2610(i).
- v. Leedy (Ok.)* 162 Pac. 760, L. R. A. 1917C, 917—vi. 998(e).
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- Kansas City Regal Auto Co. v. Old Colony Ins. Co.*, 187 Mo. App. 514, 174 S. W. 153—vii. 3037 (a), 3043(e).
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- Kansas State Mut. Hail Ass'n v. Prather*, 79 Pac. 1080, 71 Kan. 179—vi. 838(c).
- v. Title Guaranty & Surety Co.*, 155 Pac. 13, 97 Kan. 271—vi. 2440(d); vii. 3320(b).
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- Karaffa v. Supreme Court I. O. F., 159 Ill. App. 498—vi. 2071(a).
- Kasprzyk v. Metropolitan Life Ins. Co., 140 N. Y. Supp. 211, 79 Misc. Rep. 263—vi. 1932(a), 1953(c), 1956(f), 1957(g), 2168(h), 2171(a), 2174(b).
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- Kaufman v. Marshall, 115 S. W. 680, 89 Ark. 1—vii. 3336(d).
- Kaus v. Gracey, 162 Iowa, 671, 144 N. W. 625—vi. 1099(a).
- Kavanaugh v. Security Trust & Life Ins. Co., 117 Tenn. 33, 96 S. W. 499, 7 L. R. A. (N. S.) 253, 10 Ann. Cas. 680—vi. 2299(g), 2318(k).
- v. Supreme Council of the Royal League, 158 Mo. App. 234, 138 S. W. 359—vi. 564(g), 704(h), 717(m); vii. 3236(c).
- Kavooras v. Insurance Co. of Illinois, 167 Ill. App. 220—vii. 3429(l).
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- Keane v. Century Fire Ins. Co., 150 Iowa, 658, 130 N. W. 724—vi. 1511(e); vii. 2621(a), 3040(b), 3531(a).
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- Keatley v. Grand Fraternity (D. C.) 198 Fed. 264—vi. 1948(k), 1907(j), 2055(d), 2252(a).
- 198 F. 272—vi. 1988(d), 1990(g), 2174(b), 2176(c); vii. 2634(f).
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- Keeble v. Jones, 187 Ala. 207, 65 South. 384—vi. 1110(g).
- Keen v. Continental Casualty Co., 175 Iowa, 513, 154 N. W. 409—vii. 3303(f).
- v. Mutual Life Ins. Co. (C. C.) 131 Fed. 559—vi. 422(f).
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- Keiper v. Equitable Life Assur. Soc. (C. C.) 159 Fed. 206—vi. 1933(b), 1988(d), 1990(g), 2096(a), 2112(j), 2144(j).
- 165 Fed. 595, 91 C. C. A. 433—vi. 1990(g).
- Keith v. Modern Woodmen of America, 167 Iowa, 239, 149 N. W. 225, L. R. A. 1915B, 793—vii. 2683(b), 3129(a).
- Kell v. New York Life Ins. Co., 20 Okl. 195, 94 Pac. 177—vi. 422(f).
- Keller v. Home Life Ins. Co., 198 Mo. 440, 95 S. W. 903—vi. 1991(g), 1992(h), 2186(e).
- Kelley v. Aetna Ins. Co., 75 W. Va. 637, 84 S. E. 502—vii. 2807(k), 2811(n), 2820(c).
- v. People's Nat. Fire Ins. Co., 262 Ill. 158, 104 N. E. 188, 50 L. R. A. (N. S.) 1164—vi. 184(a), 185(b), 1754(d), 1849(l), vii. 2670(e), 3105(d), 3121(c).
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- Kellner v. Fire Ass'n, 128 Wis. 233, 106 N. W. 1060, 116 Am. St. Rep. 45—vi. 768(d); vii. 3390(h), 3692(c).
- Kellogg v. German-American Ins. Co., 133 Mo. App. 391, 113 S. W. 663—vi. 547(d).
- Kelly v. Ancient Order of Hibernians Life Ins. Fund, 113 Minn. 355, 129 N. W. 846—vi. 2348(d); vii. 3494(d), 3964(d).
- v. Citizens' Mut. Fire Ass'n, 96 Minn. 477, 105 N. W. 675—vi. 864(g), 866(h); vii. 2524(d), 2622(a).
- v. Court R. F. Phelan, No. 122, Foresters of America, 60 Atl. 1022, 78 Conn. 40—vi. 2348(d).
- v. Grand Circle Women of Woodcraft, 40 Wash. 681, 82 Pac. 1007—vi. 128(g).
- v. Liverpool & London & Globe Ins. Co., 102 Minn. 178, 111 N. W. 395—vii. 2546(p).
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- 102 N. W. 380, 94 Minn. 141, 110 Am. St. Rep. 351—vii. 3612(k).
- v. Metropolitan Life Ins. Co., 152 Ill. App. 179—vi. 677(a), 688(f).
- v. Mutual Life Ins. Co., 93 N. E. 695, 207 Mass. 398—vi. 2144(j).

- Kelly v. North American Union, 146 Ill. App. 611—vi. 2252(a), 2254(b); vii. 3143(f).
- v. People's Nat. Fire Ins. Co., 262 Ill. 158, 104 N. E. 188, 50 L. R. A. (N. S.) 1164—vii. 2665(c).
- v. Prudential Ins. Co., 148 Mo. App. 249, 127 S. W. 649—vi. 269(h); vii. 3741(k).
- (Sup.) 119 N. Y. Supp. 154—vii. 3968(f).
- v. Searcy, 100 Tex. 566, 102 S. W. 100—vii. 3790(b).
- v. Security Mut. Life Ins. Co., 78 N. E. 584, 186 N. Y. 16, 9 Ann. Cas. 661—vii. 2699(b), 2842(f).
- 94 N. Y. Supp. 601, 106 App. Div. 352—vii. 2699(b), 3842(f).
- v. Supreme Court I. O. F., 195 Ill. App. 501—vii. 3290(b).
- v. United States Health & Accident Ins. Co., 65 S. E. 949, 84 S. C. 95—vi. 1978(i); vii. 2673(f).
- Kelsea v. Phoenix Ins. Co., 78 N. H. 422, 101 Atl. 362—vii. 2807(k).
- Kelsey v. Agricultural Ins. Co., 78 N. J. Eq. 378, 79 Atl. 539—vi. 864(g), 3017(d).
- v. Continental Casualty Co., 108 N. W. 221, 131 Iowa, 207, 8 L. R. A. (N. S.) 1014—vii. 3303(g).
- v. Union Cent. Life Ins. Co., 196 Fed. 195, 116 C. C. A. 27—vi. 2408(g).
- Kelshaw v. Bankers' Life Ins. Co., 117 App. Div. 726, 102 N. Y. Supp. 700—vi. 65(k).
- Kempf v. Equitable Life Assur. Soc. (Mo. App.) 184 S. W. 133—vi. 537(b).
- Kenefick v. Norwich Union Fire Ins. Soc., 103 S. W. 957, 205 Mo. 294—vi. 1710(k), 1890(h).
- Kennedy v. Aetna Life Ins. Co., 90 N. E. 292, 242 Ill. 396—vii. 3174(g), 3212(k).
- 148 Ill. App. 273—vii. 3174(g).
- v. Agricultural Ins. Co., 21 S. D. 145, 110 N. W. 116—vi. 632(c), 743(f); vii. 2621(a), 3532(b).
- v. Fidelity & Casualty Co., 110 N. W. 97, 100 Minn. 1, 9 L. R. A. (N. S.) 478, 117 Am. St. Rep. 658, 10 Ann. Cas. 673—vii. 3334(b).
- v. Grand Fraternity, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78—vi. 698(f), 2336(a), 2338(b), 2361(i), 2398(c), 2400(d), 2428(c), 2432(e); vii. 2467(c), 2496(o), 2659(a), 2715(h), 2718(i), 2719(j).
- v. Kennedy Mfg. & Engineering Co., 177 App. Div. 56, 163 N. Y. Supp. 944—vii. 3319(a).
- v. London & Lancashire Fire Ins. Co., 157 Mich. 411, 122 N. W. 134—vi. 1394(c).
- Kennedy v. Metropolitan Life Ins. Co., 40 South. 533, 116 La. 66—vi. 476(g), 2310(e).
- v. Modern Woodmen of America, 243 Ill. 560, 90 N. E. 1084, 28 L. R. A. (N. S.) 181—vii. 3129(a), 3131(a).
- 149 Ill. App. 471—vii. 3129(a), 3131(a).
- v. Prudential Ins. Co., 177 Ill. App. 50—vi. 1956(f), 1974(g), 1979(j), 2096(a), 2105(f), 2117(l), 2169(i).
- Kenny v. Bankers' Accident Ins. Co., 136 Iowa, 140, 113 N. W. 566—vi. 2082(i); vii. 3165(d), 3203(h), 3303(g), 3458(a), 3977(g).
- Kent & Purdy Paint Co. v. Aetna Ins. Co., 165 Mo. App. 30, 146 S. W. 78—vii. 3628(t), 3648(l), 3654(p), 3657(p).
- Kentucky Growers' Ins. Co. v. Logan, 149 Ky. 453, 149 S. W. 922—vi. 691(a), 692(b); vii. 2476(b), 2479(e).
- Kentucky Live Stock Ins. Co. v. McWilliams, 190 S. W. 697, 173 Ky. 92—vi. 1165(f), 1183(i), 1190(a), 1315(e); vii. 3416(d), 3432(m).
- v. Stout, 175 Ky. 343, 194 S. W. 318—vii. 2481(f), 2683(b), 3410(e).
- Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc., 146 Fed. 695, 77 C. C. A. 121—vi. 1511(e), 1514(f), 1646(o), 1807(h); vii. 2692(e), 2775(d).
- Kenyon Paper Co. v. Nederlandsche Lloyds, 124 App. Div. 886, 109 N. Y. Supp. 311—vi. 864(g), 866(h).
- Kephart v. Continental Casualty Co., 17 N. D. 380, 116 N. W. 349—vii. 3165(d), 3172(g), 3966(c), 3967(e).
- Kern v. Arbeiter Unterstuetzungs Verein, 102 N. W. 746, 139 Mich. 233—vi. 698(f).
- v. Western Life Indemnity Co., 192 Ill. App. 96—vi. 2324(n).
- Kerr v. Crane, 98 N. E. 783, 212 Mass. 224, 40 L. R. A. (N. S.) 692—vi. 1082(c); vii. 3793(c).
- Kesler v. Farmers' Mut. Fire & Lightning Ins. Ass'n, 160 Iowa, 374, 141 N. W. 954—vii. 2464(b), 2520(b), 2663(b), 3952(d).
- Keuthen v. Stache, 106 N. Y. Supp. 198, 121 App. Div. 521—vii. 3125(c).
- Keys v. National Council, Knights and Ladies of Security, 174 Mo. App. 671, 161 S. W. 345—vii. 2469(c), 2472(e), 2552(v), 2658(a), 2699(b), 2715(h), 2733(a), 2775(d), 2777(e), 2779(f).
- v. Phoenix Ins. Co., 132 Pac. 820, 37 Okl. 514—vii. 3966(c).
- Keys & Keys v. Mechanics' & Traders' Ins. Co., 132 Pac. 819, 37 Okl. 480—vii. 3966(c).

- Keys & Keys v. Williamsburg City Fire Ins. Co., 132 Pac. 818, 37 Okl. 482—vii. 3966(c).
- Kibler v. Maryland Casualty Co., 132 Pac. 878, 74 Wash. 159—vii. 3329(e), 3330(a).
- Kidd v. National Council of Junior Order of United American Mechanics, 193 S. W. 130, 137 Tenn. 398—vi. 2233(b), 2254(b); vii. 3887(c).
- Kidder v. Supreme Assembly of American Stars of Equity, 154 Ill. App. 489—vi. 1940(f), 1946(j); vii. 2552(v), 2690(d).
- v. Supreme Commandery United Order of Golden Cross, 78 N. E. 469, 192 Mass. 326—vi. 131(h), 1987(c), 1988(d), 1991(g), 2096(a), 2108(h), 2144(j), 2168(h), 2169(i), 2344(d), 2425(a), 2428(c).
- Kiefert v. Maple Valley Mut. Home Fire Ins. Co., 148 N. W. 864, 158 Wis. 340—vii. 3838(b).
- Kiesewetter v. Supreme Tent of Knights of Maccabees of the World, 81 N. E. 19, 277 Ill. 48—vii. 3248(i), 3262(n).
- 112 Ill. App. 48—vii. 3248(i), 3262(n).
- Kiisel v. Mutual Reserve Life Ins. Co., 107 N. W. 1027, 131 Iowa, 54—vii. 3960(b), 3964(e), 3972(g).
- Kilborn v. Prudential Ins. Co., 108 N. W. 861, 99 Minn. 176—vi. 449(d), 478(h), 487(k).
- Kimball v. Lower Columbia Fire Relief Ass'n, 67 Or. 249, 135 Pac. 877—vi. 950(g).
- Kimbro v. New York Life Ins. Co., 134 Iowa, 84, 108 N. W. 1025, 12 L. R. A. (N. S.) 421—vi. 487(k), 609(b).
- King v. Concordia Fire Ins. Co., 140 Mich. 253, 103 N. W. 616, 6 Ann. Cas. 87—vi. 642(i), 1814(a), 1815(b), 1829(g), 1890(h); vii. 2644(m).
- v. Hartford Fire Ins. Co., 133 Minn. 322, 158 N. W. 435—vi. 1741(g).
- v. Hartford Life & Annuity Ins. Co., 114 S. W. 63, 133 Mo. App. 612—vi. 2378(p), 2428(c), 2430(d), 2432(e).
- v. Lancaster County Mut. Ins. Co., 45 Pa. Super. Ct. 464—vi. 1065(b), 1731(c).
- v. Phoenix Ins. Co., 92 S. W. 892, 195 Mo. 290, 113 Am. St. Rep. 678, 6 Ann. Cas. 618—vi. 397(d), 398(g), 403(j); vii. 3096(g).
- v. Physicians' Casualty Ass'n, 97 Neb. 637, 150 N. W. 1010—vi. 2348(d).
- v. Supreme Council Catholic Mut. Ben. Ass'n, 65 Atl. 1108, 216 Pa. 553—vii. 3765(r).
- King v. Wynema Council, No. 10, Daughters of Pocahontas, 3 Boyce (Del.) 242, 82 Atl. 1076—vii. 3676(b).
- Kingan & Co. v. Maryland Casualty Co. (Ind. App.) 115 N. E. 348—vii. 3334(b), 3341(b).
- Kingkade v. Continental Casualty Co., 35 Okl. 99, 128 Pac. 683—vii. 3184(b).
- Kinney v. Brotherhood of American Yeomen, 106 N. W. 44, 15 N. D. 21—vi. 2425(a), 2430(d); vii. 3134(b).
- v. Buffalo German Ins. Co., 148 Ill. App. 260—vi. 1183(i); vii. 2796(e), 2797(f), 2801(h), 2818(b).
- v. Caledonian Ins. Co., 148 Ill. App. 256—vi. 1183(i); vii. 2796(e), 2797(f), 2801(h), 2818(b).
- v. Farmers' Mut. Fire & Ins. Soc., 141 N. W. 706, 159 Iowa, 490, Ann. Cas. 1915A, 609—vi. 1622(m), 1623(n); vii. 3383(c).
- v. Rochester German Ins. Co., 141 Ill. App. 543—vi. 1183(i); vii. 2796(e), 2797(f), 2801(h), 2818(b).
- Kinston Cotton Mills v. Liability Assur. Corporation, 77 S. E. 682, 161 N. C. 562—vii. 3316(a).
- Kinzer v. National Mut. Ins. Co., 127 Pac. 762, 88 Kan. 93, 43 L. R. A. (N. S.) 121—vii. 3047(a), 3081(c).
- Kiolbassa v. Polish Roman Catholic Union, 141 Ill. App. 297—vii. 3775(t), 3819(c).
- Kirk v. Fraternal Aid Ass'n, 149 Pac. 400, 95 Kan. 707—vi. 709(k).
- v. Sovereign Camp of Woodmen of the World, 155 S. W. 39, 169 Mo. App. 449—vi. 444(a), 476(g).
- Kirkham v. German American Ins. Co., 141 Pac. 1012, 92 Kan. 941—vii. 3614(k), 3651(m).
- Kirkpatrick v. Aetna Life Ins. Co., 141 Iowa, 74, 117 N. W. 1111, 22 L. R. A. (N. S.) 1255—vi. 632(c); vii. 3189(e), 3213(k).
- v. London Guarantee & Acc. Co., 139 Iowa, 370, 115 N. W. 1107, 19 L. R. A. (N. S.) 102—vi. 686(e), 687(e), 1974(g).
- Kissire v. Plunkett-Jarrell Grocer Co., 103 Ark. 473, 145 S. W. 567—vii. 3701(g).
- Kitsap County Transp. Co. v. Pacific Coast Casualty Co., 121 Pac. 457, 67 Wash. 297—vii. 3343(g), 3582(g).
- Kittredge v. Boston Firemen's Mut. Relief Ass'n, 77 N. E. 648, 191 Mass. 23—vi. 814(k).
- Klauck v. Federal Ins. Co., 131 App. Div. 519, 115 N. Y. Supp. 1049—vii. 3853(e).
- 111 N. Y. Supp. 1037, 60 Misc. Rep. 170, 182—vii. 2989(g), 3853(e).

- Klauss v. National Council, Knights and Ladies of Security, 170 Ill. App. 196—vi. 2404(e); vii. 2495(o).
- Klee v. Klee, 47 Misc. Rep. 101, 93 N. Y. Supp. 588—vi. 809(i); vii. 2837(d).
- Kleeman Co. v. New Amsterdam Casualty Co., 164 S. W. 167, 177 Mo. App. 397—vii. 3319(a).
- Klein v. Knights and Ladies of Security, 79 Wash. 173, 140 Pac. 72—vi. 708(j).
- v. National Protective Legion, 179 Ill. App. 605—vi. 2096(a), 2142(b).
- v. Supreme Council of Loyal Ass'n, 155 N. Y. Supp. 580, 92 Misc. Rep. 216—vi. 2044(g); vii. 2467(c).
- 163 N. Y. Supp. 5, 98 Misc. Rep. 218—vii. 2514(g), 2694(g).
- Kleis v. Travelers' Ins. Co., 136 N. W. 1101, 118 Minn. 422—vii. 3312(i).
- Kline Bros. & Co. v. German Union Fire Ins. Co., 132 N. Y. Supp. 181, 147 App. Div. 790—vi. 220(c).
- v. Royal Ins. Co. (C. C.) 192 Fed. 378—vi. 408(a), 1420(c), 1506(a), 1774(g), 1821(d), 1828(f), 1829(g); vii. 3890(d).
- Klotz Tailoring Co. v. Eastern Fire Ins. Co., 102 N. Y. Supp. 82, 116 App. Div. 723—vii. 3103(b).
- Kludt v. German Mut. Fire Ins. Co., 140 N. W. 321, 152 Wis. 637, 45 L. R. A. (N. S.) 1131, Ann. Cas. 1914C, 609—vi. 163(h), 1340(g), 1715(a); vii. 3066(e).
- Klumb v. Iowa State Traveling Men's Ass'n, 141 Iowa, 519, 120 N. W. 81—vii. 3175(h), 3255(l).
- Knapp v. Brotherhood of American Yeomen, 105 N. W. 63, 128 Iowa, 566—vi. 2237(a); vii. 2552(v), 3627(b).
- 139 Iowa, 136, 117 N. W. 298—vi. 684(d), 1969(f); vii. 2768(a), 3597(a).
- v. Order of Pendo, 79 Pac. 209, 36 Wash. 601—vi. 1969(f); vii. 3246(h).
- Knerll v. Ocean Accident & Guarantee Corporation (Sup.) 119 N. Y. Supp. 744—vii. 3338(e).
- Kness v. Anchor Fire Ins. Co., 31 Pa. Super. Ct. 521—vii. 3496(e), 3516(b).
- Knights and Ladies of Columbia Ins. Order v. Shoaf, 166 Ind. 367, 77 N. E. 738—vii. 3137(c).
- Knights and Ladies of Security v. Considine, 158 Pac. 282, 61 Colo. 474—vi. 2096(a).
- Knights of Columbus v. Burroughs' Beneficiary, 107 Va. 671, 60 S. E. 40, 17 L. R. A. (N. S.) 246—vi. 697(e), 2336(a), 2338(b); vii. 2495(o), 2717(h).
- Knights of Columbus v. Curran, 91 Conn. 115, 90 Atl. 485—vii. 3767(s), 3772(s).
- v. McInerney, 153 Mich. 574, 117 N. W. 166, 126 Am. St. Rep. 541—vii. 3722(b), 3732(f).
- Knights of Honor of the World v. Epps, 123 Ark. 371, 185 S. W. 470—vii. 4001(b).
- Knights of Maccabees v. Anderson, 104 Ark. 417, 148 S. W. 1016—vi. 2057(g); vii. 3886(b).
- v. Brown, 186 Mich. 284, 152 N. W. 1085—vi. 698(f); vii. 3736(h).
- v. Gordon, 83 Ark. 17, 102 S. W. 711—vi. 386(n), 398(e).
- v. Hunter, 103 Tex. 612, 132 S. W. 116—vi. 609(b), 2096(a), 2142(h), 2144(j).
- 143 S. W. 359, 57 Tex. Civ. App. 115—vi. 2096(a), 2142(h).
- v. Johnson (Tex. Civ. App.) 143 S. W. 718—vii. 3265(o).
- v. Nelson, 77 Kan. 629, 95 Pac. 1052—vi. 712(l); vii. 3234(c).
- v. Pelton, 21 Colo. App. 185, 121 Pac. 949—vi. 68(m); vii. 2715(h), 2727(p).
- v. Sackett, 86 Pac. 423, 34 Mont. 357, 115 Am. St. Rep. 532—vii. 3762(r), 3767(s), 3772(s), 3773(s).
- v. Shields, 160 S. W. 1043, 156 Ky. 270, 49 L. R. A. (N. S.) 853—vi. 1962(k), 2006(e), 2127(c); vii. 3135(c), 3149(f).
- 162 S. W. 778, 157 Ky. 35, 49 L. R. A. (N. S.) 860—vi. 1962(k), 2006(e), 2127(c); vii. 3135(c), 3149(f).
- Knights of Modern Maccabees v. Commissioner of Insurance, 155 Mich. 693, 118 N. W. 585—vi. 61(h).
- v. Gillespie, 71 South. 67, 14 Ala. App. 493—vi. 1988(d); vii. 2634(f).
- v. Gillis, 125 S. W. 338, 59 Tex. Civ. App. 109—vi. 2430(d).
- (Tex. Civ. App.) 144 S. W. 713—vi. 2432(e).
- v. Grice, 148 Mich. 422, 111 N. W. 1054—vii. 3738(j).
- v. Mayfield (Tex. Civ. App.) 147 S. W. 675—vi. 2375(o); vii. 3684(d).
- v. Sharp, 163 Mich. 449, 128 N. W. 786, 33 L. R. A. (N. S.) 780—vi. 285(f); vii. 3775(t).
- Knights of Pythias of North America v. Long, 117 Ark. 136, 174 S. W. 1197—vi. 708(j); vii. 3762(r).
- Knipp v. United Benev. Ass'n, 45 Tex. Civ. App. 357, 101 S. W. 273—vii. 3288(b).
- Knobel v. London Guarantee & Acc. Co. (Sup.) 163 N. Y. Supp. 977—vi. 348(b), 643(k); vii. 3338(e).

- Knode v. Modern Woodmen of America**, 157 S. W. 818, 171 Mo. App. 377—vi. 2336(a), 2338(b); vii. 2711(d).
- Knodel v. Equitable Life Ins. Co. (Tex. Civ. App.)** 193 S. W. 1138—vii. 2705(b).
- Knoebel v. North American Acc. Ins. Co.**, 135 Wis. 424, 115 N. W. 1094, 20 L. R. A. (N. S.) 1037—vi. 2330(q), 2659(a).
- Knott v. Security Mut. Life Ins. Co.**, 161 Mo. App. 579, 144 S. W. 178—vi. 54(e), 619(b), 620(c), 641(i), 993(b), 2314(b).
- Knowles v. Knowles**, 205 Mass. 290, 91 N. E. 213—vi. 686(e); vii. 3819(c).
- Knowlton v. Black**, 67 Atl. 563, 102 Me. 503—vii. 3699(g).
- v. Patrons Androscooggin Fire Ins. Co.**, 62 Atl. 289, 100 Me. 481, 2 L. R. A. (N. S.) 517—vi. 1634(g), 1657(b), 1675(i), 1681(l); vii. 2689(c).
- Knox-Burchard Mercantile Co. v. Hartford Fire Ins. Co.**, 152 N. W. 650, 129 Minn. 292—vii. 3077(n), 3674(m), 3827(c).
- Knutzen v. National Life Stock Ins. Co.**, 121 N. W. 632, 108 Minn. 163—vii. 3036(a).
- Kobin v. St. Paul Fire & Marine Ins. Co.**, 137 N. W. 753, 150 Wis. 591—vi. 233(l); vii. 3432(m).
- Koblitz v. American Credit Indemnity Co.**, 110 N. E. 919, 92 Ohio St. 272—vii. 3582(f).
- Koch v. Commonwealth Ins. Co. (N. J. Ch.)** 99 Atl. 920—vi. 862(f).
- v. Home Ins. Co.**, 185 Ill. App. 34—vii. 3627(s).
- Koehler v. Modern Brotherhood**, 160 Mich. 180, 125 N. W. 49, 136 Am. St. Rep. 424—vii. 2709(d).
- Koenigstein v. Finke (Neb.)** 163 N. W. 758, L. R. A. 1917F, 398—vi. 813(k); vii. 3774(s).
- Kolosinski v. Modern Brotherhood of America**, 175 Mich. 684, 141 N. W. 589—vi. 434(l), 610(c).
- Kompa v. Franklin Fire Ins. Co.**, 28 Pa. Super. Ct. 425—vi. 1731(c); vii. 2618(k).
- Komula v. General Accident Fire & Life Assur. Corporation**, 165 Wis. 520, 162 N. W. 919—vi. 854(a), 878(s); vii. 3334(b).
- Kopetovske v. Mutual Life Ins. Co.**, 187 Fed. 499, 111 C. C. A. 265—vi. 282(d), 328(h).
- Kornig v. Western Life Indemnity Co.**, 102 Minn. 31, 112 N. W. 1039—vii. 3257(m), 3262(n), 3263(o), 3264(o), 3265(o).
- Kotek v. Court of Honor**, 152 Ill. App. 92—vi. 1953(c).
- Krank v. Continental Ins. Co.**, 100 N. Y. Supp. 399, 50 Misc. Rep. 144—vii. 3036(a).
- Krapp v. Metropolitan Life Ins. Co.**, 106 N. W. 1107, 143 Mich. 369, 114 Am. St. Rep. 651—vii. 3468(b).
- Kratzer & Co. v. Pennsylvania Casualty Co.**, 86 Atl. 303, 238 Pa. 515—vii. 3146(f).
- Krause v. Modern Woodmen of America**, 133 Iowa, 199, 110 N. W. 452—vi. 61(b), 579(h), 1934(c), 1966(b), 2023(a), 2025(d), 2029(g).
- Kray v. Mutual Reserve Life Ins. Co.**, 50 Tex. Civ. App. 555, 111 S. W. 421—vi. 2281(a), 2378(p).
- Krebs v. Philadelphia Life Ins. Co.**, 95 Atl. 91, 249 Pa. 330, Ann. Cas. 1917D, 1184—vi. 632(c); vii. 3240(e).
- v. Security Trust & Life Ins. Co. (C. C.)** 156 Fed. 294—vii. 2708(c), 2846(h).
- Kreck v. Supreme Lodge of Fraternal Union of America**, 95 Neb. 428, 145 N. W. 859—vii. 2552(v), 2688(b).
- Krell v. Chickasaw Farmers' Mut. Fire Ins. Co.**, 104 N. W. 364, 127 Iowa, 748—vi. 687(f), 1185(k), 1457(c), 1787(c).
- Kresge v. Maryland Casualty Co.**, 143 N. W. 668, 154 Wis. 627—vi. 632(c); vii. 3316(a).
- Krey Packing Co. v. United States Fidelity & Guaranty Co.**, 175 S. W. 322, 189 Mo. App. 591—vi. 2439(c); vii. 2668(d), 2764(a).
- Kribs v. United Order of Foresters**, 191 Mo. App. 524, 177 S. W. 766—vi. 54(e), 1950(a), 1984(a), 1997(j), 2561(b).
- Kring v. Globe Farmers' Town Mut. Fire, Tornado, Cyclone & Windstorm Ins. Co.**, 195 Mo. App. 133, 189 S. W. 628—vi. 348(b), 1835(b); vii. 2549(t).
- Kroge v. Modern Brotherhood of America**, 126 Mo. App. 693, 105 S. W. 685—vi. 57(f); vii. 3281(e).
- Krogh v. Modern Brotherhood of America**, 153 Wis. 397, 141 N. W. 276, 45 L. R. A. (N. S.) 404—vii. 3255(l), 3257(m), 3265(o), 3281(e), 3285(e), 3471(c).
- Krol v. Royal Ins. Co.**, 162 Ill. App. 202—vii. 3037(a).
- Kuck v. Citizens' Ins. Co.**, 90 Wash. 35, 155 Pac. 406—vii. 3527(g).
- Kuh v. British American Assur. Co.**, 130 App. Div. 38, 114 N. Y. Supp. 268—vi. 662(a), 1250(l); vii. 2927(e), 2976(e).
- 112 N. Y. Supp.** 410, 59 Misc. Rep. 589—vi. 662(a), 1250(l); vii. 2927(e), 2976(e).
- 195 N. Y.** 571, 88 N. E. 1122—vii. 2927(e).
- Kulberg v. Fraternal Union of America**, 154 N. W. 748, 131 Minn. 131—vii. 4007(f).
- v. National Council, Knights & Ladies of Security**, 145 N. W. 120, 124 Minn. 437—vi. 129(h), 130(h), 2378(p); vii. 3236(f).
- v. Supreme Ruling of Fraternal Mystic Circle**, 148 N. W. 299, 126 Minn. 494—vii. 2779(f).

- Kunse v. Knights of Modern Maccabees, 45 Ind. App. 30, 90 N. E. 89—vii. 3228(b).
- Kupfersmith v. Delaware Ins. Co., 80 N. J. Law, 191, 76 Atl. 329—vi. 1065(b).
- 81 N. J. Law, 664, 80 Atl. 561—vii. 3716(m).
- 84 N. J. Law, 271, 86 Atl. 399, 45 L. R. A. (N. S.) 847, Ann. Cas. 1914E, 1172—vi. 1663(e).
- Kutschenreuter v. Providence Washington Ins. Co., 159 N. W. 552, 164 Wis. 63—vii. 3531(a).
- L**
- Labranche v. St. Jean Baptiste Soc., 81 Atl. 698, 76 N. H. 237—vi. 2338(b); vii. 2464(b), 2704(b).
- Lacy v. Continental Casualty Co., 170 Ill. App. 527—vi. 2319(l).
- Ladies' Auxiliary of Ancient Order of Hibernians v. Flanigan, 190 Mich. 675, 157 N. W. 355—vii. 3732(f).
- Ladies of Maccabees of the World v. Kendrick (Tex. Civ. App.) 165 S. W. 110—vi. 2154(e), 2168(h).
- Ladies of Modern Maccabees v. Daley, 166 Mich. 542, 131 N. W. 1127—vii. 3774(s).
- v. Illinois Surety Co. (Mich.) 163 N. W. 7—vi. 846(i), 851(d).
- 181 Fed. 945, 104 C. C. A. 409—vii. 2995(j).
- LaFont v. Home Ins. Co., 193 Mo. App. 543, 182 S. W. 1029—vi. 163(h), 1900(f); vii. 2558(a), 3089(g), 3887(c).
- Lagden v. Concordia Mut. Fire Ins. Co., 154 N. W. 87, 188 Mich. 689—vi. 1511(e), 1835(b).
- Lagudis v. London Assur. Corporation, 156 Pac. 68, 29 Cal. App. 482—vii. 3955(a).
- Laib v. Fraternal Reserve Life Ass'n, 177 Ill. App. 72—vi. 665(c).
- Laird v. Piedmont Mut. Fire Ins. Co., 82 S. C. 424, 64 S. E. 404—vi. 1326(n).
- Lake v. New York Life Ins. Co.; 45 South. 959, 120 La. 971—vi. 301(d).
- Lake Superior Produce & Cold Storage Co. v. Concordia Fire Ins. Co., 95 Minn. 492, 104 N. W. 560—vi. 1835(b); vii. 3511(a).
- Lake View Brewing Co. v. Commerce Ins. Co., 143 App. Div. 665, 128 N. Y. Supp. 337—vi. 854(a), 864(g).
- Lakka v. Modern Brotherhood of America, 163 Iowa, 159, 143 N. W. 513, 49 L. R. A. (N. S.) 902—vi. 2061(k), 2108(h).
- Lally v. Prudential Ins. Co., 75 N. H. 188, 72 Atl. 208—vii. 2706(c), 2709(d).
- Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co., 18 N. D. 253, 119 N. W. 1048—vi. 124(e), 691(a), 692(b), 693(c), 1874(c), 1881(f).
- Lambert v. Security Mut. Fire Ins. Co., 58 Pa. Super. Ct. 624—vi. 642(i), 1774(g).
- Lamontagne v. Standard Life & Accident Ins. Co., 115 N. E. 244, 226 Mass. 161—vii. 3456(i).
- Lamport v. General Accident, Fire & Life Assur. Corporation (Mo.) 197 S. W. 95—vi. 2053(b), 2065(a).
- Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491—vii. 3438(e), 3527(g), 3627(s).
- Lancaster v. Southern Ins. Co., 153 N. C. 285, 69 S. E. 214, 138 Am. St. Rep. 665—vi. 642(i), 1378(h), 1382(k), 1422(c), 1482(a).
- Lane v. Fidelity Mut. Life Ins. Co., 142 N. C. 55, 54 S. E. 854, 115 Am. St. Rep. 729—vi. 2398(c), 2400(d).
- v. General Accident Ins. Co. (Tex. Civ. App.) 113 S. W. 324—vii. 3309(h), 3886(b).
- v. Yeomen of America, 125 Ill. App. 406—vi. 2239(c); vii. 2658(a), 2699(b).
- Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 N. E. 452, 18 L. R. A. (N. S.) 1190—vi. 684(d), 1974(g), 1988(d), 2051(a), 2061(k), 2071(a), 2075(e), 2082(i), 2151(a); vii. 3755(q), 3802(g).
- Langdon v. Northwestern Mut. Life Ins. Co., 116 App. Div. 558, 101 N. Y. Supp. 914—vi. 665(c).
- 131 App. Div. 922, 115 N. Y. Supp. 1128—vi. 615(f), 854(a), 873(o).
- 92 N. E. 440, 199 N. Y. 188—vi. 615(f), 854(a), 873(o).
- Lang v. Royal Highlanders, 75 Neb. 188, 106 N. W. 224, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786—vi. 691(a), 701(g), 704(h), 709(k), 711(l), 712(l); vii. 3226(a), 3234(c).
- Lange v. New York Life Ins. Co., 162 S. W. 589, 254 Mo. 488—vi. 658(g); vii. 2777(e).
- v. Royal Highlanders, 75 Neb. 188, 110 N. W. 1110, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786—vi. 409(k), 691(a), 701(g), 704(h), 709(k), 711(l), 712(l); vii. 3226(a), 3234(c).
- Langford v. National Life & Accident Ins. Co., 116 Ark. 527, 173 S. W. 414, Ann. Cas. 1917A, 1081—vi. 253(f), 258(g), 2070(d).
- Langsner v. German Alliance Ins. Co., 123 N. Y. Supp. 144, 67 Misc. Rep. 411—vii. 3623(p), 3623(t).
- Lanier v. Eastern Life Ins. Co., 54 S. E. 786, 142 N. C. 14—vi. 792(f); vii. 2865(b), 3533(b), 3755(q).
- Lapcevic v. Concordia Ins. Co., 40 Pa. Super. Ct. 301—vii. 3350(a), 3524(f).
- v. Lebanon Mut. Ins. Co., 40 Pa. Super. Ct. 294—vii. 3350(a), 3524(f).

- Lapcevic v. Ohio Ins. Co., 40 Pa. Super. Ct. 301—vii. 3350(a), 3524(f).
- Larkin v. Knights of Columbus, 73 N. E. 850, 188 Mass. 22—vii. 3722 (b).
- v. Modern Woodmen of America, 163 Mich. 670, 127 N. W. 786—vi. 609(b); vii. 2496(o), 3676 (b), 3685(d).
- Larrimore v. United States Fidelity & Guaranty Co., 132 Pac. 1050, 21 Cal. App. 767—2450(c).
- La Rue v. Provident Saving Life Assur. Society, 138 Ky. 776, 129 S. W. 104—vi. 993(b).
- Lasch v. New York Life Ins. Co. (City Ct.) 153 N. Y. Supp. 898—vi. 505(e).
- Latham Mercantile & Commercial Co. v. Harrod, 71 Kan. 565, 81 Pac. 214—vi. 360(k), 584(b).
- Lathers v. Mutual Fire Ins. Co., 135 Wis. 431, 116 N. W. 1, 22 L. R. A. (N. S.) 848, 15 Ann. Cas. 659—vi. 739(d).
- Lathrop v. Modern Woodmen of America, 56 Or. 440, 106 Pac. 328—vi. 451(f), 469(e); vii. 2494(o). 56 Or. 440, 109 Pac. 81—vi. 451(f), 469(e); vii. 2494(o). 63 Or. 193, 126 Pac. 1002—vi. 454(g), 2432(e).
- Laue v. Grand Fraternity, 132 Tenn. 235, 177 S. W. 941, L. R. A. 1915F. 1056, Ann. Cas. 1917A, 376—vi. 2221(b), 2368(l), 2382(r); vii. 3286(f).
- Laun v. Pacific Mut. Life Ins. Co., 111 N. W. 660, 131 Wis. 555, 9 L. R. A. (N. S.) 1204—vi. 1040(c).
- Laurenzi v. Atlas Ins. Co., 131 Tenn. 644, 176 S. W. 1022—vii. 3050(a), 3435(b), 3700(g).
- Lauterbach v. New York Inv. Co., 117 N. Y. Supp. 152, 62 Misc. Rep. 561—vii. 3755(g), 3793(c).
- Lauze v. New York Life Ins. Co., 74 N. H. 334, 68 Atl. 31—vi. 458(j), 478(h), 997(d).
- Laventhal v. Fidelity & Casualty Co., 98 Pac. 1075, 9 Cal. App. 275—vi. 628(a); vii. 3168(e).
- Lavin v. Grand Lodge A. O. U. W., 86 S. W. 600, 112 Mo. App. 1—vi. 2391(u), 2432(e).
- Law v. Home Mut. Fire Ins. Co., 56 Pa. Super. Ct. 527—vi. 1658(c).
- v. Northern Assur. Co., 165 Cal. 394, 132 Pac. 590—vi. 535(a), 537(c), 839(c).
- Lawler v. Home Life Ins. Co., 59 Pa. Super. Ct. 409—vi. 289(j); vii. 2755(b).
- Lawrence v. General Accident Assur. Corp., 108 N. Y. Supp. 939, 124 App. Div. 545—vii. 3331(a).
- 85 N. E. 1112, 192 N. Y. 568—vii. 3331(a).
- v. Massachusetts Bonding & Ins. Co. (Sup.) 160 N. Y. Supp. 883—vii. 3986(j).
- Lawrence v. Northwestern Nat. Ins. Co., 197 Ill. App. 449—vii. 3431(m), 3432(m).
- v. Union Ins. Co. of Philadelphia, 80 N. J. Law, 133, 76 Atl. 1053—vi. 184(a), 185(b), 788(a).
- Lawson v. Hotchkiss, 125 N. Y. Supp. 261, 140 App. Div. 297—vi. 325(f).
- v. Lyon, 136 Ga. 214, 71 S. E. 149—vii. 3811(k).
- v. United Benev. Ass'n (Tex. Civ. App.) 185 S. W. 976—vi. 285(f), 806(f), 819(m), 1037(a); vii. 2688(b).
- Lawver v. Globe Mut. Ins. Co., 25 S. D. 549, 127 N. W. 615—vi. 1779(j), 1783(a); vii. 2524(d), 2621(a), 2622(a), 2665(c), 2670(e), 3099(a).
- Lawyers' Title Ins. & Trust Co. v. Kelly (Sup.) 132 N. Y. Supp. 721—vi. 913(a).
- Laxton v. Patrons' Mut. Fire Ins. Co., 134 N. W. 467, 168 Mich. 448—vii. 2683(b).
- Layton v. Interstate Business Men's Acc. Ass'n, 158 Iowa, 356, 139 N. W. 463—vii. 3228(b), 3267(o).
- L. Black Co. v. London Guarantee & Accident Co., 144 N. Y. Supp. 424, 159 App. Div. 186—vi. 636(e), 688(f), 2439(c), 2444(f), 2445(f); vii. 2634(f), 2766(b).
- 111 N. E. 241, 216 N. Y. 560—vi. 2445(f).
- Lea v. Atlantic Fire Ins. Co., 168 N. C. 478, 84 S. E. 813—vi. 397(d), 535(a).
- Lea & Adcock v. Atlantic Fire Ins. Co., 168 N. C. 478, 84 S. E. 813—vi. 923(f).
- Leader Realty Co. v. Markham, 163 Mo. App. 314, 143 S. W. 1104—vi. 915(b), 925(g); vii. 2803(i).
- Leary v. Murray, 178 Fed. 209, 101 C. C. A. 529, 21 Ann. Cas. 868—vii. 3002(l).
- Leavitt v. National Fire Ins. Co., 88 Misc. Rep. 563, 151 N. Y. Supp. 71—vi. 744(f).
- Lebanon County v. Franklin Fire Ins. Co., 85 Atl. 419, 237 Pa. 360, 44 L. R. A. (N. S.) 148, Ann. Cas. 1914B, 130—vi. 1605(c), 1699(f).
- Le Blanc v. Standard Ins. Co., 95 Atl. 284, 114 Me. 6—vii. 3582(g).
- Leder v. National Union Fire Ins. Co., 141 N. W. 646, 175 Mich. 470—vii. 3125(c).
- Ledford v. Hartford Fire Ins. Co., 161 Ill. App. 233—vi. 1316(f); vii. 3839(b).
- Ledy v. National Council of Knights and Ladies of Security, 129 Minn. 137, 151 N. W. 905, Ann. Cas. 1916E. 486—vi. 708(j); vii. 3256(l).
- Lee v. Casualty Co. of America, 96 Atl. 952, 90 Conn. 202—vi. 636(e); vii. 2460(a), 3347(a), 3477(a), 3514(b).
- Lee v. Equitable Life Assur. Soc., 195 Mo. App. 40, 189 S. W. 1195—vi. 251(e), 253(f), 269(h), 1105(d).

- Lee v. New Hampshire Fire Ins. Co., 154 N. C. 446, 70 S. E. 819—vii. 2809(l).
- 155 N. C. 425, 70 S. E. 1004—vii. 2809(l).
- v. Prudential Life Ins. Co., 203 Mass. 299, 89 N. E. 529, 17 Ann. Cas. 236—vi. 456(h), 495(o), 677(a).
- 206 Mass. 440, 92 N. E. 709—vi. 495(o).
- Leech v. Order of R. Telegraphers, 109 S. W. 811, 130 Mo. App. 5—vi. 2238(b), 2338(b).
- Leeker v. Prudential Ins. Co. of America, 134 S. W. 676, 154 Mo. App. 440—vi. 2263(b).
- Lefler v. New York Life Ins. Co., 143 Fed. 814, 74 C. C. A. 488—vi. 2308(d).
- Legler v. United States Fidelity & Guaranty Co., 103 N. E. 897, 88 Ohio St. 336—vi. 2437(b).
- Lehigh Valley R. Co. v. Providence-Washington Ins. Co., 172 Fed. 364, 97 C. C. A. 62—vi. 1547(c); vii. 3969(f).
- (D. C.) 167 Fed. 223—vi. 1547(c); vii. 3969(f).
- Lehman v. Great Western Accident Ass'n, 155 Iowa, 737, 133 N. W. 752, 42 L. R. A. (N. S.) 562—vii. 3156(a), 3157(a), 3176(a), 3199(h).
- v. Gunn, 154 Ala. 369, 45 So. 620—vii. 3787(a).
- v. Lancaster County Mut. Ins. Co., 45 Pa. Super. Ct. 375—vii. 3692(b).
- v. Lehman, 215 Pa. 344, 64 Atl. 598—vii. 807(g).
- 29 Pa. Super. Ct. 60—vi. 636(e); vii. 3737(i).
- Lehmann v. Hartford Fire Ins. Co., 167 S. W. 1047, 183 Mo. App. 696—vi. 68(l); vii. 2555(a).
- Leiman v. Metropolitan Surety Co. (Sup.) 111 N. Y. Supp. 536—vi. 632(c), 1829(g).
- Leisen v. St. Paul Fire & Marine Ins. Co., 20 N. D. 316, 127 N. W. 837, 30 L. R. A. (N. S.) 539—vii. 2465(b), 2510(f), 2555(a), 2580(h), 2620(a), 2622(a), 2651(s).
- Leland v. Modern Samaritans, 111 Minn. 207, 126 N. W. 728—vi. 691(a), 703(h); vii. 2503(b), 2706(c).
- Lemaitre v. National Casualty Co., 195 Mo. App. 599, 186 S. W. 964—vi. 643(j); vii. 3301(f).
- Lenagh v. Commonwealth Union Assur. Co., 77 Neb. 649, 110 N. W. 740—vi. 163(h), 786(a).
- Lenning v. Retail Merchants' Mut. Fire Ins. Co., 129 Minn. 66, 151 N. W. 425—vi. 786(a).
- Lenon v. Mutual Life Ins. Co., 98 S. W. 117, 80 Ark. 563, 8 L. R. A. (N. S.) 193, 10 Ann. Cas. 467—vi. 2413(h), 2417(i), 2422(j).
- Lentz v. Fritter, 110 N. E. 637, 92 Ohio St. 186—vii. 3762(r), 3767(s).
- Leonard v. American Life & Annuity Co., 77 S. E. 41, 139 Ga. 274—vi. 1011(d).
- v. Bosch, 73 N. J. Eq. 438, 68 Atl. 56—vii. 2983(b), 2985(c).
- 74 N. J. Eq. 854, 71 Atl. 1134—vii. 2983(b), 2985(c).
- v. Farmers' Mut. Fire Ins. Co., 192 Mich. 230, 158 N. W. 1041—vi. 422(f), 693(c), 1066(c); vii. 2465(b).
- v. John Hancock Mut. Life Ins. Co., 135 N. Y. Supp. 564, 76 Misc. Rep. 529—vii. 3472(d).
- v. Prudential Ins. Co., 107 N. W. 646, 128 Wis. 348, 116 Am. St. Rep. 50—vi. 2398(c); vii. 2706(b).
- v. State Mut. Life Assur. Co., 24 R. I. 7, 51 Atl. 1049, 96 Am. St. Rep. 698—vi. 1984(a).
- 27 R. I. 121, 61 Atl. 52, 114 Am. St. Rep. 30—vi. 1984(a), 1994(i).
- Lepman v. Employers' Liability Assur. Corporation, 170 Ill. App. 379—vii. 3033(i), 3063(a).
- Lesem v. Mutual Life Ins. Co., 149 N. Y. Supp. 559, 164 App. Div. 507—vi. 1094(g).
- Leslie v. Firemen's Ins. Co., 112 N. Y. Supp. 496, 60 Misc. Rep. 558—vii. 3700(g).
- Lesseps v. Fidelity Mut. Life Ins. Co., 120 La. 610, 45 South. 522—vi. 2259(a), 2308(d), 2398(c).
- Lesser v. Jefferson Fire Ins. Co., 133 S. W. 551, 141 Ky. 667—vii. 3042(c), 3043(e).
- Lessnau v. Catholic Order of Foresters, 163 Mich. 111, 128 N. W. 201—vii. 2562(b), 2683(b), 2688(b).
- Letherer v. Phoenix Accident & Sick Benefit Ass'n, 108 N. W. 492, 145 Mich. 313—vii. 3168(e).
- v. United States Health & Accident Ins. Co., 108 N. W. 491, 145 Mich. 310—vii. 3168(e).
- Letzler's Adm'r v. Pacific Mut. Life Ins. Co., 119 Ky. 924, 85 S. W. 177—vi. 533(k), 2408(g).
- Leu v. Commercial Mut. Fire Ins. Co., 107 N. W. 59, 15 N. D. 360—vii. 3627(t).
- Leumann v. Grand Lodge A. O. U. W., 85 Neb. 803, 124 N. W. 475—vii. 3815(b).
- Levi v. Palatine Ins. Co., 78 Atl. 617, 75 N. H. 551—vii. 3077(m), 3364(e), 3477(a), 3661(b).
- Levin v. New England Casualty Co., 160 N. Y. Supp. 1041, 97 Misc. Rep. 7—vii. 3343(g).
- v. Northwestern Nat. Ins. Co. (C. C.) 146 Fed. 76—vii. 3654(p).
- (C. C.) 185 Fed. 981—vii. 3642(i), 3651(m).

- Levy v. Scottish Union & National Ins. Co.*, 52 S. E. 449, 58 W. Va. 546—vii. 3657(p).
- Lewine v. Supreme Lodge Knights of Pythias*, 99 S. W. 821, 122 Mo. App. 547—vi. 713(m), 717(n); vii. 3236(c).
- Lewinthal v. Travelers' Ins. Co.*, 113 N. Y. Supp. 1031, 61 Misc. Rep. 621—vii. 3334(b).
- Lewis v. Brotherhood Acc. Co.*, 194 Mass. 1, 79 N. E. 802, 17 L. R. A. (N. S.) 714—vii. 3185(c), 3726(d).
- v. Continental Casualty Co.*, 61 Wash. 154, 112 Pac. 91—vii. 3181(b).
- v. Farmers' Mut. Fire Ins. Co.*, 159 Wis. 547, 150 N. W. 949—vii. 2689(c), 2692(e), 3432(m).
- v. Guardian Fire & Life Assur. Co.*, 93 App. Div. 157, 87 N. Y. Supp. 525—vii. 2524(c), 3711(j), 3945(a).
- 181 N. Y. 392, 74 N. E. 224, 106 Am. St. Rep. 557—vii. 2524(c), 3711(j), 3945(a).
- v. International Ins. Co. (Ala.)* 73 South. 629—vii. 4006(f), 4007(f).
- v. London & Lancashire Fire Ins. Co.*, 137 N. Y. Supp. 887, 78 Misc. Rep. 176—vi. 1039(a); vii. 2819(b).
- v. New York Life Ins. Co. (C. C.)* 173 Fed. 1009—vii. 2833(c), 2849(j).
- 181 Fed. 433, 104 C. C. A. 181, 30 L. R. A. (N. S.) 1202—vii. 2833(c), 2849(j).
- v. Palmer*, 106 Va. 522, 56 S. W. 341—vi. 285(f).
- Lexington Grocery Co. v. Philadelphia Casualty Co.*, 157 N. C. 116, 72 S. E. 870—vi. 11(h), 662(a), 677(a); vii. 3323(c).
- Leyden v. Lawrence*, 81 Atl. 121, 79 N. J. Eq. 113—vii. 3701(g), 3915(j).
- 85 Atl. 1134, 80 N. J. Eq. 550—vii. 3701(g), 3915(j).
- Libre v. Brotherhood of American Yeomen*, 168 Ill. App. 328—vii. 3467(b).
- Lichtenhan v. Prudential Ins. Co.*, 191 Ill. App. 412—vi. 2413(h); vii. 3131(a).
- Lickleider v. Iowa State Traveling Men's Ass'n (Iowa)* 151 N. W. 479—vii. 3157(a).
- Lieberman v. Columbia Nat. Life Ins. Co.*, 47 Pa. Super. Ct. 276—vii. 3294(c).
- Liebing v. Mutual Life Ins. Co.*, 269 Mo. 509, 191 S. W. 250—vi. 2407(g); vii. 3287(f), 3477(a).
- Lierheimer v. Minnesota Mut. Life Ins. Co.*, 122 Mo. App. 374, 99 S. W. 525—vii. 2849(j).
- Liesney v. Metropolitan Life Ins. Co.*, 166 App. Div. 625, 151 N. Y. Supp. 1084—vi. 2286(b).
- 148 N. Y. Supp. 1057, 86 Misc. Rep. 650—vi. 2286(b).
- Liesny v. Metropolitan Life Ins. Co.*, 131 N. Y. Supp. 1087, 147 App. Div. 253—vi. 2428(c).
- Life Ass'n of America v. Cravens*, 60 Mo. 388—vi. 1001(e).
- v. Edwards*, 159 Fed. 53, 86 C. C. A. 243—vi. 2156(a).
- Life Ins. Co. of Virginia v. Fitzgerald*, 85 S. E. 913, 143 Ga. 725—vi. 2202(c).
- v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989—vi. 484(j), 487(k), 495(o), 498(b), 507(f), 512(h), 1969(f), 1978(i), 1980(k), 1988(d); vii. 3257(m), 3263(o), 3268(p).
- v. Proctor*, 89 S. E. 1088, 18 Ga. App. 517—vi. 914(a).
- Life & Casualty Ins. Co. v. Jones*, 112 Miss. 506, 73 South. 566—vii. 3289(b).
- v. King*, 137 Tenn. 685, 195 S. W. 585—vi. 453(f), 681(c), 2096(a); vii. 2517(a), 2524(d), 2025(a), 3135(c).
- Lightner v. Prudential Ins. Co.*, 154 Pac. 227, 97 Kan. 97—vi. 2286(b); vii. 2479(e), 2704(b).
- Liles v. Eubanks*, 114 Miss. 587, 75 South. 447—vii. 3775(t).
- Lilja v. Standard Accident Ins. Co.*, 137 N. W. 266, 171 Mich. 378—vi. 470(e), 632(c).
- Lillie v. Modern Woodmen of America*, 89 Neb. 1, 130 N. W. 1004—vii. 3153(h), 3155(h).
- Limerick v. Home Ins. Co.*, 150 S. W. 978, 150 Ky. 827, 44 L. R. A. (N. S.) 371—vii. 2727(o).
- Lincoln Reserve Life Ins. Co. v. Morgan*, 191 S. W. 236, 126 Atl. 615—vi. 2033(h).
- Lindahl v. Supreme Court I. O. F.*, 100 Minn. 87, 110 N. W. 358, 8 L. R. A. (N. S.) 916, 117 Am. St. Rep. 666—vii. 3129(a), 3131(a), 3255(l), 3257(m), 3263(o), 3677(b).
- Lindemann v. Metropolitan Life Ins. Co.*, (Sup.) 120 N. Y. Supp. 96—vi. 1978(i).
- Lindsay v. Hotchkiss*, 195 Mo. App. 563, 193 S. W. 902—vii. 3886(b).
- Lindstrom v. National Life Ins. Co.*, 84 Or. 588, 165 Pac. 675—vii. 2561(b).
- Linglebach v. Theresa Village Mut. Fire Ins. Co.*, 143 N. W. 688, 154 Wis. 595—vi. 1724(e); vii. 3532(b).
- Linneweber v. Supreme Council Catholic Knights of America*, 158 Pac. 229, 30 Cal. App. 315—vi. 706(h), 2344(d); vii. 3131(a).
- Linzee v. Frankfort General Ins. Co.*, 147 N. Y. Supp. 606, 162 App. Div. 282—vi. 1133(d), 1427(a).
- Lippincott v. Supreme Council A. L. H. (C. C.)* 130 Fed. 483—vii. 2832(c).
- Listers Agricultural Chemical Works v. Home Ins. Co. (D. C.)* 202 Fed. 1011—vii. 2884(d).

- Lite v. Firemen's Ins. Co.*, 104 N. Y. S. 434, 119 App. Div. 410—vi. 629(a), 632(c); vii. 3071(h).
- 193 N. Y. 639, 86 N. E. 1127—vi. 632(c); vii. 3071(h).
- Little v. Arkansas Nat. Bank*, 105 Ark. 281. 152 S. W. 281—vi. 258(g), 1002(e).
- v. Berry* (Ky.) 113 S. W. 902—vi. 1101(b).
- v. Colwell*, 74 S. E. 10, 158 N. C. 351, 39 L. R. A. (N. S.) 450—vii. 3722(b).
- v. Grand Lodge K. P.*, 81 S. E. 152, 96 S. C. 448—vii. 2779(f).
- v. Iowa State Traveling Men's Ass'n*, 154 Iowa. 440, 154 N. W. 1087—vii. 3205(i), 3223(m).
- v. Security Mut. Life Ins. Co.*, 150 Ky. 35, 149 S. W. 1112—vi. 1979(j), 2126(b), 2144(j).
- Little Cahaba Coal Co. v. Aetna Life Ins. Co.*, 192 Ala. 42, 68 South. 317, Ann. Cas. 1917D, 863—vii. 3331(a).
- Littleton v. Sain*, 126 Tenn. 461, 150 S. W. 423, 41 L. R. A. (N. S.) 1118—vi. 27(b); vii. 3756(g).
- Live Stock Ins. Ass'n v. Edgar*, 56 Ind. App. 489, 105 N. E. 641—vii. 3031(i).
- v. Stickler* (Ind. App.) 115 N. E. 691—vi. 413(c), 421(f), 610(c).
- Liverpool & London & Globe Ins. Co. v. Cargill*, 44 Okl. 735, 145 Pac. 1134—vi. 1685(n); vii. 2658(a), 3396(k), 3549(c), 3710(j).
- v. Delta County Farmers' Ass'n*, 121 S. W. 599, 56 Tex. Civ. App. 588—vii. 3099(a), 3100(a), 3103(c).
- v. Hammond*, 41 Colo. 323, 92 Pac. 686—vii. 3523(f).
- v. Harding*, 201 Fed. 515, 119 C. C. A. 611—vii. 2793(d).
- v. Hughes*, 89 S. E. 817, 145 Ga. 716—vi. 1376(g); vii. 2517(a).
- v. Lavine*, 5 Ala. App. 392, 59 South. 336—vi. 638(g), 1499(i), 1760(g).
- v. Lester* (Tex. Civ. App.) 176 S. W. 602—vi. 1427(a), 2439(c); vii. 2633(e).
- v. McCollum* (Tex. Civ. App.) 149 S. W. 775—vi. 351(e).
- v. McFadden*, 170 Fed. 179, 95 C. C. A. 429, 27 L. R. A. (N. S.) 1095—vii. 3080(b), 3085(e).
- v. Payton*, 194 S. W. 503, 128 Ark. 528—vi. 1427(a); vii. 2555(a), 3059(c), 3495(e), 3522(f).
- v. Wright*, 164 S. W. 952, 158 Ky. 290—vii. 3042(c).
- Livingston & Taft v. Fidelity & Deposit Co.*, 81 N. E. 330, 76 Ohio St. 253—vi. 2435(a); vii. 3320(b).
- Livingstone v. Boston Ins. Co.*, 99 Atl. 212, 255 Pa. 1—vi. 632(c), 1376(g), 1382(j); vii. 3350(a).
- Lloyd v. North British & Mercantile Ins. Co.*, 161 N. Y. Supp. 271, 174 App. Div. 371—vi. 1378(h); vii. 3531(a).
- L. N. Gross Co. v. Westchester Fire Ins. Co.*, 88 Misc. Rep. 327, 151 N. Y. Supp. 945—vii. 3417(d).
- Locher v. Kuechenmeister*, 98 S. W. 92, 120 Mo. App. 701—vi. 253(f), 290(j), 328(g).
- Locke v. Bowman*, 151 S. W. 468, 168 Mo. App. 121—vi. 308(h), 1111(h), 1115(j), 1118(k).
- v. Royal Ins. Co.*, 220 Mass. 202, 107 N. E. 911—vi. 1283(f).
- Lockway v. Modern Woodmen of America*, 121 Minn. 170, 141 N. W. 1—vii. 3141(e), 3472(d).
- Locomotive Engineers' Mut. Life & Accident Ins. Ass'n v. Bobo*, 8 Ga. App. 149, 68 S. E. 842—vi. 2344(d), 2350(e).
- v. Thomas*, 206 Fed. 409, 124 C. C. A. 291—vi. 2398(c).
- Loehr v. Supreme Assembly of Equitable Fraternal Union*, 132 Wis. 436, 112 N. W. 441—vi. 2096(a), 2101(d), 2182(a).
- Loesch v. Supreme Tribe of Ben Hur* (Tex. Civ. App.) 190 S. W. 506—vi. 1969(f), 2174(b).
- Loewenstein v. Queen Ins. Co.*, 127 S. W. 72, 227 Mo. 100—vi. 184(a); vii. 3353(c), 3479(b), 3561(d), 3915(j).
- Loftin v. Great Southern Home Benevolent Ass'n*, 9 Ga. App. 121, 70 S. E. 353—vii. 2574(e), 2591(k).
- Loftis v. Pacific Mut. Life Ins. Co.*, 38 Utah, 532, 114 Pac. 134—vi. 2464(b), 2476(b), 2504(c), 2706(c), 2724(i), 2727(p).
- Logan v. Court of Honor*, 153 S. W. 73, 168 Mo. App. 195—vi. 2144(j), 2168(h).
- v. Modern Woodmen of America*, 137 Minn. 221, 163 N. W. 292—vi. 816(i); vii. 3748(n), 3775(t), 3812(a).
- v. Provident Sav. Life Assur. Soc.*, 57 W. Va. 384, 50 S. E. 529—vi. 633(c), 688(f), 1940(f), 1969(f), 1978(i).
- Logia Suprema de La Alianza Hispano-Americana v. Aguirre*, 14 Ariz. 390, 129 Pac. 503—vi. 2023(a), 2024(b).
- Lohoeffner v. Mercantile Town Mut. Ins. Co.*, 118 S. W. 515, 136 Mo. App. 540—vii. 4001(a).
- Lombard v. Balsley*, 181 Ill. App. 1—vii. 3805(i).
- v. Maguire-Penniman Co.*, 78 N. H. 110, 97 Atl. 892—vii. 3334(b), 78 N. H. 280, 99 Atl. 295—vii. 3841(b).
- London Guaranty & Accident Co. v. Hartman*, 122 Ill. App. 315—vii. 2485(g).

- London Guaranty & Accident Co. v. Mississippi Cent. R. Co., 97 Miss. 165, 52 South. 787—vi. 846(i); vii. 2508(d), 2767(d), 2781(f), 3330(a), 3590(e).
- v. Morris, 156 Ill. App. 533—vi. 545 (b), 633(c); vii. 3319(a).
- v. Ogelsby, 80 Atl. 57, 231 Pa. 186—vii. 3330(a).
- Londry v. Sovereign Camp Woodmen of the World, 140 Mo. App. 45, 124 S. W. 530—vii. 3756(q), 3762(r), 3765(r), 3767(s), 3772(s).
- Lone Star Ins. Union v. Brannan (Tex. Civ. App.) 184 S. W. 691—vii. 2699 (b).
- Long v. Farmers' State Bank, 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585—vii. 3712(k).
- Long Bros. Grocery Co. v. United States Fidelity & Guaranty Co., 110 S. W. 29, 130 Mo. App. 421—vi. 635(d), 851(d), 2451(c).
- Longer v. Beakley, 106 Ark. 213, 153 S. W. 811—vii. 3819(c).
- v. Carter, 102 Ark. 72, 143 S. W. 575—vii. 3756(q), 3819(c).
- Loomis v. Connecticut Fire Ins. Co., 16 Cal. App. 532, 117 Pac. 642—vi. 1610(f), 1611(f), 1612(f).
- Lord v. Des Moines Fire Ins. Co., 99 Ark. 476, 138 S. W. 1008—vii. 2659(a), 2741(b), 2781(f), 3522 (f).
- v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 N. E. 443—vi. 120(d).
- Loring v. Dutchess Ins. Co., 1 Cal. App. 186, 81 Pac. 1025—vi. 154(f), 184(a), 190(b), 220(c); vii. 2621(a).
- Loud v. Federal Ins. Co. (Mich.) 161 N. W. 928—vii. 3589(b).
- Louden v. Modern Brotherhood of America, 107 Minn. 12, 119 N. W. 425—vi. 434(l), 435(l), 610(c), 683(c), 700(f).
- Louis F. Kleeman Co. v. New Amsterdam Casualty Co., 164 S. W. 167, 177 Mo. App. 397—vii. 3319(a).
- Louisville German Mut. Fire Ins. Ass'n v. Schneider, 165 Ky. 285, 176 S. W. 1154—vi. 1741(g).
- Louisville & N. R. Co. v. United States Fidelity & Guaranty Co., 125 Tenn. 658, 148 S. W. 671—vi. 635(d), 2451 (c); vii. 3323(b).
- Lounsbury v. Knights of Maccabees of the World, 112 N. Y. Supp. 921, 128 App. Div. 394—vi. 2395(b), 2398(c), 2404(e), 2432 (e).
- 93 N. E. 377, 199 N. Y. 573—vi. 2395(b), 2398(c), 2404(e), 2432(e).
- Love v. Modern Woodmen of America, 259 Ill. 102, 102 N. E. 183—vi. 698(f); vii. 3440(a), 3496 (e).
- 177 Ill. App. 76—vi. 698(f); vii. 3440(a), 3496(e).
- Lovett v. National Fire Ins. Co., 99 Kan. 759, 162 Pac. 1162—vi. 1837(c), 1845(i).
- Lowe v. Fidelity & Casualty Co., 87 S. E. 250, 170 N. C. 445—vii. 3331 (a), 3334(b), 3576(d).
- v. St. Paul Fire & Marine Ins. Co., 80 Neb. 499, 114 N. W. 586—vi. 413(c).
- Lowenstein v. Franklin Life Ins. Co., 122 Ill. App. 632—vii. 2665(c).
- v. Koch, 165 App. Div. 760, 152 N. Y. Supp. 506—vii. 3787(a).
- v. Old Colony Life Ins. Co., 179 Mo. App. 364, 166 S. W. 889—vi. 2033(h); vii. 2686(b), 3285(f), 3472(d).
- Loyal Americans of the Republic v. McClanahan, 50 Tex. Civ. App. 256, 109 S. W. 973—vi. 61(h); vii. 3265(o), 3239(d).
- v. Mayer, 137 Ill. App. 574—vii. 2755(b), 3139(e).
- Loyal Mut. Fire Ins. Co. v. J. S. Brown & Bro. Mercantile Co., 47 Colo. 467, 107 Pac. 1098—vi. 678(a), 1176(b), 1385(b), 1603(b), 1796(a).
- Loyal Mystic Legion v. Richardson, 76 Neb. 562, 107 N. W. 795—vi. 434(l), 435(l).
- Loyal Protective Ins. Co. v. Walker, 126 Ark. 296, 189 S. W. 1050—vi. 2350 (e).
- Lloyd v. Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530—vi. 56(f), 61(h), 434(l), 450 (e), 609(b), 697(e), 698(f), 799 (b).
- v. Planters' Mut. Ins. Co., 80 Ark. 486, 97 S. W. 658—vi. 181(b).
- v. Pollitt, 144 Ga. 91, 86 S. E. 233—vi. 1002(e).
- Lucas v. New Amsterdam Casualty Co., 162 N. Y. Supp. 191, 97 Misc. Rep. 618—vii. 3582(g).
- Luckenbach v. Home Ins. Co. (D. C.) 142 Fed. 1023—vii. 3964(e), 3978(g).
- Luckett-Wake Tobacco Co. v. Globe & Rutgers Fire Ins. Co. (C. C.) 171 Fed. 147—vi. 627(a); vii. 3021(f), 3025(f).
- Luckey v. Yeomen of America, 141 Ill. App. 332—vii. 4001(b).
- Ludwig v. Preferred Accident Ins. Co., 113 Minn. 510, 130 N. W. 5—vii. 3156 (a), 3174(g).
- Lukasik v. Czaczyński (Sup.) 162 N. Y. Supp. 1—vii. 3797(d).
- Lukens v. International Life Ins. Co., 269 Mo. 574, 191 S. W. 418—vi. 559 (a), 564(g).
- Lumber Underwriters v. Rife, 35 S. Ct. 717, 237 U. S. 605, 59 L. Ed. 1140—vii. 2664(b).
- Lummus v. Fireman's Fund Ins. Co., 83 S. E. 688, 167 N. C. 654, L. R. A. 1915D, 239—vi. 1622(m).
- Lundberg v. Interstate Business Men's Acc. Ass'n, 162 Wis. 474, 156 N. W. 482, Ann. Cas. 1916D, 667—vi. 532 (k); vii. 3183(b).

- Lundholm v. Mystic Workers of the World, 164 Ill. App. 472—vii. 3133(b), 3134(b), 3146(f).
- Lundvick v. Westchester Fire Ins. Co., 104 N. W. 429, 128 Iowa, 376—vii. 3126(d), 3438(e).
- Lusk v. American Cent. Ins. Co. (W. Va.) 91 S. E. 1078—vii. 2514(g), 2792 (c), 3503(h), 3514(b).
- Lyke v. American Nat. Assur. Co. (Mo. App.) 187 S. W. 265—vi. 459(j), 484 (j).
- Lynch v. Germania Life Ins. Co., 132 App. Div. 571, 116 N. Y. Supp. 998—vi. 2168(h); vii. 2625(a), 2633(e); 2779(f).
- v. Prudential Ins. Co., 150 Mo. App. 461, 131 S. W. 145—vi. 1987 (c), 1989(e), 1991(g), 2185(d), 2186(e).
- v. Travelers' Ins. Co., 200 Fed. 193, 118 C. C. A. 379—vi. 2150(c); vii. 2580(h).
- Lynchburg Cotton Mill Co. v. Travelers' Ins. Co. (C. C.) 140 Fed. 718—vii. 3991(k).
- 149 Fed. 954, 79 C. C. A. 464, 9 L. R. A. (N. S.) 654—vii. 3991(k).
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- Lyons v. Grand Lodge of K. P., 172 N. C. 408, 90 S. E. 423—vi. 702 (g), 2382(r).
- v. National Surety Co., 147 S. W. 778, 243 Mo. 607—vii. 3337(d).
- M**
- Maahs v. Antigo Lumber Co., 145 N. W. 222, 156 Wis. 1—vii. 2815(a), 3845 (c).
- Maas v. Anchor Fire Ins. Co., 111 N. W. 1044, 148 Mich. 432—vi. 1177(c), 1354(e), 1686(p).
- McAlarney v. Supreme Council A. L. H. (C. C.) 131 Fed. 538—vi. 1056(f).
- McAleenan v. Massachusetts Bonding & Insurance Co., 173 App. Div. 100, 159 N. Y. Supp. 401—vi. 2454(New); vii. 3332(a), 3343 (g).
- 179 App. Div. 34, 166 N. Y. Supp. 184—vi. 2454(New).
- 219 N. Y. 563, 114 N. E. 114—vi. 2454(New); vii. 3332(a), 3343(g).
- McAlpine v. Fidelity & Casualty Co., 158 N. W. 967, 134 Minn. 192—vi. 1984(a).
- McArdle v. German Alliance Ins. Co., 98 App. Div. 594, 90 N. Y. Supp. 485—vii. 3969(f), 3999 (l).
- 183 N. Y. 368, 76 N. E. 337—vii. 3909(f), 3999(l).
- MacArthur v. United States Health & Accident Ins. Co., 151 Ill. App. 507—vi. 2259(a).
- Macatawa Transp. Co. v. Fireman's Fund Ins. Co., 168 Mich. 365, 134 N. W. 193, Ann. Cas. 1913C, 69—vi. 1545(b), 1893 (i).
- 179 Mich. 443, 146 N. W. 396—vi. 68(l), 1482(a); vii. 2779 (f).
- McAuley v. Casualty Co. of America, 37 Mont. 256, 96 Pac. 131—vii. 3174(g), 3200(h).
- 39 Mont. 185, 102 Pac. 586—vii. 3157(a), 3163(c), 3176(a), 3200 (h).
- McBride v. Etna Life Ins. Co., 191 S. W. 5, 126 Ark. 528—vii. 3334(b), 3335 (c), 3802(g).
- McCaffrey v. Knights & Ladies of Columbia, 63 Atl. 189, 213 Pa. 609—vi. 2096(a), 2110(i), 2124(a).
- McCall v. International Life Ins. Co., 196 Mo. App. 318, 193 S. W. 860—vi. 2393(a), 2411(g).
- McCann v. Ladies of Maccabees of the World, 182 Ill. App. 319—vi. 576(f), 578(h), 622(e), 2023(a), 2029(g), 2033(i).
- v. Metropolitan Life Ins. Co., 58 N. E. 1026, 177 Mass. 280—vi. 299 (b).
- v. Supreme Conclave, Improved Order Heptasophs, 87 Atl. 383, 119 Md. 655, 46 L. R. A. (N. S.) 537—vi. 2375(o), 2378(p), 2380(q).
- McCarl v. Travelers' Ins. Co., 151 Iowa, 669, 132 N. W. 12—vi. 795(h), 854(a), 866(h).
- McCarthy v. Metropolitan Life Ins. Co., 75 N. J. Law, 887, 69 Atl. 170—vii. 3265(o).
- v. Pacific Mut. Life Ins. Co., 178 Ill. App. 502—vi. 675(g), 2205 (a); vii. 3165(d), 3184(b), 3311 (i).
- McCartney v. Supreme Tent Knights of Maccabees, 132 Ill. App. 15—vi. 577(g), 580(i), 622(e).
- McCarty v. Piedmont Mut. Ins. Co., 81 S. C. 152, 62 S. E. 1, 18 L. R. A. (N. S.) 729—vii. 2516(a), 2625(a), 2646(o), 2757(b).
- McCaslin v. Metropolitan Life Ins. Co., 59 Pa. Super. Ct. 475—vi. 1974 (g).
- McClelland v. Mutual Life Ins. Co., 151 App. Div. 264, 135 N. Y. Supp. 735—vi. 495(o), 2256 (c); vii. 2625(a).
- 162 App. Div. 926, 147 N. Y. Supp. 1124—vi. 507(f).
- 217 N. Y. 336, 111 N. E. 1062—vi. 507(f).

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 171 App. Div. 890, 155 N. Y. Supp. 1121—vi. 714(m).
 88 Misc. Rep. 475, 152 N. Y. Supp. 136—vi. 714(m).
- McCloskey v. Supreme Council, A. L. H., 109 App. Div. 309, 96 N. Y. Supp. 347—vi. 712(l), 715(n), 717(n); vii. 3271(a), 3756(q), 3872(d), 3969(f).
- McClure v. Great Western Acc. Ass'n, 133 Iowa, 224, 110 N. W. 466, 8 L. R. A. (N. S.) 970, 119 Am. St. Rep. 598, 12 Ann. Cas. 41—vii. 3303(g).
 141 Iowa, 350, 118 N. W. 269—vii. 3187(d), 3189(d), 3223(m), 3298(e), 3310(i), 3476(g), 3485(e), 3977(g).
- v. Mutual Fire Ins. Co., 88 Atl. 921, 242 Pa. 59, 48 L. R. A. (N. S.) 1221—vi. 1705(h), 2683(b).
- McCollough v. Home Ins. Co., 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862—vi. 1376(g); vii. 2514(f), 3503(h), 3522(f).
- McCombs v. Travelers' Ins. Co., 159 Iowa, 435, 141 N. W. 328—vi. 1978(i); vii. 2561(b), 2569(e).
 159 Iowa, 445, 141 N. W. 327—vii. 3811(k).
- McCord v. Illinois Nat. Fire Ins. Co., 47 Ind. App. 602, 94 N. E. 1053—vii. 4001(b).
- v. Masonic Casualty Co., 88 N. E. 6, 201 Mass. 473—vii. 3456(a), 3516(b).
- McCormack v. Illinois Commercial Men's Ass'n, 159 Fed. 114, 86 C. C. A. 304—vii. 3203(h).
- v. Security Mut. Life Ins. Co., 146 N. Y. Supp. 613, 161 App. Div. 33—vi. 2296(f), 2406(f); vii. 2523(c), 2649(p).
 116 N. E. 74, 220 N. Y. 447—vi. 2296(f), 2417(i), 2540(m), 2757(b).
- McCormick v. New York Life Ins. Co., 141 N. Y. Supp. 993, 156 App. Div. 406—vi. 2398(c).
- McCoy v. Bankers' Life Ass'n, 114 S. W. 551, 134 Mo. App. 35—vi. 2263(b).
- McCracken v. Travelers' Ins. Co. (Okl.) 156 Pac. 640—vi. 398(e), 413(c).
- McCrea v. Patrons' Mut. Fire Ins. Co., 46 Pa. Super. Ct. 618—vii. 3382(a), 3561(d).
- McCue v. Northwestern Mut. Life Ins. Co., 167 Fed. 435, 93 C. C. A. 71—vi. 658(g); vii. 3152(g).
- McCulloch v. Mutual Reserve Fund Life Ass'n, 93 S. W. 62, 78 Ark. 32—vii. 3969(f).
- McCullough v. Georgia Casualty Co., 137 Minn. 88, 162 N. W. 894—vi. 2447(New).
- McCullough v. Home Ins. Co., 118 Tenn. 263, 100 S. W. 104, 12 Ann. Cas. 626—vi. 1868(a), 1873(c), 1888(g).
 v. Railway Mail Ass'n, 73 Atl. 1007, 225 Pa. 118—vii. 3175(h).
- McCurdy v. Orient Ins. Co., 30 Pa. Super. Ct. 77—vi. 1710(l).
- McCurrey v. Metropolitan Life Ins. Co., 168 Ill. App. 625—vii. 2690(d).
- McDaniel v. German-American Ins. Co., 134 Ga. 189, 67 S. E. 668—vii. 3975(g), 3984(i), 3989(k).
- McDermott v. Hawkeye Commercial Men's Ass'n, 158 Iowa, 544, 139 N. W. 472—vii. 3205(i).
- MacDonald v. Aetna Indemnity Co., 96 Atl. 926, 90 Conn. 226—vi. 846(i); vii. 3964(e).
- v. Aetna Life Ins. Co. (Tex. Civ. App.) 187 S. W. 1005—vii. 3585(a).
- v. Columbian Nat. Life Ins. Co., 97 Atl. 1086, 253 Pa. 239, L. R. A. 1916F, 1244—vi. 2259(a), 2407(g).
- v. Mutual Life Ins. Co. (Iowa) 160 N. W. 289—vii. 3153(h).
- McDonnell v. Mutual Life Ins. Co., 131 App. Div. 643, 116 N. Y. Supp. 35—vi. 121(d); vii. 3270(a).
- McDougald v. New York Life Ins. Co., 146 Fed. 674, 77 C. C. A. 100—vi. 2263(b), 2304(b).
- McDowell v. St. Paul Fire & Marine Ins. Co., 145 App. Div. 724, 130 N. Y. Supp. 294—vii. 3375(c), 3700(g).
 207 N. Y. 482, 101 N. E. 457—vii. 3375(c), 3700(g).
- McEachern v. New York Life Ins. Co., 82 S. E. 820, 15 Ga. App. 222—vi. 2276(i), 2277(k), 2408(g), 3287(f).
- McElroy v. Metropolitan Life Ins. Co., 84 Neb. 866, 122 N. W. 27, 23 L. R. A. (N. S.) 968, 19 Ann. Cas. 28—vi. 656(f), 2290(c); vii. 2606(f).
- McEvoy v. Court of Honor, 163 Ill. App. 556—vii. 3972(g).
 184 Ill. App. 317—vi. 2254(b).
- McEvoy v. Security Fire Ins. Co., 73 Atl. 157, 110 Md. 275, 22 L. R. A. (N. S.) 964, 132 Am. St. Rep. 428—vi. 637(f), 1799(d); vii. 3025(f).
- McEwen v. New York Life Ins. Co., 23 Cal. App. 694, 139 Pac. 242—vi. 1979(j), 2117(l).
- v. Occidental Life Ins. Co., 172 Cal. 6, 155 Pac. 86—vi. 1969(f).
 20 Cal. App. 477, 129 Pac. 598—vii. 3175(h).
- McFadden v. Liverpool & London & Globe Ins. Co. (C. C.) 162 Fed. 783—vii. 3125(c).
- McFarlane v. Robertson, 137 Ga. 132, 73 S. E. 490—vi. 247(b), 279(a), 280(b), 290(k), 328(h), 1097(a), 1099(a).

- McGee v. Felter, 135 N. Y. Supp. 267, 75 Misc. Rep. 349—vi. 486(k), 1007(h), 1010(d).
- McGeehan v. Mutual Life Ins. Co., 111 S. W. 604, 131 Mo. App. 417—vi. 2281(a), 2290(c), 2408(g); vii. 2834(d).
- McGehee v. Rinker, 70 S. E. 962, 9 Ga. App. 147—vi. 2267(e).
- McGillon v. United Brotherhood of Carpenters & Joiners of America, 77 N. H. 590, 89 Atl. 301—vi. 2393(a).
- McGinnis v. St. Paul Fire & Marine Ins. Co., 38 Pa. Super. Ct. 390—vi. 632(c), 1723(e), 1746(j); vii. 3350(a).
- McGlade v. Home Ins. Co., 71 N. J. Law, 40, 59 Atl. 628—vi. 1174(a), 1176(b), 1177(c).
- McGovern v. Brotherhood of Locomotive Firemen and Engineers, 31 Ohio Cir. Ct. R. 243—vi. 708(j), 3131(a).
- McGowin v. Menken, 177 App. Div. 841, 164 N. Y. Supp. 953—vi. 650(b).
- McGrath v. Piedmont Mut. Ins. Co., 54 S. E. 218, 74 S. C. 69—vi. 331(a); vii. 3949(d).
- McGraw v. Home Ins. Co. of New York, 93 Kan. 482, 144 Pac. 821, Ann. Cas. 1916D, 227—vii. 3013(b), 3042(c).
- McGraw Wooden Ware Co. v. German Fire Ins. Co. of Pittsburgh, Pa., 52 South. 183, 126 La. 32, 38 L. R. A. (N. S.) 614, 20 Ann. Cas. 1229—vi. 680(l).
- McGreedy v. National Union, 152 Ill. App. 62—vi. 1950(a); vii. 2570(e).
- McGregor v. Metropolitan Life Ins. Co., 136 S. W. 889, 143 Ky. 488—vi. 452(f).
- McGuinness v. Court Elm City, No. 1, Foresters of America, 60 Atl. 1023, 73 Conn. 43, 3 Ann. Cas. 209—vi. 130(h).
- McGuire v. Union Mut. Life Ins. Co., 114 App. Div. 344, 99 N. Y. Supp. 891—vi. 2408(g).
- McIntosh v. North State Fire Ins. Co., 152 N. C. 50, 67 S. E. 45, 136 Am. St. Rep. 818—vi. 1350(c).
- McInturff v. Insurance Co. of North America, 248 Ill. 92, 93 N. E. 369, 140 Am. St. Rep. 153, 21 Ann. Cas. 176—vii. 3528(h), 155 Ill. App. 225—vii. 3528(h).
- McIntyre v. Federal Life Ins. Co., 126 S. W. 227, 142 Mo. App. 256—vi. 397(d), 398(e), 403(f), 406(l).
- v. Liverpool, London & Globe Ins. Co., 110 S. W. 604, 131 Mo. App. 88—vii. 2665(c), 2670(e), 3079(a).
- v. Modern Woodmen of America, 200 Fed. 1, 121 C. C. A. 1—vi. 2144(j), 2400(d); vii. 3769(s).
- McKelvey v. Eureka Fire & Marine Ins. Co., 1 Ohio App. 184, 34 Ohio Cir. Ct. R. 443—vii. 2521(c).
- McKeon v. Ehringer, 48 Ind. App. 226, 95 N. E. 604—vi. 1964(a); vii. 3765(r), 3815(b).
- McKernan v. North River Ins. Co. (D. C.) 206 Fed. 984—vi. 1779(j).
- McKinney v. Fidelity Mut. Ins. Co., 270 Mo. 305, 193 S. W. 564—vi. 691(a); vii. 3755(a), 3759(r).
- v. General Acc. Fire & Life Assur. Co., 211 Fed. 951, 128 C. C. A. 449—vi. 638(g); vii. 3311(f).
- McKinney v. Metropolitan Life Ins. Co., 191 Ill. App. 592—vii. 2690(d).
- MacKinnon v. Fidelity & Casualty Co., 72 N. J. Law, 29, 60 Atl. 180—vi. 1940(f), 1950(a).
- Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234—vi. 1724(e), 1734(e), 1807(i); vii. 2614(i).
- McKnelly v. Brotherhood of American Yeomen, 160 Wis. 514, 152 N. W. 169—vi. 1984(a), 2131(e), 2142(h); vii. 2758(c).
- McKune v. Continental Casualty Co., 154 Pac. 990, 28 Idaho, 22—vi. 2277(k), 2658(a), 2727(p), 2768(a).
- McLaughlin v. National Protective Legion, 184 Ill. App. 597—vi. 2428(c).
- McLean v. Tobin, 109 N. Y. Supp. 926, 58 Misc. Rep. 528—vi. 507(f); vii. 3073(j), 3667(g).
- McLeod v. John Hancock Mut. Life Ins. Co., 190 Mo. App. 653, 176 S. W. 234—vi. 2408(g); vii. 3477(a), 3531(a), 3561(d).
- v. Travelers' Ins. Co., 70 S. E. 157, 8 Ga. App. 765—vii. 3556(a), (Ga. App.) 92 S. E. 1014—vi. 2395(b).
- McMahon v. Feldman, 139 Ill. App. 624—vii. 3726(d).
- McManus v. Peerless Casualty Co., 95 Atl. 510, 114 Me. 98—vi. 1950(a), 2039(b); vii. 3755(g).
- v. Prudential Ins. Co., 80 S. E. 613, 96 S. C. 375—vii. 2777(e).
- McMillan & Son v. Insurance Co. of North America, 58 S. E. 1020, 1135, 78 S. C. 433—vi. 1818(c), 1819(c), 1824(e); vii. 2506(d), 2621(a), 2740(b), 2781(f), 3410(e).
- McNamee v. National Surety Co. (Sup.) 156 N. Y. Supp. 758—vii. 3320(b).
- McNaught v. Equitable Life Assur. Soc., 136 App. Div. 774, 121 N. Y. Supp. 447—vi. 612(e).
- McNaughton v. Des Moines Life Ins. Co., 140 Wis. 214, 122 N. W. 764—vi. 1011(d), 1012(d), 2324(n), 2391(u), 2428(c); vii. 2724(l).
- McNeil v. Chinn, 45 Tex. Civ. App. 551, 101 S. W. 465—vi. 1090(f), 1091(f), 1100(b), 1110(g).
- McNellis v. Aetna Ins. Co., 176 Ill. App. 575—vii. 2793(d), 2794(d).
- McNevin v. Prudential Ins. Co., 57 Misc. Rep. 608, 108 N. Y. Supp. 745—vi. 1100(b); vii. 1117(k), 1118(k).
- McNicholas v. Prudential Ins. Co., 77 N. E. 756, 191 Mass. 304—vi. 2430(d); vii. 2715(h), 3872(d), 82 N. E. 692, 196 Mass. 565—vi. 2432(e); vii. 2717(h).

- McNicol v. New York Life Ins. Co., 149 Fed. 141, 79 C. C. A. 11—vi. 415(c), 492(m), 609(b).
- McPaith v. Grand Lodge, A. O. U. W., 126 N. W. 321, 149 Iowa, 148—vi. 2094(e).
- McPherson v. Camden Fire Ins. Co. (Tex. Civ. App.) 185 S. W. 1055—vi. 1190(a), 1502(k), 1829(g), 1893(i).
- McPike v. Supreme Ruling of Fraternal Mystic Circle, 187 Mo. App. 679, 173 S. W. 71—vi. 56(f), 825(b).
- McQuaid v. Aetna Ins. Co., 226 Mass. 281, 115 N. E. 428—vi. 397(d), 403(j).
- McRae v. Warmack, 98 Ark. 52, 135 S. W. 807, 33 L. R. A. (N. S.) 949—vi. 273(o), 274(o), 290(k), 308(h).
- McRaith v. Grand Lodge, A. O. U. W., 149 Iowa, 148, 126 N. W. 321—vi. 2395(b), 2406(f), 2425(a).
- McRory v. Independent Order of Puritans, 60 Colo. 456, 154 Pac. 92—vii. 2528(f).
- McTindall v. Piedmont Mut. Ins. Co., 81 S. C. 240, 62 S. E. 213—vi. 938(c).
- McWilliams v. Modern Woodmen of America (Tex. Civ. App.) 142 S. W. 641—vi. 434(l), 450(e), 609(b), 697(e).
- Maddox v. Southern Mut. Life Ins. Ass'n, 65 S. E. 789, 6 Ga. App. 681—vi. 678(a), 2024(b), 2096(a).
- Madsen v. Farmers' & Merchants' Ins. Co., 87 Neb. 107, 126 N. W. 1086, 29 L. R. A. (N. S.) 97, Ann. Cas. 1912A, 985—vi. 1404(f), 1420(c).
- v. Maryland Casualty Co., 168 Cal. 204, 142 Pac. 51—vi. 458(j); vii. 2484(g), 2504(c), 2525(d).
- v. Prudential Ins. Co. (Mo. App.) 185 S. W. 1168—vii. 2479(e), 2484(g), 2715(h).
- Mady v. Switchmen's Union, 116 Minn. 147, 133 N. W. 472—vi. 637(f); vii. 3301(f).
- Maginnis v. Hartford Fire Ins. Co., 160 Ill. App. 614—vi. 1385(b).
- Magnuson v. Continental Casualty Co., 101 S. W. 1125, 125 Mo. App. 206—vii. 3872(d).
- Mahon v. Royal Union Mut. Life Ins. Co., 67 C. C. A. 636, 134 Fed. 732—vi. 554(j); vii. 2583(h).
- Mahoney v. Metropolitan Life Ins. Co., 80 N. J. Law, 136, 76 Atl. 458—vi. 990(a), 1041(d).
- v. Minnesota Farmers' Mut. Ins. Co., 136 Minn. 34, 161 N. W. 217—vi. 67(l), 854(a), 864(g).
- v. State Ins. Co., 110 N. W. 1041, 133 Iowa, 570, 9 L. R. A. (N. S.) 490—vi. 209(j).
- Majestic Life Assur. Co. v. Tuttle, 58 Ind. App. 98, 107 N. E. 22—vi. 2308(d); vii. 2460(a), 2464(b), 2470(d), 2699(b), 2708(c).
- v. Winfield, 108 N. E. 249, 58 Ind. App. 402—vi. 2432(e).
- Major v. Insurance Co. of North America, 112 Mo. App. 235, 86 S. W. 883—vi. 1826(f).
- Makman v. Independent Order Free Sons of Judah, 148 N. Y. Supp. 141, 86 Misc. Rep. 13—vi. 2338(b), 2378(p); vii. 2832(c).
- Malancy v. Malancy, 165 Wis. 642, 163 N. W. 186—vi. 691(a); vii. 3756(q), 3765(r).
- Mallen v. National Life Ass'n, 168 Mo. App. 503, 153 S. W. 1065—vii. 2559(b), 2569(e), 2574(e), 2591(k).
- Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144—vii. 3755(q), 3762(r).
- Maloney v. Maryland Casualty Co., 113 Ark. 174, 167 S. W. 845—vi. 636(e), 2051(a), 2053(b); vii. 2561(b), 3159(a), 3200(h), 3207(k), 3442(a).
- v. North American Union, 143 Ill. App. 615—vi. 1978(i), 2001(a), 2023(f).
- 177 Ill. App. 658—vii. 3281(e).
- Maneu v. L'Union Lafayette, 98 Atl. 821, 115 Me. 380—vi. 717(n).
- Mangold v. American Ins. Co. of New-ark, N. J., 157 N. W. 632, 99 Neb. 656—vii. 3861(b).
- Mangrum & Otter v. Law Union & Rock Ins. Co., 172 Cal. 497, 157 Pac. 239, L. R. A. 1916F. 440, Ann. Cas. 1917B, 907—vii. 2801(h).
- Manhattan Life Ins. Co. v. Cohen (Tex. Civ. App.) 139 S. W. 51—vi. 272(m), 308(h), 1079(a), 1102(c); vii. 3804(h), 3890(d).
- v. Hereford, 172 Ala. 434, 55 So. 497—vi. 488(k).
- v. Kephart, 102 S. W. 882, 31 Ky. Law Rep. 545—vi. 2432(e).
- v. Verneulle, 156 Ala. 592, 47 South. 72—vi. 437(a), 678(a); vii. 3405(b).
- Manhattan Wholesale Grocery Co. v. Westchester Fire Ins. Co., 140 Pac. 853, 92 Kan. 336—vii. 3892(d).
- Manheim v. Standard Fire Ins. Co., 84 Wash. 16, 145 Pac. 992—vii. 3659(a), 3590(e).
- Manheim Ins. Co. v. Tyner, 142 Ky. 22, 133 S. W. 1000—vi. 1806(h); vii. 2614(i), 2744(c).
- Mann v. Employers' Liability Assur. Corporation, 123 Minn. 305, 143 N. W. 794—vii. 2768(d).
- Mannheim Ins. Co. v. Charles Clarke & Co. (Tex. Civ. App.) 157 S. W. 291—vi. 1807(h); vii. 2880(b), 2883(d), 3856(f).
- Mannheimer v. Independent Order of Ahawas Israel, 145 N. Y. Supp. 74, 83 Misc. Rep. 455—vii. 3447(d).
- Manning v. Connecticut Fire Ins. Co., 176 Mo. App. 678, 159 S. W. 750—vii. 2479(e), 2521(c), 2690(d).

- Manning v. Metropolitan Life Ins. Co., 80 N. J. Law, 72, 76 Atl. 334—vi. 2144(j).
- v. North British & Mercantile Ins. Co., 99 S. W. 1095, 123 Mo. App. 456—vi. 1736(e).
- Manson v. Metropolitan Surety Co., 112 N. Y. Supp. 886, 128 App. Div. 577—vi. 461(j), 496(o).
- 93 N. E. 1124, 199 N. Y. 590—vi. 461(j).
- Manufacturers' Mut. Fire Ins. Co. v. Swaney, 53 Ind. App. 429, 101 N. E. 843—vi. 1779(j), 1863(c); vii. 2630(d).
- Marbut v. Empire Life Ins. Co., 85 S. E. 834, 143 Ga. 654—vi. 628(a), 2023(a).
- Marcello v. Concordia Fire Ins. Co., 234 Pa. 31, 82 Atl. 1090, 39 L. R. A. (N. S.) 366—vi. 1747(a).
- Marcus v. Fidelity & Deposit Co. (Sup.) 145 N. Y. Supp. 49—vii. 3323(b).
- v. Heralds of Liberty, 241 Pa. 423, 88 Atl. 678—vi. 61(h), 700(f); vii. 3226(a), 3239(d).
- v. National Council of Knights and Ladies of Security, 123 Minn. 145, 143 N. W. 265—vi. 2023(a); vii. 2834(d).
- 127 Minn. 196, 149 N. W. 197—vi. 2378(p); vii. 2833(c), 3532(b).
- 134 Minn. 338, 159 N. W. 835—vii. 3722(b).
- v. Rhode Island Ins. Co., 187 Mo. App. 134, 173 S. W. 30—vi. 1720(b).
- Marino v. Hartford Fire Ins. Co., 75 Atl. 1037, 227 Pa. 120—vii. 3955(a).
- Marion Iron & Brass Bed Co. v. Empire State Surety Co., 52 Ind. App. 480, 100 N. E. 882—vi. 2450(c); vii. 2764(a).
- Markgraf v. Fellowship of Solidarity, 134 App. Div. 984, 119 N. Y. Supp. 665—vi. 2277(k); vii. 2706(c), 2708(c).
- 65 Misc. Rep. 64, 119 N. Y. Supp. 665—vi. 2277(k); vii. 2706(c), 2708(c).
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- Markham v. Supreme Court, I. O. F., 78 Neb. 295, 110 N. W. 638—vii. 3677(b).
- Marks v. Fireman's Fund Ins. Co., 179 Tenn. 213, 159 S. W. 733, L. R. A. 1915B, 749. Ann. Cas. 1915B, 677—vi. 253(f), 285(f), 312(b); vii. 3733(g), 3755(q).
- Marqusee v. Hartford Fire Ins. Co., 198 Fed. 475, 119 C. C. A. 251, 42 L. R. A. (N. S.) 1025—vi. 556(k).
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- v. Insurance Co. of North America, 211 Fed. 903, 128 C. C. A. 281—vi. 612(d).
- Marren v. North American Union, 145 Ill. App. 375—vi. 632(c), 2051(a), 2182(a), 2254(b).
- Marrian v. Robbins, 102 App. Div. 214, 92 N. Y. Supp. 654—vi. 1047(g).
- Marshall v. Farmers' & Bankers' Life Ins. Co., 159 Pac. 17, 98 Kan. 502—vi. 2267(e).
- v. Locomotive Engineers' Mut. Life & Acc. Ins. Ass'n (W. Va.) 90 S. E. 847—vi. 698(f), 702(g), 1957(g).
- v. Missouri State Life Ins. Co., 148 Mo. App. 669, 129 S. W. 40—vi. 663(b), 2271(g); vii. 2726(n).
- v. Modern American Fraternal Order, 184 Ill. App. 224—vi. 706(h); vii. 2757(b).
- Martin v. Illinois Commercial Men's Ass'n, 195 Ill. App. 421—vii. 3456(a), 3516(c).
- v. Lehigh Valley R. Co. (N. J.) 100 Atl. 345—vii. 3911(h).
- v. Modern Woodmen of America, 253 Ill. 400, 97 N. E. 693, Ann. Cas. 1913A, 299—vi. 806(g); vii. 3778(u).
- 163 Ill. App. 548—vii. 3778(u).
- 158 Mo. App. 468, 139 S. W. 231—vii. 3131(a), 3864(b), 3989(k), 3998(l).
- v. Mutual Life Ins. Co., 190 Mo. App. 703, 176 S. W. 266—vii. 3886(a).
- Marx v. Williamsburgh City Fire Ins. Co., 192 Mich. 497, 158 N. W. 1052—vi. 190(c); vii. 2658(a), 3384(d).
- Maryland Casualty Co. v. Ballard County Bank, 134 Ky. 354, 120 S. W. 301—vii. 3033(i).
- v. Burns, 149 S. W. 867, 149 Ky. 550—vii. 3174(g), 3356(a), 3458(b).
- v. Cherryvale Gas, Light & Power Co., 162 Pac. 313, 99 Kan. 563, L. R. A. 1917C, 487—vii. 3028(g), 3893(a).
- v. Chew, 122 S. W. 642, 92 Ark. 276—vi. 78(b); vii. 3176(a), 3299(e).
- v. Eddy, 239 Fed. 477, 152 C. C. A. 355—vi. 2071(a); vii. 2510(f).
- v. Edgar, 203 Fed. 656, 122 C. C. A. 52—vii. 3306(g).
- v. Finch, 147 Fed. 388, 77 C. C. A. 566, 8 L. R. A. (N. S.) 308—vi. 632(c), 638(g); vii. 3035(j).
- v. Gaffney Mfg. Co., 76 S. E. 1089, 93 S. C. 406—vi. 68(l); vii. 2530(h).

- Maryland Casualty Co. v. Grace, 110 Miss. 488, 70 South. 577—vi. 1110(g).
- v. Hanlon (N. J. Ch.) 100 Atl. 352—vi. 629(a), 632(c); vii. 3343(g).
- v. Little Rock Ry. & Electric Co., 92 Ark. 306, 122 S. W. 994—vi. 1039(a), 1110(g); vii. 3316(a).
- v. Maloney, 119 Ark. 434, 178 S. W. 387, L. R. A. 1916A, 519—vii. 3890(d).
- v. Morrow, 213 Fed. 599, 130 C. C. A. 179, 52 L. R. A. (N. S.) 1213—vii. 3201(h).
- v. Ohle, 87 Atl. 763, 120 Md. 371—vii. 3174(g), 3456(a).
- v. Omaha Electric Light & Power Co., 157 Fed. 514, 85 C. C. A. 106—vii. 3331(a), 3334(b), 3719(o).
- v. Peppard (Okla.) 157 Pac. 106, L. R. A. 1916E, 597—vii. 3330(a), 3331(a), 3334(b).
- v. W. C. Robertson & Co. (Tex. Civ. App.) 194 S. W. 1140—vi. 678(a), 795(h); vii. 3314(a), 3571(b), 3572(c), 3573(c).
- Maryland Motor Car Ins. Co. v. Haggard (Tex. Civ. App.) 168 S. W. 1011—vii. 3911(h).
- Marysville Mercantile Co. v. Home Fire Ins. Co., 21 Idaho, 377, 121 Pac. 1026—vi. 450(d), 480(i), 848(a).
- Marzulli v. Metropolitan Life Ins. Co., 78 N. J. Law, 271, 75 Atl. 473—vii. 3741(k).
- 81 N. J. Law, 166, 78 Atl. 1051—vi. 1979(j).
- Masino v. Farmers' & Mechanics' Mut. Ins. Ass'n, 84 Atl. 406, 235 Pa. 419—vii. 3347(a).
- Mason v. Fire Ass'n of Philadelphia, 23 S. D. 431, 122 N. W. 423—vii. 3630(a), 3635(d), 3657(p).
- Mason-Henry Press v. Aetna Life Ins. Co., 146 App. Div. 181, 130 N. Y. Supp. 961—vii. 2768(d), 3332(a).
- 155 App. Div. 876, 139 N. Y. Supp. 1133—vi. 542(a); vii. 3319(a), 3332(a).
- 105 N. E. 826, 211 N. Y. 489—vi. 542(a); vii. 3319(a), 3332(a).
- Masonic Benefit Ass'n of Stringer Grand Lodge v. Dotson, 111 Miss. 60, 71 South. 266—vii. 3952(d).
- Masonic Ben. Ass'n v. Hoskins, 99 Miss. 812, 56 South. 169—vi. 698(e), 706(h), 709(k).
- Masonic Life Ass'n v. Pollard's Guardian, 89 S. W. 219, 121 Ky. 349, 28 Ky. Law Rep. 301, 123 Am. St. Rep. 198—vii. 3245(h), 3246(h), 3255(l), 3256(l).
- Masonic Life Ass'n v. Robinson, 149 Ky. 80, 147 S. W. 882, 41 L. R. A. (N. S.) 505—vi. 700(f), 1990(g); vii. 2071(a), 2562(b), 2584(i), 2683(b).
- 156 Ky. 371, 160 S. W. 1078—vii. 2561(b), 2562(b), 2625(a), 2683(b).
- Massachusetts Bonding & Ins. Co. v. Duncan, 179 S. W. 472, 166 Ky. 515—vi. 2112(j), 2440(d); vii. 2622(a); 3288(a), 3450(g).
- v. Home Life & Accident Co., 119 Ark. 102, 178 S. W. 314—vi. 561(c), 592(h); vii. 3889(c).
- Massachusetts Mut. Life Ins. Co. v. Boswell (Ga. App.) 93 S. E. 95—vi. 442(a), 449(d), 451(f).
- v. Crenshaw, 186 Ala. 460, 65 South. 65—vi. 1967(c), 1999(l), 2002(b).
- 195 Ala. 263, 70 South. 768—vi. 1946(j), 1988(d).
- Massock v. Royal Ins. Co., 196 Ill. App. 394—vii. 3477(a), 3494(d), 3503(h), 3514(b).
- Mastenbrook v. United States Acc. Ass'n, 117 N. W. 543, 154 Mich. 16—vii. 3989(k).
- Mather v. London Guarantee & Accident Co., 125 Minn. 186, 145 N. W. 963—vi. 645(m); vii. 3157(a).
- Mathers v. Protected Home Circle, 55 Pa. Super. Ct. 421—vii. 2777(e).
- Mathews v. Modern Woodmen of America, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D, 483—vi. 632(c), 2205(a), 2237(a), 2242(f).
- Mathews Farmers' Mut. Live Stock Ins. Co. v. Moore, 58 Ind. App. 240, 108 N. E. 155—vi. 636(e).
- Mathewson v. Supreme Council Royal Arcanum, 146 Mich. 671, 110 N. W. 69—vi. 812(j); vii. 3766(r).
- Mathieu v. Mathieu, 112 Md. 625, 77 Atl. 112—vi. 706(b), 709(k), 711(l), 715(n), 717(n), 801(d).
- Matlock v. Bledsoe, 77 Ark. 60, 90 S. W. 848—vi. 268(g), 292(l).
- Matthews v. Continental Casualty Co., 93 S. W. 55, 78 Ark. 81—vi. 845(g).
- v. Metropolitan Life Ins. Co., 147 N. C. 339, 61 S. E. 192, 18 L. R. A. (N. S.) 1219—vi. 2322(m).
- v. Travelers' Ins. Co., 73 Or. 278, 144 Pac. 85—vi. 2310(e); vii. 2717(h).
- Matthews & Co. v. Employers' Liability Assur. Corp., 127 App. Div. 195, 111 N. Y. Supp. 76—vi. 649(a); vii. 3320(b).
- 195 N. Y. 593, 89 N. E. 1102—vi. 649(a); vii. 3320(b).

- Mauch v. Supreme Tribe of Ben Hur**, 100 App. Div. 49, 91 N. Y. Supp. 367—vii. 3228(b), 3244 (h).
 76 N. E. 1100, 184 N. Y. 527—vii. 3228(b).
 184 N. Y. 527, 76 N. E. 1100—vii. 3228(b), 3244(h).
- Maxey v. Franklin Life Ins. Co. (Tex. Civ. App.)** 164 S. W. 438—vi. 287(h); vii. 3819(c).
- Max J. Winkler Brokerage Co. v. Fidelity & Deposit Co.**, 44 South. 449, 119 La. 735—vi. 2435(a), 2439(c).
- Maxwell v. York Mut. Fire Ins. Co.**, 95 Atl. 877, 114 Me. 170—vi. 1658(c); vii. 2558(a).
- Maxwell Bros. v. Liverpool & London & Globe Ins. Co.**, 12 Ga. App. 127, 76 S. E. 1036—vii. 3964(e), 3965(e), 3975 (g).
- May Creek Logging Co. v. Pacific Coast Casualty Co.**, 82 Wash. 301, 144 Pac. 67, L. R. A. 1915C, 155—vii. 3314(a).
- Mayer v. Phoenix Assur. Co.**, 108 N. Y. Supp. 711, 124 App. Div. 241—vii. 3631(b), 3641(h), 3655(p).
- Mayes v. National Council of Knights and Ladies of Security**, 142 Pac. 290, 92 Kan. 841—vii. 2704(b).
- Maynard v. United States Health & Accident Ins. Co.**, 76 N. H. 275, 81 Atl. 1077—vii. 3964(e), 3991(k).
- Mayor, Lane & Co. v. Commercial Casualty Ins. Co. (Sup.)** 150 N. Y. Supp. 624—vi. 1715(a), 2447(a); vii. 3330(a).
 155 N. Y. Supp. 75, 169 App. Div. 772—vi. 2447(a); vii. 3330(a).
- Mays v. New Amsterdam Casualty Co.**, 40 App. D. C. 249, 46 L. R. A. (N. S.) 1108—vi. 1979(j), 2072(b), 2110(i), 2163(e).
- Mears Mining Co. v. Maryland Casualty Co.**, 144 S. W. 883, 162 Mo. App. 178—vi. 632(c), 2448(b); vii. 3332(a), 3594(j), 3885(a), 3886(b).
- Mecca Fire Ins. Co. v. Blohopolo (Tex. Civ. App.)** 141 S. W. 358—vii. 3586(a).
- v. Coghlan**, 63 Tex. Civ. App. 601, 134 S. W. 266—vi. 1900(g), 1907(k), 1924(w).
- Mecca Fire Ins. Co. v. First State Bank of Hamlin (Tex. Civ. App.)** 135 S. W. 1083—vi. 747(g).
- v. Moore (Tex. Civ. App.)** 128 S. W. 441—vi. 1183(h), 1394(c); vii. 2768(a).
- v. Smith (Tex. Civ. App.)** 135 S. W. 688—vii. 2521(c), 2621(a), 2651(s).
- v. Stricker (Tex. Civ. App.)** 136 S. W. 599—vi. 1190(a), 1410(h).
- v. Wilderspin (Tex. Civ. App.)** 118 S. W. 1131—vi. 1900(g), 1916(r); vii. 3839(b).
- Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.**, 173 Fed. 883, 97 C. C. A. 400, 32 L. R. A. (N. S.) 940—vii. 3433(m).
 182 Fed. 590, 105 C. C. A. 128, 31 L. R. A. (N. S.) 873—vii. 3085(e), 3119(a).
- Mechanics' & Traders' Ins. Co. v. Boyce**, 114 Miss. 165, 74 South. 821, L. R. A. 1917E, 328—vi. 1754(d).
- v. Dalton (Tex. Civ. App.)** 189 S. W. 771—vi. 1835(b); vii. 2604(e).
- v. Davis (Tex. Civ. App.)** 167 S. W. 175—vi. 1730(b), 1820(d).
- Mechling v. Philadelphia Life Ins. Co.**, 53 Pa. Super. Ct. 526—vi. 1011(d).
- Medlin v. Atlantic Fire Ins. Co.**, 151 N. C. 35, 65 S. E. 605—vi. 1376(g).
- Mee v. Fay**, 76 N. E. 229, 190 Mass. 40—vi. 797(a), 820(n).
- Meech v. Citizens' Ins. Co. of Missouri**, 147 Mich. 343, 110 N. W. 1078—vi. 1402(e), 1421(c).
- Meegan v. Illinois Surety Co.**, 195 Mo. App. 423, 193 S. W. 899—vi. 906(g).
- Meehan v. Supreme Council Catholic Benev. Legion**, 95 App. Div. 142, 88 N. Y. Supp. 821—vi. 578(h), 2033(h).
 194 N. Y. 577, 88 N. E. 1125—vi. 578(h), 2033(h).
- Meerbach v. Metropolitan Life Ins. Co.**, 46 Pa. Super. Ct. 133—vi. 2395(b).
- Mees v. Pittsburgh Life & Trust Co.**, 154 N. Y. Supp. 660, 169 App. Div. 86—vi. 658(g), 686(e).
- Meggett v. Northwestern Mut. Life Ins. Co.**, 138 Wis. 636, 120 N. W. 392—vi. 1090(f), 1110(g).
- Meigs v. London Assur. Co. (C. C.)** 126 Fed. 781—vi. 744(f); vii. 2606(f), 2660(b), 3861(h).
 134 Fed. 1021, 68 C. C. A. 249—vi. 744(f); vii. 2606(f), 2660 (b), 3861(h).
- Meily Co. v. London & L. Fire Ins. Co. (C. C.)** 142 Fed. 873—vii. 3015(d), 3038(b), 3042(c), 3043(d).
 148 Fed. 683, 79 C. C. A. 454—vii. 3015(d), 3038(b), 3042(c), 3043(d).
- Meinhardt v. Meinhardt**, 117 Md. 426, 83 Atl. 715—vi. 286(g), 803(e), 806(f); vii. 3735(g).
- Meisenbach v. Supreme Tent, Knights of Maccabees of the World**, 140 Mo. App. 76, 119 S. W. 514—vi. 496(o), 2380(q), 2382(r); vii. 3531(a).
- Melancon v. Phoenix Ins. Co.**, 40 South. 718, 116 La. 324—vii. 3063(a), 3364(e), 3523(f).
- Melcher v. Ocean Accident & Guarantee Corp.**, 161 N. Y. Supp. 586, 175 App. Div. 77—vii. 3582(g).

- Melick v. Metropolitan Life Ins. Co.** (Sup.) 87 Atl. 75, 84 N. J. Law, 437—vi. 636(e); vii. 2715(h).
91 Atl. 1070, 85 N. J. Law, 727—vi. 636(e); vii. 2715(h).
- Mellen v. United States Health & Accident Ins. Co.**, 75 Atl. 273, 83 Vt. 242—vi. 636(e); vii. 3432(m), 3442(a), 3447(d), 3461(c), 3476(g), 3485(e), 3537(d), 3560(c).
- Mellon v. Ohio German Fire Ins. Co.**, 40 Pa. Super. Ct. 623—vi. 628(a), 636(e), 1645(n).
- Mellville v. Wickham** (Tex. Civ. App.) 169 S. W. 1123—vi. 807(g).
- Melvin v. Piedmont Mut. Life Ins. Co.**, 64 S. E. 180, 150 N. C. 398, 134 Am. St. Rep. 943—vi. 2259(a), 2398(c).
- Mendelson v. Gausman**, 156 App. Div. 914, 141 N. Y. Supp. 1131—vii. 3748(n).
157 App. Div. 370, 142 N. Y. Supp. 293—vi. 806(f).
78 Misc. Rep. 457, 139 N. Y. Supp. 947—vi. 806(f); vii. 3748(n).
- Mendenhall v. Farmers' Ins. Co.**, 110 N. E. 60, 183 Ind. 694—vi. 1600(b); vii. 2469(c), 2801(h).
- Menear v. Aetna Life Ins. Co.**, 31 Ohio Cir. Ct. R. 483—vii. 3442(a), 3473(e), 3556(a), 3559(b).
- Mercer v. South Atlantic Life Ins. Co.**, 69 S. E. 961, 111 Va. 699—vi. 843(g); vii. 2724(l).
- Merchants' Fire Ins. Co. v. McAdams**, 115 S. W. 175, 88 Ark. 550—vi. 1454(r); vii. 2638(i), 2777(e), 2809(l), 3890(d).
- Merchants' Ins. Co. v. Brown**, 35 Ohio Cir. Ct. R. 69—vi. 1375(f).
- Merchants' Mut. Fire Ins. Co. v. Harris**, 51 Colo. 95, 116 Pac. 143—vi. 629(a), 786(a), 864(g), 1379(h), 1901(h); vii. 2524(d), 2531(i), 2555(a), 2622(a).
- Merchants' Underwriters at Indemnity Exchange v. Parkhurst-Davis Merc. Co.**, 140 Ill. App. 504—vi. 632(c), 1432(c), 1793(h), 1858(r).
- Merchants' & Bankers' Fire Underwriters v. Brooks** (Tex. Civ. App.) 188 S. W. 243—vi. 458(j), 525(i), 662(a), 924(f), 1717(b); vii. 3059(c), 3526(g), 3657(q).
v. Foster (Tex. Civ. App.) 192 S. W. 811—vi. 1826(f).
v. Parker (Tex. Civ. App.) 190 S. W. 525—vi. 413(c).
v. Williams (Tex. Civ. App.) 181 S. W. 859—vi. 1337(f).
- Merchants' & Miners' Transp. Co. v. Robinson-Baxter-Dissosway Towing & Transp. Co.**, 191 Fed. 769, 113 C. C. A. 427—vii. 3901(d).
- Merchants' & Planters' Ins. Co. v. Marsh**, 34 Okl. 453, 125 Pac. 1100, 42 L. R. A. (N. S.) 996—vii. 2481(f), 2484(g), 2525(d).
- Meridian Life Ins. Co. v. Dean**, 182 Ala. 127, 62 South. 90—vi. 1012(d), 1962(k).
184 Ala. 673, 62 South. 94—vi. 1012(d), 1962(k).
v. Hobbs (Ala.) 76 South. 429—vi. 2411(g).
v. Milam, 188 S. W. 879, 172 Ky. 75, L. R. A. 1917B, 103—vii. 2757(b).
- Meriwether v. Phenix Ins. Co.**, 119 S. W. 535, 137 Mo. App. 96—vi. 735(b).
- Merriam Mortgage Co. v. St. Paul Fire & Marine Ins. Co.**, 155 Pac. 17, 97 Kan. 190—vii. 3892(d).
- Merrick v. Northwestern Nat. Life Ins. Co.**, 102 N. W. 593, 124 Wis. 221, 109 Am. St. Rep. 931—vii. 2842(f), 2846(h).
- Merriman v. Grand Lodge Degree of Honor**, 77 Neb. 544, 110 N. W. 302, 8 L. R. A. (N. S.) 983, 124 Am. St. Rep. 867, 15 Ann. Cas. 124—vi. 2102(d), 2110(i).
- Messenger v. German-American Ins. Co.**, 107 Pac. 643, 47 Colo. 448—vi. 637(f).
- Messersmith v. Supreme Lodge K. P.**, 31 N. D. 163, 153 N. W. 989—vii. 3261(n), 3268(p).
- Messing v. Order of the Golden Seal** (Sup.) 154 N. Y. Supp. 475—vii. 3271(a).
- Messler v. Williamsburgh City Fire Ins. Co.** (R. I.) 94 Atl. 875—vii. 3597(a), 3642(i).
(R. I.) 95 Atl. 601—vii. 3597(a), 3642(i).
- Metcalf v. Mutual Fire Ins. Co.**, 132 Wis. 67, 112 N. W. 22—vii. 2520(b), 2621(a), 2625(a).
- Metropolitan Casualty Ins. Co. v. Berghheim**, 21 Colo. App. 527, 122 Pac. 812—vii. 3032(i).
- Metropolitan Casualty Ins. Co. v. Cato**, 113 Miss. 283, 74 South. 114—vi. 2110(i); vii. 3290(b).
113 Miss. 303, 74 South. 118—vi. 2252(a).
v. McAuley, 67 S. E. 393, 134 Ga. 165—vii. 3455(i), 3516(c).
- Metropolitan Ins. Co. v. Clanton**, 76 N. J. Eq. 4, 73 Atl. 1052, vii. 3755(f), 3767(s).
- Metropolitan Life Ins. Co. v. Betz**, 44 Tex. Civ. App. 557, 99 S. W. 1140—vi. 451(f), 2096(a), 2142(h).
v. Brubaker, 78 Kan. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas. 267—vi. 2156(a), 2163(e).
v. Burch, 39 App. D. C. 397—vi. 680(b).
v. Caudle, 50 S. E. 337, 122 Ga. 608—vii. 3964(e), 3968(f).
v. Clay, 164 S. W. 968, 158 Ky. 192—vi. 2423(k).
v. Clayton's Adm'x, 144 S. W. 75, 147 Ky. 358—vi. 2428(c).

- Metropolitan Life Ins. Co. v. De Vault's Adm'r, 109 Va. 392, 63 S. E. 982, 17 Ann. Cas. 27—vi. 1969 (f), 2061(k); vii. 3263(o).
- v. Elison, 72 Kan. 199, 83 Pac. 410, 3 L. R. A. (N. S.) 934, 115 Am. St. Rep. 189, 7 Ann. Cas. 909—vi. 251(e), 272(l), 290(k), 308 (h).
- v. Felix, 73 Ohio St. 46, 75 N. E. 941, 4 Ann. Cas. 121—vi. 990 (a), 1041(d).
- v. Ford, 126 Ky. 49, 102 S. W. 876, 31 Ky. Law Rep. 513—vi. 2051 (a), 2053(b), 2061(k), 2075(e), 2082(i).
- v. Frankel, 103 N. E. 501, 58 Ind. App. 115—vii. 3461(b, c), 104 N. E. 856—vii. 3461(b, c).
- v. Freedman, 123 N. W. 547, 159 Mich. 114, 32 L. R. A. (N. S.) 298—vii. 2570(e), 2831(b), 2861 (n).
- v. Goodman, 196 Ala. 304, 71 South. 409—vi. 1965(b), 1984(a), 10 Ala. App. 446, 65 South. 449—vi. 615(f), 1931(a), 1951 (b), 1952(c), 1984(a), 2156(a), 2168(h), 2189(a).
- v. Hall, 52 S. E. 345, 104 Va. 572—vi. 2310(e); vii. 2724(l).
- v. Hardison, 94 N. E. 477, 208 Mass. 386—vi. 576(f).
- v. Hawkins, 31 App. D. C. 493, 14 Ann. Cas. 1092—vi. 684(d), 686 (e).
- v. Hayslett, 111 Va. 107, 68 S. E. 256—vi. 1979(j), 2131(e), 2143 (i).
- v. Hooppel, 76 N. J. Eq. 94, 74 Atl. 467—vi. 793(a); vii. 3755(q).
- v. Jennings, 130 Md. 622, 101 Atl. 608—vi. 1969(f), 1979(j), 2096 (a).
- v. Johnson, 105 Ark. 101, 150 S. W. 393—vi. 1932(a), 1933(b), 1939 (f), 2096(a), 121 Ill. App. 257—vii. 3741(k).
- 49 Ind. App. 233, 94 N. E. 785—vi. 636(e), 1048(h), 1933 (b), 1939(f), 1956(f), 2144(j); vii. 2524(d), 2602(d), 2625(a), 2683(b), 2690(d).
- v. Lennox, 124 S. W. 623, 103 Tex. 133—vi. 2033(h); vii. 3285(f).
- v. Lewis, 14 Ga. App. 10, 80 S. E. 17—vii. 3802(g).
- v. Lindsay's Adm'r, 124 Ky. 707, 100 S. W. 295—vi. 471(f), 472(f), 492(m).
- v. Little, 149 S. W. 998, 149 Ky. 717—vi. 686(e), 2112(j).
- v. Louisville Trust Co., 89 S. W. 268, 28 Ky. Law Rep. 426—vii. 3867(c).
- v. McCray, 156 Ala. 589, 47 So. 65—vii. 3315(b).
- v. Maddox (Ky.) 127 S. W. 503—vii. 3262(n), 3265(o), 3532(b).
- Metropolitan Life Ins. Co. v. Moore, 117 Ky. 651, 79 S. W. 219—vi. 453 (f).
- v. Moravec, 73 N. E. 415, 214 Ill. 186—vi. 2002(a), 2142(h), 116 Ill. App. 271—vi. 2002(a), 2142(h).
- v. National Life Ins. Co., 127 Ill. App. 665—vi. 2408(g); vii. 2839 (d).
- v. Nelson, 186 S. W. 520, 170 Ky. 674, L. R. A. 1916F, 457—vi. 273(n), 294(n); vii. 3740(k).
- v. People, 209 Ill. 42, 70 N. E. 643—vi. 1012(d), 106 Ill. App. 516—vi. 1012(d).
- v. People's Trust Co., 177 Ind. 578, 98 N. E. 513, 41 L. R. A. (N. S.) 285—vii. 3260(n), 3461(b).
- v. Schmidt, 93 S. W. 1055, 29 Ky. Law Rep. 255—vi. 2096(a), 2105(f).
- v. Shane, 98 Ark. 132, 135 S. W. 838—vi. 2057(g); vii. 3153(h), 3155(h), 3887(c).
- v. Solomito, 184 Ind. 722, 112 N. E. 521—vi. 2156(a).
- v. Stiewing, 173 Mo. App. 108, 155 S. W. 900—vi. 2025(d).
- v. Thomas, 106 S. W. 1175, 32 Ky. Law Rep. 770—vii. 3250(i), 3265 (o), 3472(d), 3548(b).
- v. Thompson (Ga. App.) 93 S. E. 299—vi. 442(a), 461(a), 469(e), 844 (g).
- v. Wagner, 50 Tex. Civ. App. 233, 109 S. W. 1120—vii. 2768(a), 3134(b), 3265(o), 3440(a).
- v. Williamson, 174 Fed. 116, 98 C. C. A. 90—vi. 456(h), 495(o), 499 (b), 512(h); vii. 3265(o).
- v. Willis, 37 Ind. App. 48, 76 N. E. 560—vi. 451(f), 2002(b), 2008 (b); vii. 2485(g), 2683(b), 2697 (h).
- v. Wolford, 49 Ind. App. 392, 97 N. E. 444—vi. 1969(f), 1978(i).
- Metropolitan Plate Glass & Casualty Ins. Co. v. Hawes' Ex'r, 149 S. W. 1110, 150 Ky. 52, 42 L. R. A. (N. S.) 700—vi. 632(c); vii. 3294(c).
- Mettner v. Northwestern Nat. Life Ins. Co., 127 Iowa, 205, 103 N. W. 112—vii. 2470(d), 2719(j).
- Meyer v. Grand Lodge of Order of Sons of Hermann, 121 N. W. 235, 108 Minn. 25, 133 Am. St. Rep. 460—vi. 803(e), 816(l); vii. 2694 (g).
- v. Home Ins. Co., 106 N. W. 1087, 127 Wis. 293—vii. 3355(d), 3416 (d).
- v. National Surety Co. (N. J.) 100 Atl. 164—vii. 3943(d).
- v. Supreme Lodge K. of P., 82 App. Div. 359, 81 N. Y. S. 813—vi. 564(g), 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839—vi. 564(g).

- Meyerson v. United States Grand Lodge, Independent Order Sons of Benjamin (Sup.)** 151 N. Y. Supp. 932—vii. 3281(e).
- Michaels v. Fidelity & Casualty Co. of New York** 105 S. W. 783, 128 Mo. App. 18—vii. 3033(i).
- Michaelsen v. Security Mut. Life Ins. Co. (C. C.)** 150 Fed. 224—vi. 653(c); vii. 2833(c), 2840(e).
154 Fed. 356, 83 C. C. A. 334, 12 Ann. Cas. 37—vii. 2833(c).
- Michalek v. Modern Brotherhood of America (Iowa)** 161 N. W. 125—vii. 3255(l), 3472(d).
- Michel v. Southern Ins. Co.**, 128 La. 562, 54 South. 1010, Ann. Cas. 1912C, 810—vii. 2810(m), 2811(m).
128 La. 569, 54 South. 1012—vii. 2810(m), 2811(m).
135 La. 933, 66 South. 302—vii. 3712(k).
- Michigan Commercial Ins. Co. v. Wills**, 57 Ind. App. 256, 106 N. E. 725—vii. 3033(i).
- Michigan Idaho Lumber Co. v. Northern Fire & Marine Ins. Co.**, 35 N. D. 244, 160 N. W. 130—vi. 538(d); vii. 2521(c), 2742(c), 3585(a).
- Michigan Mut. Life Ins. Co. v. Basler**, 140 Mich. 233, 103 N. W. 596—vii. 3778(u).
- v. Liphart, 177 Ill. App. 645—vi. 1101(b).
 - v. Mayfield's Adm'r, 121 Ky. 839, 90 S. W. 607—vi. 2408(g).
 - v. Thompson, 44 Ind. App. 180, 86 N. E. 508—vi. 68(l), 349c, 445 (a), 451(f), 454(g), 1037(a).
 - v. Whittaker, 28 Ohio Cir. Ct. R. 688—vi. 2142(h).
- Mick v. Royal Exch. Assur.**, 87 N. J. Law, 607, 91 Atl. 102, 52 L. R. A. (N. S.) 1074—vi. 632(c); vii. 3412(a).
- Middelstadt v. Grand Lodge, Order of Sons of Hermann**, 107 Minn. 228, 120 N. W. 37—vi. 819(m).
- Midland Casualty Co. v. Mason (Okl.)** 154 Pac. 1171—vii. 3201(h).
- M. I. Hibbler Mach. Supply Co., In re (D. C.)** 192 Fed. 741—vi. 1747(a).
- Mikesell v. Mikesell**, 40 Pa. Super. Ct. 392—vi. 799(b).
- Miles v. Casualty Co. of America**, 120 N. Y. Supp. 1135, 136 App. Div. 908—vii. 3532(b), 3956 (a), 3959(b).
96 N. E. 744, 203 N. Y. 453—vii. 3956(a).
(Sup.) 115 N. Y. Supp. 1—vii. 3532(b), 3956(a), 3959(b).
- v. Court of Honor, 173 Ill. App. 187—vii. 3257(m), 3268(p).
- Miles Lamp Chimney Co. v. Erie Fire Ins. Co.**, 73 N. E. 107, 164 Ind. 181—vi. 1067(c).
- Milhim v. Hawkeye Ins. Co.**, 171 Ill. App. 262—vi. 1387(e); vii. 3043(d).
- Milison v. Mutual Cash Guaranty Fire Ins. Co.**, 24 S. D. 285, 123 N. W. 839, 140 Am. St. Rep. 788—vi. 1336(f), 1349 (c).
- Millard v. Beaumont**, 194 Mo. App. 69, 185 S. W. 547—vi. 1065(b); vii. 3690 (b).
- Miller v. Assured's Nat. Mut. Fire Ins. Co.**, 106 N. E. 203, 264 Ill. 380—vi. 457(i), 1869(a).
164 Ill. App. 237—vi. 460(j).
184 Ill. App. 271—vi. 457(i), 1869(a).
- v. Commercial Union Assur. Co., 69 Wash. 529, 125 Pac. 782—vi. 1131(c), 1147(k), 1161(e), 1314 (d), 1466(b), 1471(e).
 - v. Connecticut Fire Ins. Co. (Okl.) 151 Pac. 605—vi. 734(b).
 - v. Fireman's Fund Ins. Co., 6 Cal. App. 395, 92 Pac. 332—vii. 3411 (f), 3415(d), 3431(m).
 - v. Gibbs, 108 App. Div. 103, 95 N. Y. Supp. 385—vi. 184(a), 185(b), 1898(c), 1912(n); vii. 3702(g).
 - v. Home Ins. Co., 127 Md. 140, 96 Atl. 267—vi. 615(f), 1821(d), 1829(g).
 - v. Maryland Casualty Co., 193 Fed. 343, 113 C. C. A. 267—vi. 1990 (g), 1994(i), 1997(j), 2144(j); vii. 2559(b).
 - v. Massachusetts Bonding & Ins. Co., 93 Atl. 320, 247 Pa. 182, L. R. A. 1915D, 615—vii. 3343 (g).
 - v. Milwaukee Mechanics' Ins. Co., 181 Ill. App. 133—vi. 3362(d).
 - v. Missouri State Life Ins. Co., 153 S. W. 1080, 168 Mo. App. 330—vi. 675(g); vii. 3308(h).
194 Mo. App. 265, 186 S. W. 762—vi. 54(e).
 - v. National Casualty Co., 62 Pa. Super. Ct. 417—vi. 1932(a), 1979(j), 2090(a).
 - v. Phenix Ins. Co., 100 Miss. 311, 56 South. 449—vi. 1387(f).
 - v. Prella, 122 Ill. App. 380—vi. 814 (k); vii. 3735(g), 3766(r), 3776 (t).
 - v. Prussian Nat. Ins. Co., 158 Mich. 402, 122 N. W. 1093—vi. 1643 (m), 1650(q); vii. 2622(a).
 - v. St. Paul Fire & Marine Ins. Co., 26 S. D. 454, 128 N. W. 609—vi. 629(a); vii. 2615(j).
 - v. Sovereign Camp Woodmen of the World, 122 N. W. 1126, 140 Wis. 505, 28 L. R. A. (N. S.) 173, 133 Am. St. Rep. 1095—vii. 3514(b).
 - v. Spring Garden Ins. Co., 202 Fed. 442, 120 C. C. A. 548—vi. 1600 (b).
- Millers' & Manufacturers' Ins. Co., In re**, 106 N. W. 485, 97 Minn. 98, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144—vi. 453(j), 1176(b), 1332(d).

- Mills v. National Life Ins. Co.**, 189 S. W. 691, 136 Tenn. 350—vi. 531(j), 2281(a), 2411(g), 2432(e).
- Millville Aerie No. 1836, Fraternal Order of Eagles v. Weatherby**, 82 N. J. Eq. 455, 88 Atl. 847—vii. 3698(f).
- Milmine, In re (Sur.)** 134 N. Y. Supp. 553—vii. 3744(m).
- Milwaukee Mechanics' Ins. Co. v. Frosch (Tex. Civ. App.)** 130 S. W. 600—vii. 3035(a), 3042(c), 3079(a), 3125(c), 3127(d), 3635(d).
- v. Fuquay**, 120 Ark. 330, 179 S. W. 497—vi. 352(f), 1295(e); vii. 3490(c), 3514(b).
- v. Ramsey**, 76 Or. 570, 149 Pac. 542, L. R. A. 1916A, 556, Ann. Cas. 1917B, 1132—vii. 3915(j).
- Milwaukee Steel Type & Die Co. v. American Cent. Ins. Co.**, 159 N. W. 938, 164 Wis. 298—vi. 1388(g).
- Mincho v. Bankers' Life Ins. Co.**, 124 App. Div. 578, 109 N. Y. Supp. 179—vii. 2841(e).
- 129 App. Div. 332, 113 N. Y. Supp. 346—vii. 2841(e).
- Mineola Tribe No. 114 v. Lizer**, 83 Atl. 149, 117 Md. 136, 42 L. R. A. (N. S.) 1170—vii. 3774(s).
- Miner v. Farmers' Mut. Fire Ins. Co.**, 117 N. W. 211, 153 Mich. 594—vi. 970(t), 972(u), 1879(e).
- v. National Casualty Co.**, 166 Mich. 669, 132 N. W. 446—vii. 3371(h).
- Miners' & Merchants' Bank v. United States Fidelity & Guaranty Co.**, 233 Fed. 654, 147 C. C. A. 462—vii. 3337(d).
- Minner v. Great Western Acc. Ass'n**, 99 Kan. 575, 162 Pac. 1160, L. R. A. 1917D, 738—vii. 3197(g).
- Minnesota Farmers' Mut. Ins. Co. v. Landkammer**, 148 N. W. 305, 126 Minn. 245—vi. 965(r).
- v. Sweet**, 148 N. W. 306, 126 Minn. 528—vi. 965(r).
- Minnesota Mut. Life Ins. Co. v. Link**, 82 N. E. 637, 230 Ill. 273—vi. 632(c), 1940(f), 1944(i), 2096(a); vii. 3471(c), 3864(b).
- 131 Ill. App. 89—vi. 632(c), 1931(a), 1944(i), 2096(a); vii. 3471(c).
- v. Miller**, 131 Ill. App. 89—vi. 1931(a).
- v. Welsh**, 82 N. E. 637, 230 Ill. 273—vi. 632(c), 1931(a), 1940(f), 1944(i), 2096(a); vii. 3471(c), 3864(b).
- 131 Ill. App. 103—vii. 3864(b).
- Minrath v. New York Inv. & Imp. Co.**, 122 N. Y. Supp. 1137, 137 App. Div. 919—vii. 3755(q), 3793(c).
- Mischler v. Mutual Reserve Fund Life Ass'n**, 220 Ill. 451, 77 N. E. 202—vi. 691(a); vii. 3943(d).
- Missey v. Supreme Lodge, Knights and Ladies of Honor**, 147 Mo. App. 137, 126 S. W. 559—vi. 61(h), 2067(b).
- Mississippi Electric Co. v. Hartford Fire Ins. Co.**, 105 Miss. 767, 63 South. 231—vi. 876(q).
- Mississippi Fire Ass'n v. Stein**, 41 South. 66, 88 Miss. 499—vi. 864(g).
- Mississippi Home Ins. Co. v. Barron**, 45 South. 875, 91 Miss. 722—vii. 3089(g), 3355(d).
- v. Stevens**, 93 Miss. 439, 46 South. 245—vi. 1640(l), 1889(h); vii. 2639(j).
- Missouri State Life Ins. Co. v. Burton (Ark.)** 195 S. W. 371—vi. 451(f).
- v. Crabtree**, 124 Ark. 214, 187 S. W. 173—vi. 2393(a); vii. 3755(q).
- v. Hill**, 109 Ark. 17, 159 S. W. 31—vi. 643(k); vii. 2837(d).
- v. Lovelace**, 58 S. E. 93, 1 Ga. App. 446—vi. 632(c), 650(b); vii. 3885(a), 3886(a).
- Mitchell v. Aetna Ins. Co.**, 111 Miss. 253, 71 South. 382—vii. 2665(c).
- v. Allis**, 157 Ala. 304, 47 South. 715—vii. 3726(d).
- v. German Commercial Acc. Co.**, 179 Mo. App. 1, 161 S. W. 362—vi. 636(e); vii. 3163(c).
- v. Lambert**, 34 App. D. C. 583—vii. 3731(e), 3793(c).
- v. Langley**, 85 S. E. 1050, 143 Ga. 827, L. R. A. 1916C, 1134, Ann. Cas. 1917A, 469—vii. 3758(q).
- v. Supreme Lodge M. A. F. O.**, 155 Ill. App. 183—vii. 4016(i).
- Mittelstadt v. Modern Woodmen of America**, 143 Iowa, 186, 121 N. W. 803, 136 Am. St. Rep. 765—vii. 3260(n), 3264(o), 3268(p).
- Mock v. Supreme Council of Royal Arcanum**, 121 App. Div. 474, 106 N. Y. Supp. 155—vi. 559(a), 713(m), 715(n), 717(n).
- Modern Brotherhood of America v. Bailey (Okla.)** 150 Pac. 673, L. R. A. 1916A, 551—vii. 2715(h).
- v. Beshara**, 142 Pac. 1014, 42 Okl. 684—vi. 698(f), 2338(b); vii. 2498(a).
- v. Chandler (Tex. Civ. App.)** 146 S. W. 626—vi. 2430(d).
- v. Hudson**, 194 Mich. 124, 160 N. W. 406—vii. 3758(q), 3770(s).
- v. Jordan (Tex. Civ. App.)** 167 S. W. 794—vi. 1953(c), 2096(a), 2127(c), 2142(h).
- v. Lock**, 22 Colo. App. 409, 125 Pac. 556—vii. 3239(d).
- v. Matkovitch**, 56 Ind. App. 8, 104 N. E. 795—vii. 3762(r), 3769(s), 3770(s).
- v. Phelps**, 134 S. W. 892, 142 Ky. 544—vi. 452(f).

- Modern Order of Prætorians v. Hollmig** (Tex. Civ. App.) 103 S. W. 474—vi. 1997(j), 2146(k), 2156(a); vii. 2580(h).
(Tex. Civ. App.) 105 S. W. 846—vi. 1997(j), 2146(k), 2156(a); vii. 2580(h).
- v. Kennedy** (Okla.) 157 Pac. 926—vi. 2395(b).
- v. Taylor**, 60 Tex. Civ. App. 217, 127 S. W. 260—vi. 1964(a), 1965(b); vii. 3301(f), 3312(i).
- Modern Woodmen of America v. Angle**, 127 Mo. App. 94, 104 S. W. 297—vi. 1933(b), 2156(a); vii. 2562(b), 2570(e).
- v. Atkinson**, 155 S. W. 1135, 153 Ky. 527—vi. 2003(b).
- v. Berry**, 161 N. W. 534, 100 Neb. 820—vi. 2214(f); vii. 2683(b).
- v. Breckenridge**, 89 Pac. 661, 75 Kan. 373, 10 L. R. A. (N. S.) 136, 12 Ann. Cas. 636—vi. 2245(g); vii. 2687(b).
- v. Comeaux**, 79 Kan. 493, 101 Pac. 1, 25 L. R. A. (N. S.) 814, 17 Ann. Cas. 865—vi. 813(k); vii. 3721(b).
- v. Craiger**, 175 Ind. 30, 92 N. E. 113—vii. 3255(l), 3263(o), 3265(o), 3268(p).
- (Ind. App.) 90 N. E. 84—vii. 3255(l), 3263(o), 3265(o), 3268(p).
- v. Gerdorn**, 77 Kan. 401, 94 Pac. 788—vii. 3129(a), 3131(a).
- v. Graber**, 128 Ill. App. 585—vii. 3467(a).
- v. Headle**, 88 Vt. 37, 90 Atl. 893, L. R. A. 1915A, 580—vii. 3756(g), 3758(g), 3762(r), 3767(s), 3769(s), 3773(s).
- v. International Trust Co.**, 25 Colo. App. 26, 136 Pac. 806—vi. 2061(k), 2247(h); vii. 2498(a), 2552(v), 2777(e).
- v. Jones**, 52 Ind. App. 149, 98 N. E. 1006—vii. 2715(h).
- v. Kincheloe**, 175 Ind. 563, 94 N. E. 228, Ann. Cas. 1913C, 1259—vii. 3257(m), 3263(o).
- (Ind. App.) 91 N. E. 976—vii. 3255(l), 3257(m), 3265(o).
- v. Lawson**, 110 Va. 81, 65 S. E. 509, 135 Am. St. Rep. 927—vi. 1988(d), 1990(g), 2156(a); vii. 2559(b), 2562(b), 3139(e).
- v. Lynch** (Tex. Civ. App.) 141 S. W. 1055—vi. 677(a), 698(f), 709(k), 2214(f), 2254(b).
- v. Metcalfe** (Tex. Civ. App.) 154 S. W. 662—vii. 4016(i).
- v. Miles**, 178 Ind. 105, 97 N. E. 1009—vi. 632(c), 2130(d), 2159(c), 2163(e).
- v. Neeley**, 111 S. W. 282, 33 Ky. Law Rep. 758—vii. 3245(h).
- v. O'Connor**, 182 Ill. App. 562—vii. 3819(c).

- Modern Woodmen of America v. Owens**, 60 Tex. Civ. App. 398, 130 S. W. 853—vi. 444(a), 450(e), 451(f), 454(g), 455(h), 697(e), 1933(b), 1954(d), 1997(j), 2002(b), 2008(b), 2101(d).
- v. Talbot**, 107 N. W. 790, 76 Neb. 621—vi. 2242(f); vii. 2688(b).
- v. Terry** (Okla.) 153 Pac. 1124—vii. 3726(r), 3770(s).
- v. Vincent**, 40 Ind. App. 711, 80 N. E. 427, 14 Ann. Cas. 89—vi. 628(a), 1962(k), 2665(c), 82 N. E. 475, 40 Ind. App. 711, 14 Ann. Cas. 89—vi. 628(a), 1962(k), 2665(c).
- v. Weekley**, 139 Pac. 1138, 42 Okl. 25—vi. 2237(a), 2242(f); vii. 2481(f), 2484(g), 2688(b), 2768(a).
- v. Wilson**, 107 N. W. 568, 76 Neb. 344—vi. 687(f), 1978(i), 1980(j), 2113(k), 2158(b), 2159(c).
- v. Young**, 59 Ind. App. 1, 108 N. E. 869—vii. 3141(e).
- Modlin v. Atlantic Fire Ins. Co.**, 151 N. C. 35, 65 S. E. 605—vi. 150(e), 226(f), 1376(g), 1387(f), 1388(g), 1738(f); vii. 2659(a), 2673(f), 2742(c), 2772(b), 3972(g).
- Moest v. Continental Casualty Co.**, 122 App. Div. 897, 106 N. Y. Supp. 1138—vi. 792(f); vii. 3968(f).
- 55 Misc. Rep. 128, 104 N. Y. Supp. 553—vi. 632(c), 792(f); vii. 3968(f).
- Mohler v. Guarantee Hail Ass'n (Iowa)**, 161 N. W. 451—vi. 2828(h).
- Mohr v. Prudential Ins. Co.**, 32 R. I. 177, 78 Atl. 554—vi. 253(f), 258(h), 290(k), 328(h), 329(h), 455(h), 456(h), 469(e), 495(o); vii. 2757(b).
- Molaka v. American Fire Ins. Co.**, 29 Pa. Super. Ct. 149—vii. 3915(j).
- Moller v. Niagara Fire Ins. Co.**, 103 P. 449, 54 Wash. 439, 24 L. R. A. (N. S.) 807, 132 Am. St. Rep. 1115—vi. 1754(d); vii. 2668(d).
- Moloney v. Germania Fire Ins. Co.**, 168 Mich. 269, 134 N. W. 6—vii. 2746(e), 2777(e).
- Monahan v. Fidelity Mut. Life Ins. Co.**, 90 N. E. 213, 242 Ill. 488, 134 Am. St. Rep. 337—vi. 844(g), 2277(k); vii. 2464(b), 2715(h), 2757(b).
- 148 Ill. App. 171—vi. 844(g), 2277(k); vii. 2464(b), 2757(b).
- v. Metropolitan Life Ins. Co.**, 180 Ill. App. 390—vi. 1965(b), 1969(f), 2088(e), 2144(j); vii. 2757(b).
- v. Metropolitan Surety Co. (Sup.)**, 114 N. Y. Supp. 862—vii. 3544(a), 3911(b), 3991(k).
- v. Mutual Life Ins. Co.**, 63 Atl. 211, 103 Md. 145, 5 L. R. A. (N. S.) 759—vi. 2000(m); vii. 2683(b), 2695(g), 2715(h).

- Monast v. Manhattan Life Ins. Co., 79 Atl. 932, 32 R. I. 557, Ann. Cas. 1912D, 1007—vi. 68(l), 471(f), 554(j), 1039(a), 2259(a).
- Mongeau v. Liverpool & London & Globe Ins. Co., 128 La. 654, 55 South. 6—vii. 2558(a).
- Monger v. New Era Ass'n, 156 Mich. 645, 121 N. W. 823, 24 L. R. A. (N. S.) 1027—vi. 714 (m), 717(n); vii. 3676(b).
171 Mich. 614, 137 N. W. 631—vii. 3680(c).
- Monger & Henry v. Queen Ins. Co., 44 Tex. Civ. App. 629, 99 S. W. 887—vi. 1824(e).
- Monjeau v. Metropolitan Life Ins. Co., 208 Mass. 1, 94 N. E. 302—vi. 1969 (f), 1979(j); vii. 3456(i), 3490(b).
- Monk v. Penn Twp. Mut. Fire Ins. Ass'n, 27 Pa. Super. Ct. 449—vii. 2618(k).
- Monongahela Ins. Co. v. Batson, 111 Ark. 167, 163 S. W. 510—vi. 1774(g).
- Montana Stables v. Union Assur. Society, 101 Pac. 882, 53 Wash. 274—vi. 730(a), 744(f).
- Montano v. Missanellese Soc. of Mut. Aid, 130 N. Y. Supp. 455, 72 Misc. Rep. 515—vii. 3514(b).
- Monteleone v. Seaboard Fire & Marine Ins. Co., 52 South. 1032, 126 La. 807—vii. 3517(c).
- Montgomery v. Continental Casualty Co., 59 South. 907, 131 La. 475—vi. 2208(c).
- v. Mutual Life Ins. Co. of New York, 111 Miss. 6, 71 South. 162—vii. 2875(h).
- v. Southern Mut. Ins. Co., 88 Atl. 924, 242 Pa. 86, 51 L. R. A. (N. S.) 518—vi. 648(j); vii. 3025(f).
- v. United States Fidelity & Guaranty Co., 90 S. C. 283, 71 S. E. 1084—vii. 4016(f).
- Moodey v. Connecticut Fire Ins. Co., 160 Cal. 630, 117 Pac. 773—vi. 1610(f).
- Moon v. Order of United Commercial Travelers of America, 96 Neb. 65, 146 N. W. 1037, Ann. Cas. 1916B, 222—vii. 3201(h).
96 Neb. 65, 146 N. W. 1037, 52 L. R. A. (N. S.) 1023—vii. 3174(g).
- Mooney v. Merriam, 77 Kan. 305, 94 Pac. 263—vi. 341(g).
- v. Supreme Council of Royal Arcanum, 90 Atl. 132, 243 Pa. 463—vi. 2378(p); vii. 3968(f).
- Moore v. Aetna Life Ins. Co., 75 Or. 47, 146 Pac. 151, L. R. A. 1915D, 264, Ann. Cas. 1917B, 1005—vi. 632(c); vii. 3301(f).
- v. Crandall, 146 Iowa, 25, 124 N. W. 812, 140 Am. St. Rep. 276—vi. 1779(j).
- v. Farmers' Mut. Fire Ins. Co., 45 Pa. Super. Ct. 541—vi. 1854(o).
- Moore v. General Accident, Fire & Life Assur. Corp., 92 S. E. 362, 173 N. C. 532—vi. 2259(a); vii. 2699(b). 3168(e), 3466(e), 3531(a), 3959(b).
- v. General Accident, Fire & Light Ins. Corp., 158 N. C. 305, 73 S. E. 1002—vii. 3304(g).
- v. Illinois Commercial Men's Ass'n, 166 Ill. App. 38—vii. 3172(g).
- v. Life & Annuity Ass'n, 93 Kan. 398, 148 Pac. 981—vi. 631(b).
95 Kan. 591, 148 Pac. 981—vi. 631(b), 714(m), 2413(h).
151 Pac. 1107, 96 Kan. 397—vi. 631(b).
- v. Maryland Casualty Co., 63 Atl. 490, 73 N. H. 518, 111 Am. St. Rep. 647—vii. 3335(c).
- * 63 S. E. 675, 150 N. C. 153, 24 L. R. A. (N. S.) 211—vii. 3871(d).
- v. Mutual Reserve Fund Life Ass'n, 106 N. Y. Supp. 255, 121 App. Div. 335—vi. 1039(a); vii. 2849(j).
- v. National Acc. Soc., 80 Pac. 171, 38 Wash. 31—vii. 2680(h), 3537(d).
- v. Northwestern Life Ins. Co., 87 S. W. 988, 112 Mo. App. 696—vi. 2266(c), 2407(g), 2410(g).
- v. Northwestern Mut. Life Ins. Co., 192 Mass. 468, 78 N. E. 488, 7 Ann. Cas. 656—vi. 684(d); vii. 3248(i), 3265(o).
- v. Phoenix Ins. Co., 111 N. W. 263, 100 Minn. 393—vii. 3126(d).
- v. Prudential Casualty Co., 156 N. Y. Supp. 892, 170 App. Div. 849—vi. 23(f), 1952(c), 1984(a), 2039(b); vii. 2465(b), 2559(b).
- v. St. Paul Fire & Marine Ins. Co., 176 Iowa, 549, 156 N. W. 676—vi. 1716(b), 1717(b), 1863(c).
- v. Sun Ins. Co., 100 Minn. 374, 111 N. W. 260—vi. 1526(d), 1635(h); vii. 3118(a), 3662(d).
- v. Supreme Assembly of Royal Soc. of Good Fellows, 93 S. W. 1077, 42 Tex. Civ. App. 366—vii. 2692(e).
- v. Taylor, 161 N. Y. Supp. 480, 175 App. Div. 37—vii. 3893(a).
(Sup.) 157 N. Y. Supp. 921—vii. 3893(a).
- Moore Co. v. American Credit Indem. Co., 170 App. Div. 660, 156 N. Y. Supp. 737—vi. 2445(f), 2766(b).
- Moran v. Franklin Life Ins. Co., 160 Mo. App. 407, 140 S. W. 955—vi. 693(c), 1015(b), 1026(d), 2263(b); vii. 2772(b), 3556(a), 3561(d).
- v. Knights of Columbus, 46 Utah, 397, 151 Pac. 353—vi. 2368(l); vii. 3268(p), 3531(a).
- Moran Bros. Co. v. Pacific Coast Casualty Co., 48 Wash. 592, 94 Pac. 106—vii. 3572(b).

- Morey v. Monk, 40 South. 411, 145 Ala. 301—vi. 812(j), 813(k); vii. 3783(u).
- Morgan v. American Cent. Ins. Co. (W. Va.) 92 S. E. 84, L. R. A. 1917D, 1049—vi. 1859(a), 1866 (e); vii. 2499(a).
- v. Independent Order of Sons and Daughters of Jacob, 44 South. 791, 90 Miss. 864—vi. 631(b), 636(e); 2238(b); vii. 2658(a), 2715(h).
- v. Mutual Ben. Life Ins. Co., 16 Cal. App. 85, 116 Pac. 385, 389—vii. 3793(c).
- 119 App. Div. 645, 104 N. Y. Supp. 185—vii. 3755(q), 3805 (i).
- 116 N. Y. Supp. 989, 132 App. Div. 455—vii. 3793(c).
- 189 N. Y. 447, 82 N. E. 438—vii. 3755(q), 3805(i).
- 91 N. E. 1117, 197 N. Y. 607—vii. 3793(c).
- v. Northwestern Nat. Life Ins. Co., 42 Wash. 10, 84 Pac. 412, 7 Ann. Cas. 382—vii. 2708(c), 2709(d).
- v. Royal Ben. Society, 167 N. C. 262, 83 S. E. 479—vii. 2496(o).
- 170 N. C. 75, 86 S. E. 975—vi. 586(d).
- Morgenstern v. Insurance Co. of North America of Philadelphia, Pa., 89 Neb. 459, 131 N. W. 969—vii. 3503(h), 3514 (b), 3560(c), 3561(d).
- Morrill's Adm'r v. Catholic Order of Foresters, 79 Vt. 479, 65 Atl. 526—vi. 439(b).
- Morris v. Dutchess Ins. Co., 67 W. Va. 368, 68 S. E. 22—vii. 3347(a), 3537(d).
- v. Travelers' Ins. Co. (C. C.) 189 Fed. 211—vii. 3335(c).
- Morris McGraw Wooden Ware Co. v. German Fire Ins. Co., 52 South. 183, 126 La. 32, 38 L. R. A. (N. S.) 614, 20 Ann. Cas. 1229—vi. 68(i); vii. 2820(c).
- Morris & Co. v. Rhode Island Ins. Co., 181 Ill. App. 500—vi. 642(i), 923(f).
- v. Starkweather & Shepley, 186 Ill. App. 59—vi. 1037(a).
- Morrison v. Mutual Benev. Ass'n, 59 S. E. 27, 78 S. C. 398—vi. 631(b), 636(e), 2338(b); vii. 2779(f).
- Morriss v. Home Ins. Co., 139 N. Y. Supp. 674, 78 Misc. Rep. 303—vi. 68 (l), 445(b).
- Morrow v. National Life Ass'n, 184 Mo. App. 308, 168 S. W. 881—vi. 54(e), 294 (n), 301(d), 2090(a); vii. 3788(a), 3886 (b).
- Morse v. Commercial Travelers' Eastern Acc. Ass'n, 98 N. E. 599, 212 Mass. 140, 40 L. R. A. (N. S.) 135—vii. 3220(m).
- v. Fraternal Acc. Ass'n, 77 N. E. 491, 190 Mass. 417, 112 Am. St. Rep. 337—vi. 900(a); vii. 3306(h).
- Mosaic Templars of America v. Jones, 99 Ark. 204, 137 S. W. 812—vi. 2373 (n); vii. 2717(h).
- Moseley v. Liverpool & London & Globe Ins. Co., 104 Miss. 326, 61 South. 428—vii. 3942(d).
- v. Northwestern Nat. Ins. Co., 109 Mo. App. 464, 84 S. W. 1000—vi. 1737(e).
- Moser v. Connecticut Mut. Life Ins. Co. of Hartford, 134 Ky. 215, 119 S. W. 792—vii. 3802(g).
- Moses v. Illinois Commercial Men's Ass'n, 189 Ill. App. 440—vi. 708(j); vii. 3133(b).
- Moshenz v. Independent Order Ahawas Israel, 102 N. E. 324, 215 Mass. 185—vii. 3285(e).
- Mosier v. United States Fidelity & Guaranty Co., 119 N. Y. Supp. 157, 134 App. Div. 849—vi. 390(p), 576(e).
- 202 N. Y. 521, 95 N. E. 1134—vi. 390(p), 576(e).
- Mosiman v. Occidental Mut. Ben. Ass'n, 109 Pac. 413, 82 Kan. 670—vi. 2373 (n), 2404(e).
- Moss v. Home Ins. Co. of New York, 99 S. W. 308, 30 Ky. Law Rep. 630—vi. 1288(a); vii. 3042(c).
- Mossop v. Continental Casualty Co., 118 S. W. 680, 137 Mo. App. 399—vii. 3204 (i), 3464(d).
- Most v. Massachusetts Bonding & Ins. Co. (Mo. App.) 196 S. W. 1064—vi. 88 (c), 635(d); vii. 3319(a).
- Mott v. Spring Garden Ins. Co. (Tex. Civ. App.) 154 S. W. 658—vii. 3037 (a), 3038(b).
- Moulton v. Globe Mut. Ins. Co., 36 S. D. 339, 154 N. W. 830—vi. 204(d); vii. 3079(a).
- Mt. Eden Bank v. Ocean Accident & Guarantee Co., 96 S. W. 450, 29 Ky. Law Rep. 765—vii. 3033(i).
- Moving Picture Co. v. Scottish Union & National Ins. Co., 90 Atl. 642, 244 Pa. 358—vi. 142(g), 202(b).
- Mowles v. Boston Ins. Co., 226 Mass. 426, 115 N. E. 666—vi. 142(g), 378(g), 459(j), 837(c).
- Mowry v. National Protective Soc., 27 Pa. Super. Ct. 390—vi. 700(f); vii. 3872(d).
- Mowry & Payson v. Hanover Fire Ins. Co., 106 Me. 308, 76 Atl. 875, 29 L. R. A. (N. S.) 498—vii. 3660(b), 3662 (d).
- Mrs. A. K. Ross & Co. v. German Alliance Ins. Co., 119 Pac. 366, 86 Kan. 145, Ann. Cas. 1913B, 1045—vii. 3651(m).
- 119 Pac. 1126, 86 Kan. 352—vii. 3651(m).
- M. S. Dollar S. S. Co. v. Maritime Ins. Co. (C. C.) 149 Fed. 616—vi. 218(c).
- Mudge v. Supreme Court, I. O. F., 112 N. W. 1130, 149 Mich. 467, 14 L. R. A. (N. S.) 279, 119 Am. St. Rep. 686—vi. 2096(a), 2120(n), 2142(h); vii. 2569(e).

- Muetzel v. Travelers' Protective Ass'n, 163 Ky. 734, 183 S. W. 499—vi. 700 (f).
- Muhlenberg v. Mutual Fire Ins. Co., 60 Atl. 995, 211 Pa. 432—vi. 693(c).
- Mulherin v. Bankers' Life Ass'n, 163 Iowa, 740, 144 N. W. 1000—vi. 1013 (a), 1030(f), 2432(e).
- Mullen v. Woodmen of the World, 144 Iowa, 228, 122 N. W. 903—vi. 686 (e); vii. 3750(n).
- Muller v. Penn Mut. Life Ins. Co. of Philadelphia (Colo.) 161 Pac. 148—vii. 3767(s).
- Mulligan v. Metropolitan Life Ins. Co., 149 Ill. App. 516—vi. 449(d), 505(e).
- Mullins v. Masonic Protective Ass'n, 181 Mo. App. 394, 168 S. W. 843—vii. 3168(e).
- Mulrooney v. Royal Ins. Co. (C. C.) 157 Fed. 598—vi. 403(j), 1765 (a), 1772(f).
- 163 Fed. 833, 90 C. C. A. 317—vi. 1765(a); vii. 2476(b), 2605(e), 2610(i).
- Mun v. New York Life Ins. Co. (Mo. App.) 181 S. W. 606—vi. 2263(b), 2411 (g); vii. 3477(a), 3532(b).
- Munch v. Albrecht, 127 App. Div. 27, 111 N. Y. Supp. 209—vii. 2727(p).
- Mund v. Rehaume, 51 Colo. 129, 117 Pac. 159, Ann. Cas. 1913A, 1243—vi. 701(g), 799(b), 808(e); vii. 3721(b), 3732(f).
- Munger v. Brotherhood of American Yeomen, 176 Iowa, 291, 154 N. W. 879—vi. 2344(d).
- Munich Reinsurance Co. v. United Surety Co., 113 Md. 200, 77 Atl. 579—vi. 555(j); vii. 2813(p).
- Munk v. Maryland Casualty Co., 102 N. Y. Supp. 164, 116 App. Div. 756—vii. 3833(g).
- 107 N. Y. Supp. 215, 122 App. Div. 487—vii. 3833(g).
- Munn v. Masonic Life Ass'n, 101 N. Y. Supp. 91, 115 App. Div. 855—vii. 2777(e), 3972(g).
- 82 N. E. 724, 189 N. Y. 486—vii. 3972(g).
- Munro v. Maryland Casualty Co., 96 N. Y. Supp. 705, 48 Misc. Rep. 183—vii. 3331(a).
- Munroe v. Beggs, 139 Pac. 422, 91 Kan. 701—vii. 3721(b), 3969(f).
- Munson v. German Fire Ins. Co., 33 Pa. Super. Ct. 551—vii. 3532 (b), 3702(g).
- v. Standard Marine Ins. Co. (C. C.) 145 Fed. 957—vii. 2991(h).
- 156 Fed. 44, 84 C. C. A. 210—vii. 2991(h).
- Murch Bros. Const. Co. v. Fidelity & Casualty Co., 176 S. W. 399, 190 Mo. App. 490—vii. 3332(a).
- Murphy v. Colonial Life Ins. Co., 163 App. Div. 875, 147 N. Y. Supp. 565—vi. 686(e).
- 145 N. Y. Supp. 196, 83 Misc. Rep. 475—vi. 686(e).
- Murphy v. Continental Ins. Co. (Iowa) 157 N. W. 855, L. R. A. 1917B, 934—vi. 730(a), 732(b), 755(j).
- v. Lafayette Mut. Life Ins. Co., 167 N. C. 334, 83 S. E. 461—vi. 507(f), 2271(g), 2308(d), 2432 (e); vii. 2777(e).
- v. Metropolitan Life Ins. Co., 118 N. W. 355, 106 Minn. 112—vi. 2096(a), 2110(i), 2142(h); vii. 2467(c).
- 155 N. Y. Supp. 1062, 92 Misc. Rep. 479—vi. 2332(r).
- v. National Travelers' Benefit Ass'n (Iowa) 161 N. W. 57, L. R. A. 1917C, 338—vi. 1181(g), 1932 (a), 1951(b), 1952(c).
- v. Nowak, 79 N. E. 112, 223 Ill. 301, 7 L. R. A. (N. S.) 393—vi. 708(j), 800(c), 813(k); vii. 3722 (b), 3748(n), 3769(s).
- v. Prudential Ins. Co., 30 Pa. Super. Ct. 560—vi. 2310(e).
- Murray v. Aetna Life Ins. Co. (D. C.) 243 Fed. 285—vii. 3302(f).
- v. Brotherhood of American Yeomen (Iowa) 163 N. W. 421—vi. 1946(j), 1974(g).
- v. State Life Ins. Co. (C. C.) 151 Fed. 539—vi. 495(o), 2259(a), 2314(g), 2460(a).
- Mutual Aid Union v. Blacknall, 123 Ark. 377, 185 S. W. 465—vii. 3952(d).
- (Ark.) 196 S. W. 792—vi. 1952(c), 1969(f); vii. 2521(c), 2540(m).
- v. Wadley, 188 S. W. 1168, 125 Ark. 449—vi. 2344(d), 2356(h).
- Mutual Ben. Life Ins. Co. v. Commissioner of Ins., 115 N. W. 707, 151 Mich. 610—vi. 2393(a).
- v. Cummings, 66 Or. 272, 126 Pac. 982, 47 L. R. A. (N. S.) 252, Ann. Cas. 1915B, 535—vi. 636(e); vii. 3755(q).
- 66 Or. 272, 133 Pac. 1169, 47 L. R. A. (N. S.) 252, Ann. Cas. 1915B, 535—vi. 636(e); vii. 3735(g), 3755(q).
- v. Emig's Adm'r, 141 S. W. 38, 145 Ky. 660—vi. 1009(b), 2410(g).
- v. First Nat. Bank, 169 S. W. 1028, 160 Ky. 538—vi. 1110(g); vii. 4007(f).
- v. Hardison, 85 N. E. 410, 199 Mass. 190, 127 Am. St. Rep. 478—vi. 678(b).
- v. Malone (Tex. Civ. App.) 95 S. W. 585—vi. 1092(f).
- v. O'Brien (Ky.) 116 S. W. 750—vi. 542(a), 627(a), 2408(g), 2410(g).
- 149 S. W. 870, 149 Ky. 514—vi. 2314(g).
- v. Swett, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298—vi. 1099(a), 1101(b), 1105(d), 1114(j); vii. 3755(q).

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- Mutual Fire Ins. Co. v. Goldstein, 86 Atl. 35, 119 Md. 83, Ann. Cas. 1914C, 723—vi. 537(c).
- v. Maple, 60 Or. 359, 119 Pac. 484, 38 L. R. A. (N. S.) 726—vi. 1541(f), 1877(e); vii. 2725(m).
- v. Pickett, 83 Atl. 1097, 117 Md. 638—vii. 3355(d), 3390(h), 3409(d).
- v. Ritter, 113 Md. 163, 77 Atl. 388—vi. 677(a), 829(e), 1873(b); vii. 3438(e).
- v. Turner, 115 Va. 631, 79 S. E. 1067—vi. 970(t), 2433(f); vii. 2689(c).
- Mutual Life Industrial Ass'n v. Scott, 170 Ala. 420, 54 South. 182—vi. 1030(f), 2432(e); vii. 3452(h), 3531(a), 3733(g).
- Mutual Life Ins. Ass'n v. Rhoderick (Tex. Civ. App.) 164 S. W. 1067—vi. 2400(d).
- Mutual Life Ins. Co. v. Abbey, 76 Ark. 328, 88 S. W. 950—vi. 486(k), 487(k), 492(l), 496(o), 1000(e).
- v. Allen, 166 Ala. 159, 51 South. 877—vi. 1953(c), 2006(e).
174 Ala. 511, 56 South. 568—vi. 1988(d), 1991(g), 2100(c), 2156(a).
- v. Board, Armstrong & Co., 80 S. E. 565, 115 Va. 836, L. R. A. 1915F, 979—vi. 297(p).
- v. Board Motor Truck Co., 80 S. E. 567, 115 Va. 843—vi. 297(p).
- v. Buford (Okl.) 160 Pac. 928—vii. 2755(b).
- v. Cameron, 56 South. 782, 100 Miss. 604—vi. 2423(k).
- v. Chambliss, 61 S. E. 1034, 131 Ga. 60—vii. 2849(j).
- v. Chattanooga Savings Bank, 47 Okl. 748, 150 Pac. 190, L. R. A. 1916A, 669—vi. 995(c).
- v. Crenshaw (Tex. Civ. App.) 116 S. W. 375—vi. 552(h), 2103(d).
- v. Davis (Tex. Civ. App.) 154 S. W. 1184—vi. 2281(a), 2330(q); vii. 2472(e), 2775(d).
- v. Devine, 180 Ill. App. 422—vi. 649(a), 820(n); vii. 3737(i), 3755(q).
- v. Dibrell, 137 Tenn. 528, 194 S. W. 581, L. R. A. 1917E, 554—vi. 1980(j), 2071(a).
- v. Durden, 9 Ga. App. 797, 72 S. E. 295—vi. 632(c), 688(f); vii. 3226(a), 3227(a), 3229(b), 3239(d), 3242(g), 3244(h), 3255(l), 3257(m), 3263(o), 3264(o).
- v. Finkelstein, 58 Ind. App. 27, 107 N. E. 557—vii. 2831(b).
- Mutual Life Ins. Co. v. Ford, 103 Tex. 522, 131 S. W. 406—vi. 1940(f), 2084(b), 2087(d); vii. 3255(l), 3263(o), 3890(c).
- 61 Tex. Civ. App. 412, 130 S. W. 769—vi. 1940(f), 2084(b), 2087(d), 2098(d); vii. 3255(l), 3263(o), 3890(c).
- v. Griesa (C. C.) 156 Fed. 398—vii. 2841(f), 2856(l), 3946(a).
- v. Hargus (Tex. Civ. App.) 99 S. W. 580—vii. 2849(j).
- v. Henley, 188 S. W. 829, 125 Ark. 372—vi. 2324(n).
- v. Hilton-Green, 202 Fed. 113, 120 C. C. A. 267—vi. 409(a), 559(a).
- 211 Fed. 31, 127 C. C. A. 467—vi. 1956(f), 2071(a); vii. 2531(i), 2539(l), 2542(n).
- 36 Sup. Ct. 676, 241 U. S. 613, 60 L. Ed. 1202—vi. 1956(f), 2531(i).
- v. Jordan, 111 Ark. 324, 163 S. W. 799, Ann. Cas. 1916B, 674—vi. 454(g).
- v. Keen, 135 Fed. 677, 68 C. C. A. 315—vi. 422(f).
- v. Lane (C. C.) 151 Fed. 276—vi. 271(j), 1118(k).
- v. Leaksville Woolen Mills, 172 N. C. 534, 90 S. E. 574—vi. 2156(a).
- v. Lowther, 126 Pac. 882, 22 Colo. App. 622—vii. 3769(s).
- v. Malone (Tex. Civ. App.) 95 S. W. 585—vi. 1092(f).
- v. Morgan, 39 Okl. 205, 135 Pac. 279—vi. 453(f), 1933(b), 1952(c), 2113(k), 2163(e).
- v. Mullan, 107 Md. 457, 69 Atl. 385—vi. 562(d), 566(h, j), 1932(a), 1951(b), 1952(c), 1953(c), 1956(f), 1979(j), 1984(a), 2000(l), 2053(b), 2061(k), 2156(a), 2163(e), 2168(h), 2183(b).
- v. Murray, 111 Md. 600, 75 Atl. 348—vi. 121(d), 629(a), 637(f).
- v. New, 51 South. 61, 125 La. 41, 27 L. R. A. (N. S.) 431, 136 Am. St. Rep. 326—vi. 632(c); vii. 2757(b).
- v. Owen, 111 Ark. 554, 164 S. W. 720—vi. 1969(f), 2144(j), 2163(e).
- v. Powell, 217 Fed. 565, 133 C. C. A. 417—vii. 2529(f), 2574(e).
- v. Rain, 108 Md. 353, 70 Atl. 87—vi. 1979(j).
- v. Reid, 21 Colo. App. 143, 121 Pac. 132—vi. 446(b), 447(b), 456(h), 495(o); vii. 2768(a).
- v. Reynolds, 81 Ark. 202, 98 S. W. 963—vi. 349(c).
- v. Robinson, 115 Md. 408, 80 Atl. 1085—vi. 2096(a), 2144(j).

- Mutual Life Ins. Co. v. Spohn, 186 S. W. 633, 170 Ky. 721—vii. 3755 (g), 3778(u).
 188 S. W. 1078, 172 Ky. 90—vii. 3755(g), 3778(u).
- v. Stegall, 58 S. E. 79, 1 Ga. App. 611—vi. 2304(b).
- v. Summers, 19 Wyo. 441, 120 Pac. 185—vi. 348(b), 610(c), 1038(a), 2072(b).
- v. Thomas, 61 Atl. 293, 101 Md. 501—vii. 3534(b).
- v. Twyman, 89 S. W. 178, 28 Ky. Law Rep. 167—vi. 118(c), 1091(f).
 92 S. W. 335, 28 Ky. Law Rep. 1153, 122 Ky. 513, 121 Am. St. Rep. 471—vi. 118(c), 1091(f).
 122 Ky. 513, 97 S. W. 391, 30 Ky. Law Rep. 90, 121 Am. St. Rep. 471—vi. 2423(k).
- v. Witte, 190 Ala. 327, 67 South. 263—vi. 1967(c), 1974(g).
- Mutual Protective League v. Langsdorf, 126 Ill. App. 572—vi. 2212(e).
- v. McKee, 79 N. E. 25, 223 Ill. 364—vi. 632(c), 698(f); vii. 3240(e).
- Mutual Protective League v. McKee, 122 Ill. App. 376—vi. 632(c), 698(f); vii. 3240(e).
- v. Walker, 163 Ky. 346, 173 S. W. 802—vii. 2665(c), 2733(a).
- Mutual Reserve Fund Life Ass'n v. Austin, 142 Fed. 398, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064—vii. 2757(b).
- v. Bolles, 120 Ill. App. 242—vi. 691 (a); vii. 3943(d).
- v. Cotter, 81 Ark. 205, 99 S. W. 67—vi. 2057(g); vii. 2561(b).
- v. Ferrenbach, 75 C. C. A. 304, 144 Fed. 342, 7 L. R. A. (N. S.) 1163—vii. 2846(h).
- v. Green (Tex. Civ. App.) 109 S. W. 1131—vii. 2875(h).
- v. Mischler, 120 Ill. App. 251—vi. 691(a); vii. 3943(d).
- v. Tuchfeld, 86 C. C. A. 657, 159 Fed. 833—vi. 2316(j); vii. 2715 (h), 2720(j), 2727(p), 3890(c), 4011(h), 4016(i).
- Mutual Reserve Life Ins. Co. v. Birch, 200 U. S. 612, 26 Sup. Ct. 752, 50 L. Ed. 620—vii. 4007(f).
- v. Dobler, 137 Fed. 550, 70 C. C. A. 134—vi. 2084(b), 2159(c); vii. 2562(b).
- v. Heidel, 161 Fed. 535, 88 C. C. A. 477—vi. 507(f), 509(g), 2308(d).
- v. Jay (Tex. Civ. App.) 101 S. W. 545—vi. 2083(h).
 50 Tex. Civ. App. 165, 109 S. W. 1116—vi. 2033(i), 2036(a); vii. 3885(a).
- v. Ross, 42 Ind. App. 621, 86 N. E. 506—vi. 577(f), 662(a).
- v. Seidel, 52 Tex. Civ. App. 278, 113 S. W. 945—vi. 489(k), 492 (m), 1038(a), 1039(a), 1043(f).
- Mutual Security Co. v. Sidney Blumenthal & Co., 86 Atl. 573, 86 Conn. 667—vi. 950(g), 951(h), 961(p), 969(s).
- Mutual Trust & Deposit Co. v. Travelers' Protective Ass'n of America (Ind. App.) 100 N. E. 451—vii. 3184(b, c), 3185(c), 3516(b), 3532(b).
 57 Ind. App. 329, 104 N. E. 880—vii. 3184(b), 3185(c), 3516(b), 3532(b).
- Myers v. Maryland Casualty Co., 101 S. W. 124, 123 Mo. App. 682—vii. 3356 (a).
- Myton v. Fidelity & Casualty Co. of New York, 92 S. W. 1149, 117 Mo. App. 442—vii. 3331(a).
- N
- Nabors v. Commercial Union Assur. Co., 51 South. 429, 125 La. 378—vi. 1443(d); vii. 2819(b).
- v. Dixie Mut. Fire Ins. Co., 105 S. W. 92, 84 Ark. 184—vi. 1451(l), 1453(q), 1835(b).
- Nalley v. Home Ins. Co., 157 S. W. 769, 250 Mo. 452, Ann. Cas. 1915A, 238—vi. 576(e).
- Nance v. Oklahoma Fire Ins. Co., 31 Okl. 208, 120 Pac. 948, 38 L. R. A. (N. S.) 426—vi. 1373(c); vii. 3347(a).
- Napier v. Bankers' Life Ins. Co., 100 N. Y. Supp. 1072, 51 Misc. Rep. 283—vi. 564(g), 2286(b).
- v. Strong, 19 Ga. App. 401, 91 S. E. 579—vi. 1075(g).
- Nardinger v. Ladies of the Maccabees (Minn.) 163 N. W. 785—vii. 3135(c).
- Narinsky v. Fidelity Surety Co. (Sup.) 92 N. Y. Supp. 771—vii. 3392(i).
- Nash v. Eddy, 184 Ill. App. 375—vi. 1931(a), 1932(a), 1939(f), 1943(h).
- Nashville Trust Co. v. First Nat. Bank, 123 Tenn. 617, 134 S. W. 311—vi. 1090(f), 1092(f), 1100(b), 1111(h); vii. 3731(e), 3805(i).
- Naslund v. Svea Ins. Co., 64 Wash. 520, 117 Pac. 264—vii. 2811(n).
- National Americans v. Ritch, 121 Ark. 185, 180 S. W. 488—vi. 1979(j), 2159 (c).
- National Aniline & Chemical Co. v. American Credit Indemnity Co., 77 Atl. 920, 228 Pa. 588—vii. 3325(c).
- National Annuity Ass'n v. Carter, 96 Ark. 495, 132 S. W. 633—vi. 1931(a), 1950(a), 1951(b); vii. 2755(b), 3941(c).
- v. McCall, 146 S. W. 125, 103 Ark. 201, 49 L. R. A. (N. S.) 418—vi. 2096(a), 2105(f).
- National Ass'n of Ry. Postal Clerks v. Scott, 155 Fed. 92, 83 C. C. A. 652—vii. 3174(g), 3288(a).
- National Bank of Tarentum v. Equitable Trust Co., 72 Atl. 794, 223 Pa. 328—vi. 2437(b), 2439(c).

- National Benefit Ass'n v. Elzie, 35 App. D. C. 294—vi. 2371(m); vii. 2659(a), 2715(b).
- National Circle, Daughters of Isabella, v. Hines, 88 Conn. 676, 92 Atl. 401—vi. 65(k).
- National Conduit & Cable Co. v. Commercial Union Assur. Co., 120 N. Y. Supp. 7, 135 App. Div. 136—vii. 3109(e).
- 203 N. Y. 580, 96 N. E. 1122—vii. 3109(e).
- National Council, Junior Order United American Mechanics, v. Barbour, 96 Atl. 290, 127 Md. 97—vi. 2406(f).
- v. Caraway, 81 S. E. 243, 13 Ga. App. 819—vii. 2777(e).
- v. Thomas, 163 Ky. 364, 173 S. W. 813—vi. 2375(o), 2430(d), 2432(e); vii. 2686(b).
- v. Thompson, 156 S. W. 132, 153 Ky. 636, 45 L. R. A. (N. S.) 1148—vi. 2044(g); vii. 2697(h).
- National Council of Knights and Ladies of Security v. Burch, 126 Ill. App. 15—vi. 2338(b); vii. 2715(h), 2717(h).
- v. Garber, 154 N. W. 512, 131 Minn. 16—vi. 1013(a), 1037(a); vii. 2861(m).
- v. Owen (Okl.) 161 Pac. 178—vi. 2110(i).
- v. Sealey (Tex. Civ. App.) 162 S. W. 455—vi. 2142(h), 2159(c); vii. 2775(d).
- v. Turovh, 135 Minn. 455, 161 N. W. 225—vi. 129(h).
- v. Wilson, 143 S. W. 1000, 147 Ky. 293—vi. 1953(c), 1978(i).
- National Discount Co. v. United States Fidelity & Guaranty Co., 94 N. Y. Supp. 457, 47 Misc. Rep. 678—vii. 3580(e).
- National Fire Ins. Co. v. Crutchfield, 160 Ky. 802, 170 S. W. 187, L. R. A. 1915B. 1094—vii. 3035(j).
- v. Dennison, 113 N. E. 260, 93 Ohio St. 404, L. R. A. 1916F. 992—vii. 3059(c), 3110(e), 3860(h).
- v. J. W. Caraway & Co., 60 Tex. Civ. App. 566, 180 S. W. 458—vi. 1531(h), 1828(f).
- v. Kneidel, 30 Ohio Cir. Ct. R. 677—vi. 1894(b); vii. 2650(r).
- v. O'Bryan, 87 S. W. 129, 75 Ark. 198, 5 Ann. Cas. 334—vii. 3641(i), 3642(i).
- v. Three States Lumber Co., 75 N. E. 450, 217 Ill. 115, 108 Am. St. Rep. 239—vi. 1372(c), 1734(e); vii. 2811(n).
- 119 Ill. App. 67—vi. 1372(c), 1734(e); vii. 2811(n).
- National Furniture Co. v. Prussian Nat. Ins. Co., 91 Atl. 785, 112 Me. 557—vii. 2779(f), 3658(a).
- National Hotel Co. v. Merchants' Fire Assur. Corporation, 183 Ill. App. 71—vi. 925(g); vii. 2801(h).
- National Life Ass'n v. Hagelstein (Tex. Civ. App.) 156 S. W. 353—vi. 1997(j); vii. 2757(b), 3886(a).
- v. Parsons (Tex. Civ. App.) 170 S. W. 1038—vii. 3456(i), 3887(c).
- v. Speer, 111 Ark. 173, 163 S. W. 1188—vi. 449(d).
- National Life Ins. Co. v. Bean, 15 Ga. App. 661, 84 S. E. 152—vii. 3201(h), 3461(c).
- v. Brautigam, 154 N. W. 839, 163 Wis. 270—vii. 3757(q), 3759(r).
- 157 N. W. 782, 163 Wis. 270—vii. 3757(q), 3759(r).
- v. Cuff, 29 Okl. 113, 116 Pac. 437—vii. 3019(e).
- v. Eggleston (Tex. Civ. App.) 195 S. W. 942—vi. 2330(q).
- v. Fleming, 96 Atl. 281, 127 Md. 179—vii. 3196(c), 3288(a).
- v. Jackson, 89 S. E. 633, 18 Ga. App. 494—vii. 2831(b), 3298(e), 3531(a), 3871(d).
- v. Manning, 86 S. W. 618, 38 Tex. Civ. App. 498—vi. 2269(f), 2307(c), 2318(k), 2398(c), 2726(n).
- v. Metropolitan Life Ins. Co., 80 N. E. 747, 226 Ill. 102—vii. 2839(d).
- v. Reppond (Tex. Civ. App.) 96 S. W. 778—vi. 1939(f), 1944(c, i), 1951(b), 2159(c), 2269(f), 2318(k), 2322(m), 2432(e).
- v. Title Guaranty & Surety Co., 185 Ill. App. 221—vi. 2451(c).
- National Life & Accident Ins. Co. v. Cox, 174 Ky. 683, 192 S. W. 636—vii. 3160(a), 3161(b).
- v. King, 102 Miss. 470, 59 South. 807—vi. 3294(c), 3298(e).
- v. Langford, 123 Ark. 619, 185 S. W. 266—vi. 2142(h).
- v. Logan, 166 Ala. 174, 52 South. 45—vii. 3216(m).
- v. Lokey, 166 Ala. 174, 52 South. 45—vi. 23(f), 495(o), 632(c), 851(c), 2430(d); vii. 3146(f), 3219(m), 3220(m).
- v. O'Brien's Ex'x, 159 S. W. 1134, 155 Ky. 498—vii. 3290(b), 3303(g), 3312(i), 3531(a), 3559(c).
- v. Reams (Tex. Civ. App.) 197 S. W. 332—vi. 2302(a); vii. 2715(h).
- v. Singleton, 193 Ala. 84, 69 South. 80—vii. 2680(h), 3161(b), 3303(g).
- National Live Stock Ins. Co. v. Bartlow, 60 Ind. App. 233, 110 N. E. 224—vii. 3347(a), 3356(a).
- v. Cramer (Ind. App.) 114 N. E. 427—vi. 365(b), 398(f), 403(j).
- v. Elliott, 60 Ind. App. 112, 108 N. E. 784—vii. 3031(i), 3356(a), 3410(e), 3534(b).

- National Live Stock Ins. Co. v. Gomillion (Tex. Civ. App.) 178 S. W. 1050—vi. 686(e); vii. 3886(b). (Tex. Civ. App.) 179 S. W. 671—vi. 686(e); vii. 3886(b).
- v. Henderson (Tex. Civ. App.) 164 S. W. 852—vii. 3356(a), 3373(a).
- v. Jackson, 169 S. W. 695, 160 Ky. 228—vi. 1772(f); vii. 2604(e).
- v. Owens (Ind. App.) 113 N. E. 1024—vi. 1142(g), 1154(a), 1156(b), 1161(e), 1183(h), 1482(a); vii. 2690(d).
- v. Simmons, 62 Ind. App. 15, 111 N. E. 18—vii. 2567(d), 3356(a).
- v. Wolfe, 59 Ind. App. 418, 106 N. E. 390—vii. 3605(e), 3959(b).
- National Mut. Fire Ins. Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340—vi. 632(c), 1040(c), 1133(d), 1154(a), 1156(b), 1275(a), 1277(b), 1313(c), 1322(k), 1658(c), 1844(h); vii. 2621(a), 2622(a), 2663(b).
- v. Sprague, 92 Pac. 227, 40 Colo. 344—vi. 455(h), 456(h), 507(f), 509(g), 1506(a); vii. 2481(f), 2769(a), 3532(b).
- National Paper Box. Co. v. Aetna Life Ins. Co., 156 S. W. 740, 170 Mo. App. 361—vii. 3572(c).
- National Protective Legion v. Allphin, 133 S. W. 788, 141 Ky. 777—vi. 1969(f), 1978(i), 1980(k), 2096(a).
- v. O'Brien, 122 N. W. 1050, 102 Minn. 15—vi. 580(i).
- National Sales Co. v. Manciet, 83 Or. 34, 162 Pac. 1055, L. R. A. 1917D, 485—vi. 8(f).
- National Surety Co. v. Farmers' State Bank, 89 S. E. 581, 145 Ga. 461—vi. 914(a).
- v. Murphy-Walker Co. (Tex. Civ. App.) 174 S. W. 997—vi. 631(b), 2439(c).
- v. Price, 162 Ky. 632, 172 S. W. 1072—vi. 636(e).
- v. Redmon, 190 S. W. 1081, 173 Ky. 294—vii. 3037(a), 3042(c).
- v. Silberberg Bros. (Tex. Civ. App.) 176 S. W. 97—vii. 3042(c), 3125(c).
- v. Stallo, 156 N. Y. Supp. 988, 171 App. Div. 206—vi. 678(a).
- v. Western Pac. Ry. Co., 200 Fed. 675, 119 C. C. A. 91—vi. 2435(a), 2449(c); vii. 3336(d), 3572(c).
- National Union v. Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524—vii. 3257(m), 3261(n), 3265(o).
- v. Keefe, 105 N. E. 319, 263 Ill. 453, Ann. Cas. 1915C, 271—vi. 798(b), 800(c); vii. 3749(n).
- 172 Ill. App. 101—vi. 797(a), 800(c); vii. 3749(n), 3755(q).
- v. Kelley, 140 Pac. 1157, 42 Okl. 98—vi. 1979(j), 2156(a), 2168(h).
- National Union v. Sherry, 180 Ala. 627, 61 South. 944—vi. 1952(c), 1997(j); vii. 2683(b).
- National Union Fire Ins. Co. v. Akin (Tex. Civ. App.) 160 S. W. 669—vii. 2820(c).
- v. Baltimore Asbestos Co., 89 Atl. 408, 122 Md. 121—vii. 2797(f).
- v. Burkholder, 116 Va. 942, 83 S. E. 404—vi. 67(l), 1354(e); vii. 2521(c), 2622(a), 2629(c), 3123(c), 3125(c), 3382(b), 3532(b).
- v. Cubberly, 68 Fla. 253, 67 South. 133—vi. 1903(j).
- v. Dorroh, 63 Tex. Civ. App. 620, 133 S. W. 475—vi. 551(h), 1832(a), 1838(c), 1854(o), 1856(q); vii. 2617(k).
- v. Empire State Surety Co., 80 N. J. Law, 405, 78 Atl. 164—vi. 2451(c).
- v. Gump, 99 N. E. 1130, 86 Ohio St. 325—vi. 1626(b), 1699(f).
- v. John Spry Lumber Co., 85 N. E. 256, 235 Ill. 98—vi. 854(a), 864(g).
- v. Light's Adm'r, 163 Ky. 169, 173 S. W. 365—vi. 864(g).
- v. School Dist. No. 55, 122 Ark. 179, 182 S. W. 547, L. R. A. 1916D, 238—vi. 348(b), 427(h).
- v. Walker (Tex. Civ. App.) 156 S. W. 1095—vi. 1829(g).
- National & Providence Worsted Mills v. Frankfort Marine Accident & Plate Glass Ins. Co., 66 Atl. 58, 28 R. I. 126—vii. 3331(a).
- Nax v. Travelers' Ins. Co. (C. C.) 130 Fed. 985—3356(a), 3516(b).
- Neal v. Gray, 52 S. E. 622, 124 Ga. 510—vii. 2726(n).
- Neal, Clark & Neal Co. v. Liverpool & London & Globe Ins. Co., Limited, 178 App. Div. 730, 165 N. Y. Supp. 204—vii. 3033(i), 3537(d).
- Neal's Adm'r v. Shirley's Adm'r, 127 S. W. 471, 137 Ky. 818—vi. 287(h); vii. 3779(u).
- Nebergall v. Prudential Ins. Co., 193 Ill. App. 189—vii. 2706(c), 2717(h).
- Nederland Life Ins. Co. v. Meinert, 127 Fed. 651, 62 C. C. A. 377—vi. 2296(f).
- 26 Sup. Ct. 15, 199 U. S. 171, 50 L. Ed. 139, 4 Ann. Cas. 480—vi. 2296(f).
- Nedved v. Court of Honor, 183 Ill. App. 390—vi. 1948(k), 1956(f), 2171(a), 2174(b); vii. 2634(f).
- Neff v. Metropolitan Life Ins. Co., 39 Ind. App. 250, 73 N. E. 1041—vi. 470(e), 505(e), 507(f).
- v. Pennsylvania Daughters of Liberty, 62 Pa. Super. Ct. 251—vi. 129(h).
- Neher v. Western Assur. Co., 82 Pac. 166, 40 Wash. 157—vi. 1394(c).
- Neimeyer v. Claiborne, 87 Ark. 72, 112 S. W. 387—vii. 2670(e), 3952(d).

- Nelson v. Continental Ins. Co., 182 Fed. 783, 105 C. C. A. 215, 31 L. R. A. (N. S.) 598—vi. 159(b), 766(b); vii. 3066(e).
- v. Farm Property Mut. Ins. Ass'n, 127 Iowa, 603, 103 N. W. 96d—vi. 956(l), 960(o); vii. 2815(a), 2823(d).
- v. Modern Brotherhood, 110 N. W. 1008, 78 Neb. 429—vi. 2296(f).
- v. Traders' Ins. Co., 83 N. Y. Supp. 220, 86 App. Div. 66—vii. 3029(h).
- 74 N. E. 421, 181 N. Y. 472—vii. 3029(h).
- Nerger v. Equitable Fire Ass'n, 107 N. W. 531, 20 S. D. 419—vi. 1325(m); vii. 3404(a), 3667(g).
- Nesson v. United States Casualty Co., 87 N. E. 191, 201 Mass. 71, 131 Am. St. Rep. 390—vii. 3331(a).
- New v. Germania Fire Ins. Co. (Ind. App.) 82 N. E. 1005—vi. 446(b), 454(g), 456(h), 459(j); vii. 3707(i).
- 171 Ind. 33, 85 N. E. 703, 131 Am. St. Rep. 245—vi. 457(i), 460(j).
- New Albany Nat. Bank v. Brown (Ind. App.) 114 N. E. 486—vi. 1114(i).
- New Amsterdam Casualty Co. v. Cumberland Telephone & Telegraph Co., 152 Fed. 961, 82 C. C. A. 315, 12 L. R. A. (N. S.) 478—vii. 3331(a).
- v. East Tennessee Telephone Co., 139 Fed. 602, 71 C. C. A. 586—vii. 3334(b).
- v. Hetterstrom, 197 Ill. App. 452—vi. 921(e).
- v. Johnson, 110 N. E. 475, 91 Ohio St. 155, L. R. A. 1916B, 1018—vii. 3157(a).
- v. Mays, 43 App. D. C. 84—vii. 3161(b), 3303(g).
- v. Mesker, 128 Mo. App. 183, 106 S. W. 561—vi. 922(e).
- v. New Palestine Bank, 59 Ind. App. 69, 107 N. E. 554—vi. 445(b); vii. 2555(a), 2793(d), 3959(b).
- v. Olcott, 165 App. Div. 603, 150 N. Y. Supp. 772—vi. 913(a).
- v. Shields, 155 Fed. 54, 85 C. C. A. 122—vii. 3201(h), 3203(h), 3890(d).
- v. Union Sawmill Co., 95 Ark. 140, 128 S. W. 861—vi. 922(e).
- Newark Trust Co. v. Agricultural Ins. Co., 237 Fed. 788, 150 C. C. A. 542—vii. 3035(j).
- New England Box Co. v. New York Cent. & H. R. R. Co., 97 N. E. 140, 210 Mass. 465—vii. 3899(c).
- New England Mut. Life Ins. Co. v. Springgate, 129 Ky. 627, 112 S. W. 681, 19 L. R. A. (N. S.) 227—vii. 2506(d), 2508(d), 2724(l), 2726(n).
- New England Mut. Life Ins. Co. v. Springgate, 129 Ky. 627, 112 S. W. 824, 19 L. R. A. (N. S.) 227—vii. 2506(d), 2508(d), 2724(l), 2726(n).
- v. Swain, 100 Md. 558, 60 Atl. 469—vi. 1037(a), 1050(i).
- New Era Ass'n v. Kuyat, 191 Mich. 646, 158 N. W. 119—vii. 3762(r), 3769(s).
- New Hampshire Fire Ins. Co. v. Blakely, 97 Ark. 564, 134 S. W. 926—vi. 837(c); vii. 2481(e).
- v. Wall, 75 N. E. 668, 36 Ind. App. 238—vi. 1363(k), 1386(d); vii. 2744(c).
- New Jersey Fire Ins. Co. v. Baird (Tex. Civ. App.) 187 S. W. 356—vii. 2509(e), 2601(d).
- New Kensington Lumber Co. v. German Ins. Co., 35 Pa. Super. Ct. 32—vi. 1372(c).
- Newland v. Modern Woodmen, 153 S. W. 1097, 168 Mo. App. 311—vii. 3264(o), 3265(o).
- Newman v. Norris Implement Co. (Tex. Civ. App.) 147 S. W. 725—vi. 929(h), 936(o).
- v. Standard Accident Ins. Co., 192 Mo. App. 159, 177 S. W. 803—vii. 3301(f).
- v. Supreme Lodge, Knights of Pythias, 110 Miss. 371, 70 South. 241, L. R. A. 1916C, 1051—vi. 677(a), 698(f), 703(h).
- Newmore v. Western & Southern Life Ins. Co., 28 Ohio Cir. Ct. R. 669—vi. 289(j).
- New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Ins. Co., 128 La. 45, 54 South. 466—vi. 529(j); vii. 3050(b).
- New Orleans & C. R. Co. v. Maryland Casualty Co., 38 South. 89, 114 La. 153, 6 L. R. A. (N. S.) 562—vii. 3330(a).
- Newport Benev. Burial Ass'n v. Clay, 170 Ky. 633, 186 S. W. 658—vi. 60(h).
- Newsome v. Travelers' Ins. Co., 85 S. E. 1035, 143 Ga. 785—vii. 3156(a), 3210(k).
- Newton v. New York Life Ins. Co., 148 Pac. 619, 95 Kan. 427—vi. 2185(d).
- v. Theresa Village Mut. Fire Ins. Co., 104 N. W. 107, 125 Wis. 289—vi. 1819(d); vii. 3057(b), 3432(m).
- New York, C. & St. L. Ry. Co. v. Roper, 176 Ind. 497, 96 N. E. 468, 36 L. R. A. (N. S.) 952—vii. 3899(b).
- New York Finance Co. v. United Security Life Ins. & Trust Co., 66 Atl. 984, 218 Pa. 47—vii. 3805(i).
- New York Life Ins. Co. v. Andrews, 167 Ill. App. 182—vii. 3775(t).
- v. Brame, 112 Miss. 828, 73 So. 806—vii. 3864(b), 3972(g).
- v. Conner, 160 S. W. 491, 155 Ky. 779—vi. 2413(h); vii. 2726(n).

- New York Life Ins. Co. v. Daley, 25 Cal. App. 376, 143 Pac. 1033—vii. 3755(g).
- v. Dunlevy, 214 Fed. 1, 130 C. C. A. 473—vi. 1079(a), 1102(c), 1110(g).
- v. Evans, 136 Ky. 391, 124 S. W. 376—vii. 2464(b), 2726(n), 2777(e).
- 143 S. W. 37, 146 Ky. 600—vii. 2777(e).
- v. Franklin, 118 Va. 418, 87 S. E. 584—vi. 641(i), 2100(c), 2159(c), 2280(m).
- v. Greenlee, 42 Ind. App. 82, 84 N. E. 1101—vi. 247(b), 251(e), 253(f), 288(h), 449(d), 456(h), 461(a), 498(b), 505(e).
- v. Hagler (Tex. Civ. App.) 169 S. W. 1064—vi. 2408(g); vii. 2866(d), 3887(c).
- v. Hamburger, 174 Mich. 254, 140 N. W. 510—vi. 686(e).
- v. Hardison, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478—vi. 531(j), 633(c), 678(b), 686(e), 2263(b), 2395(b), 2423(k); vii. 2755(b).
- v. Head, 34 Sup. Ct. 879, 234 U. S. 149, 58 L. Ed. 1259—vi. 2263(b).
- 34 Sup. Ct. 883, 234 U. S. 166, 58 L. Ed. 1266—vi. 2263(b).
- v. Kansas City Bank, 121 Mo. App. 479, 97 S. W. 195—vi. 1081(b), 1082(b), 1092(f), 1118(k); vii. 3731(e).
- v. Levy's Adm'r, 122 Ky. 457, 92 S. W. 325, 5 L. R. A. (N. S.) 739—vi. 431(j).
- v. McIntosh, 86 Miss. 236, 38 South. 775—vi. 411(b), 458(i).
- (Miss.) 41 South. 381—vi. 421(f).
- v. Malone (Tex. Civ. App.) 95 S. W. 585—vi. 1092(f), 1100(b).
- v. Manning, 156 App. Div. 818, 124 N. Y. Supp. 775—vi. 456(h), 484(j); vii. 2755(b).
- 156 App. Div. 818, 142 N. Y. Supp. 1132—vii. 2755(b).
- v. Mills, 51 Fla. 256, 41 South. 603—vii. 2831(b).
- v. Moats, 207 Fed. 481, 125 C. C. A. 143—vi. 452(f), 1932(a), 1956(f), 1978(i), 1979(j), 2002(b), 2163(e).
- v. Montgomery, 115 Miss. 350, 76 South. 257—vi. 2144(j).
- v. Murtagh, 69 South. 165, 137 La. 760—vi. 253(f); vii. 3769(s).
- v. Neal, 38 South. 485, 114 La. 652—vi. 299(b); vii. 3752(n).
- v. Noble, 34 Okl. 103, 124 Pac. 612—vi. 2408(g).
- v. O'Dom, 100 Miss. 219, 56 South. 379, Ann. Cas. 1914A, 583—vi. 2310(e); vii. 2498(a), 2499(a).
- New York Life Ins. Co. v. People, 195 Ill. 430, 63 N. E. 264—vi. 1012(d).
- 95 Ill. App. 136—vi. 1012(d).
- v. Pike, 51 Colo. 238, 117 Pac. 899—vi. 449(d), 451(f), 475(g), 486(k).
- v. Rhodes, 60 S. E. 828, 4 Ga. App. 25—vi. 347(b).
- v. Scheuer (Ala.) 73 South. 409—vi. 653(c), 900(a), 2411(g).
- v. Slocum, 177 Fed. 842, 101 C. C. A. 56—vi. 2259(a), 2310(e), 2411(g).
- v. Van Meter's Adm'r, 137 Ky. 4, 121 S. W. 438, 136 Am. St. Rep. 282—vi. 2408(g), 2411(g).
- v. Veith (Tex. Civ. App.) 192 S. W. 905—vii. 3154(h), 3887(c), 3888(c).
- New York Mut. Savings & Loan Ass'n v. Westchester Fire Ins. Co., 110 App. Div. 760, 97 N. Y. Supp. 436—vii. 2541(m), 2639(j).
- 82 N. E. 1129, 189 N. Y. 525—vii. 2541(m), 2639(j).
- New York & Cuba Mail S. S. Co. v. Royal Exch. Assur., 154 Fed. 315, 83 C. C. A. 235—vii. 2985(c).
- (D. C.) 145 Fed. 713—vii. 2985(c).
- New York & P. R. S. S. Co. v. Aetna Ins. Co., 204 Fed. 255, 122 C. C. A. 523—vi. 642(i); vii. 2883(d), 2904(d).
- (D. C.) 192 Fed. 212—vi. 628(a), 642(i); vii. 2882(c), 2883(d), 2904(d).
- Niagara Fire Ins. Co. v. Boon, 88 S. W. 915, 76 Ark. 153—vii. 3656(p).
- v. Jordan, 134 Ga. 667, 68 S. E. 611, 20 Ann. Cas. 363—vi. 864(g).
- v. Layne, 162 Ky. 665, 172 S. W. 1090—vi. 190(b), 1064(a), 1340(g), 1394(c); vii. 3347(a), 3359(b), 3548(b).
- 185 S. W. 1136, 170 Ky. 339—vi. 1221(n), 1394(c).
- v. Mitchell (Tex. Civ. App.) 164 S. W. 919—vii. 2801(h).
- Nichol v. Murphy, 145 Mich. 424, 108 N. W. 704—vi. 938(o), 942(c), 952(h); vii. 2825(e).
- v. Newman, 160 Mich. 582, 125 N. W. 760—vi. 981(d).
- Nichols v. Prudential Ins. Co., 155 S. W. 478, 170 Mo. App. 437—vii. 2504(c), 2719(i), 2769(a), 2777(e).
- Nicoud v. New York Life Ins. Co., 134 N. Y. Supp. 119, 149 App. Div. 784—vii. 2487(h).
- Nielsen v. Merchants' Mut. Ins. Ass'n, 26 S. D. 405, 128 N. W. 491—vi. 529(j).

- Niemyski v. Schlesinger, 154 N. Y. Supp. 219, 91 Misc. Rep. 50—vi. 707 (i).
- Nies v. Protected Home Circle (Sup.) 166 N. Y. Supp. 426—vi. 2373(n).
- Nilson v. Canadian Northern Ry. Co., 117 Minn. 528, 136 N. W. 280—vii. 3898(b).
- Nimic v. Security Mut. Hail Ins. Co., 84 Neb. 403, 121 N. W. 434—vi. 1870(b).
- Nixon v. Malone, 100 Tex. 250, 98 S. W. 380—vi. 1080(b), 1092(f), 1100(b).
(Tex. Civ. App.) 95 S. W. 577—vi. 1080(b), 1092(f), 1100(b).
- Nixon & Danforth v. Piedmont Mut. Ins. Co., 54 S. E. 657, 74 S. C. 438—vii. 3949(d).
- Noble v. Kansas City Life Ins. Co., 33 S. D. 458, 146 N. W. 606—vi. 507(f), 509(g).
- v. Police Beneficiary Ass'n, 73 Atl. 336, 224 Pa. 298, 132 Am. St. Rep. 783—vii. 3758(q), 3762(r), 3772(s).
- v. Southern States Mut. Life Ins. Co., 162 S. W. 528, 157 Ky. 46—vi. 2259(a), 2425(a).
- Noem v. Equitable Life Ins. Co., 153 N. W. 652, 35 S. D. 593—vi. 2302 (a); vii. 2724(l).
- 37 S. D. 176, 157 N. W. 308—vii. 2724(l).
- Nolan v. New Orleans Casualty Co., 61 South. 386, 132 L. 315—vii. 3949(d).
- v. Prudential Ins. Co., 139 App. Div. 166, 123 N. Y. Supp. 688—vii. 3740(k).
- Non-Royalty Shoe Co. v. Phoenix Assurance Co. (Mo. App.) 178 S. W. 246—vii. 3063(a), 3884(a).
- Nophsker v. Supreme Council of Royal Arcanum, 64 Atl. 788, 215 Pa. 631, 7 Ann. Cas. 646—vi. 2127(c).
- Nord Deutsche Ins. Co. v. Hart, 230 Fed. 809, 145 C. C. A. 119—vi. 535(b).
- Nordness v. Mutual Cash Guaranty Fire Ins. Co., 22 S. D. 1, 114 N. W. 1092—vi. 411(b), 454(g).
- Norfolk Fire Ins. Co. v. Talley, 112 Va. 413, 71 S. E. 534, Ann. Cas 1913B, 806—vi. 1701(g).
- Norfolk Fire Ins. Corporation v. Wood, 113 Va. 310, 74 S. E. 186, 39 L. R. A. (N. S.) 1020—vii. 2647(o).
- Norman v. Kelso Farmers' Mut. Fire Ins. Co., 114 Minn. 49, 130 N. W. 13—vi. 864(g).
- v. Order of United Commercial Travelers, 163 Mo. App. 175, 145 S. W. 853—vi. 419(e), 435 (l); vii. 3265(o), 3531(a), 3864 (a).
- Norris v. China Traders' Ins. Co., 100 Pac. 1025, 52 Wash. 554—vi. 903(d), 2465(b), 2683(b), 2779 (f), 2878(a).
- v. Connecticut Fire Ins. Co., 115 Md. 174, 80 Atl. 960, Ann. Cas. 1912D, 79—vi. 1673(h).
- Norris v. Equitable Fire Ass'n, 102 N. W. 306, 19 S. D. 114—vii. 3547 (a), 3667(g).
- v. New England Mut. Life Ins. Co. (Ala.) 73 South. 377—vi. 2259 (a), 2267(e).
- Northam v. Casualty Co. (C. C.) 177 Fed. 981—vii. 3335(c).
- North American Accident Ins. Co. v. Bowen (Tex. Civ. App.) 102 S. W. 163—vi. 663(b), 677(a), 688(f), 2269(f), 2310(e), 2324 (n); vii. 2476(b), 2777(e).
- v. Miller (Tex. Civ. App.) 193 S. W. 750—vii. 3288(b), 3295(d), 3732 (f), 3872(d), 3890(d).
- v. Rehacek, 123 Ill. App. 219—vi. 1932(a), 1939(f), 1949(l); vii. 2683(b), 2686(b).
- v. Trenton (Tex. Civ. App.) 99 S. W. 740—vi. 2150(c), 2154(f); vii. 2559(b).
- v. Watson, 64 S. E. 693, 6 Ga. App. 193—vii. 3455(i), 3462(d).
- v. Whitesides, 134 Ill. App. 290, 294—vi. 2310(e); vii. 2781(f).
- v. Williamson, 118 Ill. App. 670—vii. 3999(l).
- North American Union v. Oleske (Ind. App.) 116 N. E. 68—vii. 3241 (f).
- v. Trenner, 138 Ill. App. 586—vii. 3240(e).
- North British & Mercantile Ins. Co. v. Edmundson, 52 S. E. 350, 104 Va. 486—vi. 1818(c), 1828(f); vii. 3366(h), 3532(b).
- v. Edwards, 37 South. 748, 85 Miss. 322—vii. 3969(f).
- v. Nidiffer, 112 Va. 591, 72 S. E. 130, Ann. Cas. 1916A, 464—vi. 1486 (c); vii. 3126(d), 3434(a).
- v. Robertson, 134 Ky. 529, 121 S. W. 630—vi. 1837(c), 1844(h), 1854(o); vii. 2665(c), 2670(e).
- v. Robinett & Green, 112 Va. 754, 72 S. E. 668—vi. 637(f); vii. 3606(e), 3658(a).
- v. Rose, 228 Fed. 290, 142 C. C. A. 582—vii. 3396(k).
- v. Speer, 66 S. E. 815, 7 Ga. App. 330—vii. 3942(d).
- v. Tye, 58 S. E. 110, 1 Ga. App. 380—vi. 628(a), 744(f), 746(f).
- v. Union Stockyards Co., 120 Ky. 465, 87 S. W. 285, 27 Ky. Law Rep. 852—vi. 1165(f), 1206(c), 1430 (c), 1640(k), 1712(m), 1884(b), 1885(c).
- v. Wright (Okla.) 154 Pac. 654—vi. 1779(j); vii. 2547(g).
- Northern Assur. Co. v. Applegate (Tex. Civ. App.) 145 S. W. 295—vi. 1181(g).
- v. Carpenter (Ind. App.) 92 N. E. 1042—vi. 1829(g).
- 52 Ind. App. 432, 94 N. E. 779—vi. 636(e), 884(u); vii. 2644(m), 2683(b), 2690(d).

- Northern Assur. Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213—vii. 2510(f), 2537(k), 2653(t).
- v. J. J. Newman Lumber Co., 105 Miss. 688, 63 So. 209—vii. 2792(c), 2819(b).
- v. Meyer, 194 Mich. 371, 160 N. W. 617—vi. 929(h), 1011(d).
- v. Morrison (Tex. Civ. App.) 162 S. W. 411—vii. 3959(b).
- v. Standard Leather Co., 165 Fed. 602, 91 C. C. A. 440—vii. 2798(f), 3356(a), 3462(d).
- Northern Central Trust Co. v. Security Mut. Life Ins. Co., 53 Pa. Super. Ct. 425—vii. 3286(f).
- Northern Pine Crating Co. v. Liverpool & London & Globe Ins. Co., 143 Wis. 433, 128 N. W. 70—vii. 2791(b), 2820(c).
- North River Ins. Co. v. Dyché, 163 Ky. 271, 173 S. W. 784—vi. 1382(j).
- v. O'Conner (Okl.) 164 Pac. 982—vii. 2521(c), 2665(c).
- v. Walker, 161 Ky. 368, 170 S. W. 983—vii. 3516(b), 3561(d).
- North State Fire Ins. Co. v. Dillard, 115 S. W. 154, 88 Ark. 473—vii. 3889(c).
- Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co., 105 Minn. 483, 117 N. W. 825—vi. 904(e); vii. 2692(e).
- Northwestern Fuel Co. v. Boston Ins. Co., 154 N. W. 515, 131 Minn. 19—vi. 744(f), 1858(s); vii. 3110(e).
- Northwestern Mut. Life Ins. Co. v. Adams, 144 N. W. 1108, 155 Wis. 335, 52 L. R. A. (N. S.) 275—vi. 559(a), 1080(a).
- v. Barbour, 13 Ky. Law Rep. 205—vi. 2417(i).
- v. Collamore, 62 Atl. 652, 100 Me. 578—vii. 3819(c).
- v. Coshoccon Glass Co., 31 Ohio Cir. Ct. R. 665—vi. 279(a), 282(d), 297(p).
- v. Farnsworth, 60 Colo. 324, 153 Pac. 699—vii. 2524(d), 2561(b).
- v. Joseph, 103 S. W. 317, 31 Ky. Law Rep. 714, 12 L. R. A. (N. S.) 439—vii. 2866(d).
- v. McCue, 32 Sup. Ct. 220, 223 U. S. 284, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57—vi. 658(g); vii. 3152(g).
- v. Neafus, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211—vi. 413(c), 427(h), 637(f).
- v. Whiteselle (Tex. Civ. App.) 188 S. W. 22—vi. 312(b).
- v. Wright, 140 N. W. 1078, 153 Wis. 252, Ann. Cas. 1914D. 697—vi. 1099(a), 1102(c), 1110(g).
- Northwestern Nat. Ins. Co. v. Avant, 132 Ky. 106, 116 S. W. 274—vi. 1832(a), 1843(g); vii. 2479(e), 2490(k), 2604(e), 2613(i), 2782(g).
- Northwestern Nat. Ins. Co. v. Southern States Phosphate & Fertilizer Co., 20 Ga. App. 506, 93 S. E. 157—vi. 181(a), 1069(e); vii. 3700(g).
- Northwestern Nat. Life Ins. Co. v. Blasingame, 85 S. W. 819, 38 Tex. Civ. App. 402—vii. 3586(a).
- v. Brooker, 120 Ill. App. 301—vi. 2259(a).
- v. Gray, 161 Fed. 488, 88 C. C. A. 430—vi. 458(j), 577(f), 692(b), 696(d).
- v. Ward (Okl.) 155 Pac. 524—vii. 3968(f), 3989(k).
- Northwestern S. S. Co. v. Maritime Ins. Co. (C. C.) 161 Fed. 166—vi. 566(h), 649(a), 658(g), 1205(b), 1205(c), 1207(d), 1212(h), 1244(h), 1551(e), 1554(4), 1564(l), 1579(f); vii. 2889(f).
- Northwestern Traveling Men's Ass'n v. Crawford, 126 Ill. App. 468—vi. 691(a); vii. 3285(e).
- Norton v. Catholic Order of Foresters, 138 Iowa, 464, 114 N. W. 893, 24 L. R. A. (N. S.) 1030—vi. 697(e), 708(j), 709(k), 712(l), 713(m), 717(n); vii. 2695(g).
- Norwich Union Fire Ins. Society v. Bainbridge Grocery Co., 16 Ga. App. 432, 85 S. E. 622—vi. 545(b); vii. 3893(a).
- v. Cheaney Bros., 61 Tex. Civ. App. 220, 128 S. W. 1163—vi. 636(e), 1845(i), 1847(j).
- v. Dalton (Tex. Civ. App.) 175 S. W. 459—vi. 535(b).
- v. Pacific Union Club, 169 Fed. 778, 95 C. C. A. 244—vii. 3025(f).
- v. Prude, 40 South. 322, 145 Ala. 297, 8 Ann. Cas. 121—vi. 786(a); vii. 3727(d).
- 156 Ala. 565, 46 South. 974—vi. 1177(c), 1384(a), 1385(b).
- v. Stanton, 191 Fed. 813, 112 C. C. A. 327—vii. 3025(f).
- Novak v. Rochester German Ins. Co., 156 Ill. App. 352—vii. 3547(a), 3657(p).
- Nowak v. Murray, 127 Ill. App. 125—vi. 691(a), 698(f), 717(n), 813(k); vii. 3724(b).
- Nowell v. British-American Assur. Co., 17 Ga. App. 46, 85 S. E. 498—vii. 2605(e).
- Noyes v. Commercial Travelers' Eastern Accident Ass'n, 76 N. E. 665, 190 Mass. 171—vii. 3174(g), 3198(h), 3223(m), 3448(e), 3455(i).
- Nugent v. Rensselaer County Mut. Fire Ins. Co., 94 N. Y. Supp. 605, 106 App. Div. 308—vii. 2733(a), 3434(a).
- Nutter v. Des Moines Life Ins. Co., 156 Iowa, 539, 136 N. W. 891—vi. 686(e); vii. 2865(b).
- Nye-Schneider-Fowler Co. v. Bridges, Hoyer & Co., 151 N. W. 942, 98 Neb. 27—vii. 3892(d).
- 155 N. W. 235, 98 Neb. 863—vii. 3892(d).

Nyman v. Manufacturers' & Merchants' Life Ass'n, 104 N. E. 653, 262 Ill. 300—vi. 2144(j); vii. 2694(g).
182 Ill. App. 511—vii. 2694(g).

O

Oakes v. Pine Tree State Mut. Fire Ins. Co., 90 Atl. 707, 112 Me. 52—vii. 3662(d).

Oakland Motor Car Co. v. American Fidelity Co., 155 N. W. 729, 190 Mich. 74—vii. 3582(g).

Oatman v. Bankers' Fire Relief Ass'n, 66 Or. 388, 133 Pac. 1183—vi. 137(d), 163(h), 1903(j); vii. 2465(b), 2622(a), 2650(r).
66 Or. 388, 134 Pac. 1033—vi. 137(d), 163(h), 1903(j); vii. 2465(b), 2622(a), 2650(r).

Ober & Sons Co. v. Phillips Burttoff Mfg. Co., 40 South. 278, 145 Ala. 625—vii. 3715(m).

O'Brien v. Brotherhood of American Yeomen, 150 N. W. 130, 183 Mich. 86—vi. 2090(a).

v. Catholic Order of Foresters, 172 Ill. App. 638—vii. 2495(o), 2552(v). 2683(b), 2688(b), 2781(f), 2782(g).

v. Equitable Life Assur. Society, 173 Mich. 432, 138 N. W. 1086—vi. 124(d).

v. Grand Lodge A. O. U. W., 111 N. E. 955, 223 Mass. 237—vii. 3778(u), 3793(c).

v. Massachusetts Catholic Order of Foresters, 220 Mass. 79, 107 N. E. 400—vi. 805(f); vii. 3748(n).

v. North River Ins. Co., 128 C. C. A. 618, 212 Fed. 102, L. R. A. 1917C, 722—vi. 632(c); vii. 3056(b), 3071(h), 3382(b).

v. Rittman, 176 Ill. App. 237—vi. 129(h), 697(e).

v. Union Cent. Life Ins. Co., 100 N. E. 702, 207 N. Y. 180—vi. 2286(b).
125 N. Y. Supp. 470, 140 App. Div. 362—vi. 2286(b).

O'Bryan v. England, 189 S. W. 1126, 173 Ky. 12—vii. 3759(r), 3779(u).

Occidental Life Ins. Co. v. Jacobson, 15 Ariz. 242, 137 Pac. 869—vi. 2318(k); vii. 2464(b), 2658(a), 2726(n).

Ocean Accident & Guarantee Corporation v. Joslin Dry Goods Co., 146 Pac. 790, 27 Colo. App. 52—vii. 3332(a).

v. Combined Locks Paper Co., 162 Wis. 255, 156 N. W. 156—vi. 851(d), 922(e).

Ocean View Land Co. v. West Jersey Title Guaranty Co., 61 Atl. 83, 71 N. J. Law, 600—vii. 3328(d).

O'Connell v. American Fire Ins. Co. (C. C.) 189 Fed. 1018—vii. 3585(a).

v. New York, N. H. & H. R. R., 72 N. E. 979, 187 Mass. 272—vii. 3334(b).

v. Supreme Tent of Knights of Macabees, 153 Ill. App. 232—vii. 3769(s).

O'Connor v. Columbia Ins. Co., 169 Mo. App. 150, 152 S. W. 396—vi. 513(a), 525(i), 637(f), 640(i); vii. 3037(a).

v. Decker, 30 Pa. Super. Ct. 579—vi. 1741(g).

v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 Pac. 688—vi. 632(c), 698(f), 1932(a), 1939(f), 1941(g), 2142(h), 2144(j).

v. Knights & Ladies of Security (Iowa) 158 N. W. 761, L. R. A. 1917B, 897—vi. 68(m), 2400(d); vii. 2470(d), 2715(h).

v. Modern Woodmen, 110 Minn. 18, 124 N. W. 454, 25 L. R. A. (N. S.) 1244—vi. 1948(k), 2055(d), 2056(f), 2254(b).

v. Queen Ins. Co., 122 N. W. 1038, 140 Wis. 388, 25 L. R. A. (N. S.) 501, 133 Am. St. Rep. 1081. 17 Ann. Cas. 1118—vii. 3013(b), 3043(e).

122 N. W. 1122, 140 Wis. 395, 25 L. R. A. (N. S.) 506, 17 Ann. Cas. 1121—vii. 3013(b).

O'Connor's Adm'r v. Equitable Life Assur. Soc., 186 S. W. 502, 170 Ky. 715—vi. 273(n), 306(g).

Odd Fellows' Ben. Ass'n v. Burton, 83 Ark. 631, 104 S. W. 163—vi. 2344(d).

v. Ivy, 62 South. 423, 105 Miss. 423—vi. 2203(d); vii. 2719(j).

v. Smith, 101 Miss. 332, 58 South. 100—vi. 697(e), 2344(d); vii. 2713(f).

O'Donnell v. Metropolitan Life Ins. Co. (Del.) 95 Atl. 289—vii. 3755(q), 3759(r), 3770(s), 3868(c).

Oehler v. Phoenix Ins. Co., 159 Mo. App. 696, 139 S. W. 1173—vi. 1622(m); vii. 2733(a), 2742(c), 2746(e).

Ogburn-Griffin Grocery Co. v. Orient Ins. Co., 188 Ala. 218, 66 South. 434—vii. 3029(h).

Ogden v. Sovereign Camp, Woodmen of the World, 78 Neb. 804, 111 N. W. 797—vi. 792(f); vii. 3756(q).

78 Neb. 806, 113 N. W. 524—vi. 792(f); vii. 3756(q).

Ogle v. Barron, 247 Pa. 10, 92 Atl. 1071—vi. 56(f).

Ogle Lake Shingle Co. v. National Lumber Ins. Co., 68 Wash. 185, 122 Pac. 990—vi. 392(b), 397(d), 412(b).

Ogletree v. Hutchinson, 55 S. E. 179, 126 Ga. 454—vii. 3722(b), 3724(b), 3867(c).

- Ogletree v. Ogletree, 127 Ga. 232, 55 S. E. 954—vi. 1110(g).
- Ohio Farmers' Ins. Co. v. Bell, 51 Ind. App. 377, 99 N. E. 812—vi. 392 (b), 412(b).
- v. Glaze, 55 Ind. App. 147, 101 N. E. 734—vi. 632(c); vii. 3383(b), 3503(h).
- v. Hunter, 77 N. E. 951, 38 Ind. App. 11—vii. 2820(c).
- v. Titus, 82 Ohio St. 161, 92 N. E. 82—vii. 2695(h), 3612(k), 3627(t).
- v. Vogel (Ind. App.) 73 N. E. 612—vi. 1174(a), 1675(i); vii. 2641 (k), 2683(b), 3531(a).
- (Ind. App.) 75 N. E. 849—vi. 1675(i); vii. 2683(b), 3531(a).
- 76 N. E. 977, 166 Ind. 239, 3 L. R. A. (N. S.) 966, 117 Am. St. Rep. 382, 9 Ann. Cas. 91—vi. 1675(i); vii. 2683(b), 3531 (a).
- v. Williams (Ind. App.) 112 N. E. 556—vi. 636(e), 1448(j), 1832 (a); vii. 2690(d), 2791(b).
- Ohio German Fire Ins. Co. v. Krumm, 31 Ohio Cir. Ct. R. 409—vii. 3375(c).
- Ohio Mut. Life Ins. Co. v. Hoffman, 83 Ohio St. 477, 94 N. E. 1112—vi. 684(d).
- 32 Ohio Cir. Ct. R. 653—vi. 684(d).
- Oklahoma Farmers' Mut. Indemnity Ass'n v. McCorkle, 97 Pac. 270, 21 Okl. 606—vii. 3089(g), 3094(g).
- Oklahoma Fire Ins. Co. v. Fay Mercantile Co. (Okl.) 153 Pac. 127—vi. 848(a).
- v. Kimple (Okl.) 156 Pac. 300—vii. 3949(d).
- v. McKey (Tex. Civ. App.) 152 S. W. 440—vi. 755(j); vii. 2643(l), 3959(b).
- v. Mundel, 141 Pac. 415, 42 Okl. 270—vii. 3606(e), 3955(a).
- v. Reddington (Okl.) 156 Pac. 1165—vii. 2691(d).
- v. Wagester, 38 Okl. 291, 132 Pac. 1071—vii. 3537(d), 3966(c).
- Oklahoma Nat. Life Ins. Co. v. Norton, 44 Okl. 783, 145 Pac. 1138, L. R. A. 1915E, 695—vi. 632(c); vii. 3161(b).
- Oklahoma Sash & Door Co. v. American Bonding Co. (Okl.) 153 Pac. 1151—vi. 437(a).
- Old Colony Ins. Co. v. Starr-Mayfield Co. (Tex. Civ. App.) 135 S. W. 252—vii. 2509(e).
- Oldham v. Supreme Lodge, Modern Brotherhood, 157 S. W. 92, 170 Mo. App. 564—vi. 2336(a); vii. 2715(h).
- Old Wayne Mut. Life Ass'n v. McDonough, 27 Sup. Ct. 236, 204 U. S. 8, 51 L. Ed. 345—vii. 4007 (f).
- 73 N. E. 703, 164 Ind. 321—vii. 4007(f).
- O'Leary v. St. Paul Fire & Marine Ins. Co. (Tex. Civ. App.) 196 S. W. 575—vii. 3083(i).
- Oliker v. Williamsburgh City Fire Ins. Co., 78 S. E. 746, 76 W. Va. 436, Ann. Cas. 1915D, 914—vi. 1402(e).
- Oliphant v. American Health & Accident Ass'n, 147 Iowa, 656, 126 N. W. 806—vi. 543(a), 805(f); vii. 3748(n).
- Oliver v. Aetna Indemnity Co., 65 S. E. 116, 132 Ga. 819—vi. 935(o).
- Olson v. Court of Honor, 110 N. W. 374, 100 Minn. 117, 8 L. R. A. (N. S.) 521, 117 Am. St. Rep. 676, 10 Ann. Cas. 622—vi. 712(l); vii. 3234(c).
- Olympia Brewing Co. v. Pioneer Mut. Ins. Ass'n, 53 Wash. 16, 101 Pac. 371—vi. 1511(e), 1873(b); vii. 2772(b), 3054(b).
- O'Malley v. Supreme Council Catholic Mut. Ben. Ass'n, 165 Ill. App. 186—vii. 2715(h).
- O'Neal v. Sovereign Woodmen of the World, 130 Ky. 68, 113 S. W. 52—vi. 446(b), 450(e), 454(g), 610(c).
- O'Neil v. American Assur. Co., 52 Pa. Super. Ct. 577—vii. 2831(b), 3531(a).
- v. Franklin Fire Ins. Co., 145 N. Y. Supp. 432, 159 App. Div. 313—vi. 1734(e); vii. 3915(j), 3972 (f).
- O'Neill v. Caledonian Ins. Co., 166 Cal. 310, 135 Pac. 1121—vi. 639(h), 864(g), 1693(c), 1885(c).
- v. Northern Assur. Co., 145 Mich. 516, 108 N. W. 996—vii. 2819 (b).
- 155 Mich. 564, 119 N. W. 911—vi. 1370(b); vii. 2550(t), 3405 (b).
- v. Union Assur. Society, 166 Cal. 318, 135 Pac. 1124—vii. 3014(c).
- Oplinger v. New York Life Ins. Co., 98 Atl. 568, 253 Pa. 328—vii. 2831(b).
- Oppenheim v. Fireman's Fund Ins. Co., 138 N. W. 777, 119 Minn. 417—vii. 3089(g), 3101(b), 3125(c), 3625(g).
- Ordelheide v. Modern Brotherhood, 158 Mo. App. 677, 139 S. W. 269—vii. 3238(d), 3731(e).
- 268 Mo. 339, 187 S. W. 1193—vii. 3238(d), 3731(e).
- Order of Columbian Knights v. Matzel, 184 Ill. App. 15—vi. 1082(c); vii. 3758 (q), 3762(r).
- Order of Scottish Clans v. Reich, 97 Atl. 863, 90 Conn. 511—vii. 3724(b), 3756(g), 3781(u).
- Order of United Commercial Travelers v. Barnes, 80 P. 1020, 72 Kan. 293, 7 Ann. Cas. 809—vii. 3168(e), 3312(i), 3438(e).
- 82 Pac. 1099, 72 Kan. 293, 7 Ann. Cas. 809—vii. 3168(e), 3312(i); vii. 3438(e).
- v. Boaz, 150 Pac. 822, 27 Colo. App. 423—vi. 628(a).
- v. Roth (Tex. Civ. App.) 159 S. W. 176—vii. 3175(h).

- Order of United Commercial Travelers v. Simpson (Tex. Civ. App.) 177 S. W. 169—vi. 2051(a); vii. 2665(c).
- v. Smith, 192 Fed. 102, 112 C. C. A. 442—vi. 714(m); vii. 3195(f).
- v. Young, 212 Fed. 132, 128 C. C. A. 648—vii. 2718(i).
- Orenstein v. Preferred Accident Ins. (Minn.) 163 N. W. 747—vii. 3168(e).
- Orient Ins. Co. v. Dorroh-Kelly Mercantile Co., 59 Tex. Civ. App. 289, 126 S. W. 616—vi. 632(c), 1815(b), 1820(d), 1821(d), 1829 (g).
- v. Harmon (Tex. Civ. App.) 177 S. W. 192—vii. 3648(i), 3655(p).
- v. Kaptur, 176 Ind. 308, 95 N. E. 230—vii. 3430(m), 3662(d).
- v. Rudolph, 69 N. J. Eq. 570, 61 Atl. 26—vi. 566(i), 660(h).
- v. Van Zandt-Bruce Drug Co. (Okla.) 151 Pac. 323—vi. 1185(k), 1791 (f); vii. 3412(a).
- v. Wingfield, 49 Tex. Civ. App. 202, 108 S. W. 788—vi. 363(a), 389 (o), 390(p), 463(a), 501(d), 850 (b); vii. 3531(a), 3839(b).
- Orlando v. Great Eastern Casualty Co., 155 N. Y. Supp. 20, 91 Misc. Rep. 539—vii. 3356(a), 3409(d).
- Ormond v. Connecticut Mut. Life Ins. Co., 58 S. E. 997, 145 N. C. 140—vi. 1100(b); vii. 3819(c).
- v. McKinley, 157 N. W. 786, 163 Wis. 205—vii. 3762(r).
- O'Rourke v. German Ins. Co., 104 N. W. 900, 96 Minn. 154—vii. 3670 (j), 3674(m).
- 109 N. W. 401, 99 Minn. 293—vii. 3660(b).
- v. John Hancock Mut. Life Ins. Co., 30 N. Y. Supp. 215—vi. 77(e), 577(f), 1933(b); vii. 3537(d).
- Orr Trucking & Forwarding Co. v. Metropolitan Surety Co., 77 N. J. Law, 749, 73 Atl. 541—vii. 3037(a), 3085(e), 3347(a), 3409(d), 3531(a).
- Orthwein v. Germania Life Ins. Co., 261 Mo. 650, 170 S. W. 885—vii. 3736(h), 3759(r).
- Osborn v. American Ins. Co., 151 Ill. App. 126—vi. 1716(b).
- Osborne v. Phoenix Fire Ins. Co., 156 Pac. 5, 90 Wash. 387—vi. 193(e).
- Osburn v. Court of Honor, 133 S. W. 87, 152 Mo. App. 652—vii. 3253(k).
- Osgood v. United States Health & Accident Ins. Co., 76 N. H. 475, 84 Atl. 50, Ann. Cas. 1913C, 425—vii. 3187(d), 3189(d).
- Osterhoudt v. Prudential Ins. Co., 120 N. Y. Supp. 641, 136 App. Div. 123—vi. 552(h), 2398(c), 2430(d); vii. 2693 (f).
- Ostmann v. Supreme Lodge, Knights and Ladies of Honor, 85 N. J. Law, 86, 88 Atl. 949—vi. 2214(f), 2245(g); vii. 2683(b), 2688(b), 2773(c).
- Otis v. Provident Savings Life Assurance Society, 173 Ill. App. 70—vi. 1009 (b), 1010(d).
- O'Toole v. Jennings, 106 N. E. 601, 219 Mass. 105—vi. 2344(d).
- v. Ohio German Fire Ins. Co., 123 N. W. 795, 159 Mich. 187, 24 L. R. A. (N. S.) 802—vi. 1751 (c); vii. 2670(e), 3038(b).
- Our Home Life Ins. Co. v. Peacock, 70 South. 775, 71 Fla. 35—vi. 2267(e).
- Outlaw v. National Council, Junior Order United American Mechanics (S. C.) 92 S. E. 469—vii. 2715(b).
- Overland Southern Motor Co. v. Maryland Casualty Co. (Ga.) 92 S. E. 931—vi. 854(a).
- Overton v. Colored Knights of Pythias (Tex. Civ. App.) 173 S. W. 472—vi. 287(h).
- Owen v. Bankers' Life Ins. Co., 84 S. C. 253, 66 S. E. 290, 137 Am. St. Rep. 845—vi. 592(h); vii. 2757 (b).
- v. Metropolitan Life Ins. Co., 74 N. J. Law, 770, 67 Atl. 25, 122 Am. St. Rep. 413—vi. 1940(f), 1946(j), 1953(c), 2108(h).
- v. United States Surety Co., 38 Okla. 123, 131 Pac. 1091—vi. 2000(i), 2439(c).
- Owens v. North State Life Ins. Co., 92 S. E. 168, 173 N. C. 373—vi. 2267(e).
- v. Travelers' Ins. Co., 156 N. W. 1078, 99 Neb. 560—vii. 2706(c).
- Ozark Ins. Co. v. Hopson, 82 Ark. 603, 101 S. W. 171—vi. 1388(g).

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- Pace v. American Cent. Ins. Co., 158 S. W. 892, 173 Mo. App. 485—vi. 1829 (g); vii. 2464(b), 2733(a), 3411(f).
- Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co., 240 Fed. 36, 153 C. C. A. 72—vi. 632(c), 1064(a).
- v. Home Telephone & Telegraph Co., 106 Pac. 262, 11 Cal. App. 712—vi. 934(o); vii. 3332(a).
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- (D. C.) 210 Fed. 958—vi. 643 (j), 1257(d); vii. 2898(b), 2975 (e), 2976(e).
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- v. Carter, 92 Ark. 378, 123 S. W. 384—vi. 2259(a); vii. 2478(d), 2713(f), 2733(a), 3464(d), 3511(a), 3889(c).
- 92 Ark. 378, 124 S. W. 764—vi. 2259(a); vii. 2478(d), 2713(f), 2733(a), 3464(d), 3511(a), 3889(c).
- v. Despain, 77 Kan. 654, 95 Pac. 580—vi. 1980(k); vii. 3312(i).
- v. Galbraith, 115 Tenn. 471, 91 S. W. 204, 112 Am. St. Rep. 862—vi. 632(c); vii. 2757(b).
- v. Glaser, 245 Mo. 377, 150 S. W. 549, 45 L. R. A. (N. S.) 222—vi. 1935(d), 1984(a), 2071(a); vii. 2860(m).
- v. Hayes (Ala.) 76 South. 12—vi. 2018(a).
- v. McCabe, 162 S. W. 1136, 157 Ky. 270—vi. 632(c); vii. 3134(b), 3174(g), 3296(e).
- v. McDowell, 141 Pac. 273, 42 Okl. 300—vii. 2699(b), 2706(c).
- v. O'Neil, 36 Okl. 792, 130 Pac. 270—vi. 253(f), 2065(a); vii. 2690(d), 3548(b).
- v. Shields, 182 Ala. 106, 62 So. 71—vii. 3133(b), 3171(f).
- v. Van Fleet, 47 Colo. 401, 107 Pac. 1087—vii. 2559(b), 2579(g), 3308(h).
- v. Vogel, 232 Fed. 337, 146 C. C. A. 385—vi. 463(a), 848(a).
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- v. Palatine Ins. Co., 107 Pac. 733, 12 Cal. App. 515—vi. 632(c); vii. 3025(f).
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- Padgett v. North Carolina Home Ins. Co., 82 S. E. 409, 98 S. C. 244—vi. 190(c), 1150(m); vii. 3042(c), 3383(b), 3384(d), 3514(b).
- Padrinos v. Century Fire Ins. Co., 142 Iowa, 199, 119 N. W. 133—vii. 2676(g), 2691(d).
- Page v. Bell, 146 Ga. 680, 92 S. E. 54—vii. 3776(t).
- v. Metropolitan Life Ins. Co., 98 Ark. 340, 135 S. W. 911—vi. 268(g), 273(o), 1091(f).
- v. Modern Woodmen of America, 162 Wis. 259, 156 N. W. 137, L. R. A. 1916F, 438—vii. 3516(c).
- v. Northern Ins. Co., 125 N. Y. Supp. 1066, 141 App. Div. 239—vii. 3071(h).
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- Painter v. United States Fidelity & Guaranty Co., 91 Atl. 158, 123 Md. 301—vii. 3450(g).
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- v. Lynn, 141 Pac. 1167, 42 Okl. 486—vii. 3347(a); 3543(e), 3556(a).
- v. Munn, 55 So. 44, 99 Miss. 493—* vii. 3050(b), 3057(b).
- v. O'Brien, 152 Fed. 922, 82 C. C. A. 70—vii. 3632(b).
- 107 Md. 341, 68 Atl. 484, 16 L. R. A. (N. S.) 1055—vi. 85(a), 87(a), 638(g); vii. 3023(f), 3121(c), 3389(b).
- 109 Md. 100, 71 Atl. 775—vii. 3071(h), 3121(c).
- v. Santa Fe Mercantile Co., 13 N. M. 241, 82 Pac. 363—vii. 3038(b).
- v. Smith, McKinnon & Son, 115 Miss. 324, 75 South. 564—vii. 2663(b).
- v. Whitfield (Fla.) 74 South. 869—vi. 636(e), 1541(f), 1821(e), 1825(f).
- Palin v. Insurance Co. of North America, 140 Pac. 886, 92 Kan. 401—vi. 868(j), 3674(m).
- Palliser v. Title Ins. Co., 115 N. Y. Supp. 545, 61 Misc. Rep. 490—vii. 3327(d).
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- Palmer v. Loyal Mystic Legion of America, 126 N. W. 285, 86 Neb. 596—vi. 691(a), 2033(h); vii. 3461(b), 3864(b).
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- 121 Minn. 395, 141 N. W. 518, Ann. Cas. 1914D, 160—vi. 2276(i); vii. 2546(h).
- v. Protected Home Circle, 97 Atl. 188, 252 Pa. 201—vi. 706(h).
- Palmer Transfer Co. v. Fidelity Casualty Co., 133 Ky. 547, 118 S. W. 370—vi. 922(e).
- Palmer & Hardin v. Fidelity & Casualty Co., 137 Ky. 139, 125 S. W. 270—vi. 921(e).
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- Park v. Supreme Circle, Brotherhood of America, 86 Atl. 432, 81 N. J. Eq. 330—vi. 717(n).
- Parker v. Farmers' Fire Ins. Co., 74 N. E. 286, 188 Mass. 257—vii. 3516(b).
- v. Murphy, 107 N. Y. Supp. 202, 56 Misc. Rep. 541—vi. 1000(e).
- v. North American Accident Ins. Co., 79 W. Va. 576, 92 S. E. 88, L. R. A. 1917D, 1174—vii. 2562(b), 3288(a), 3309(h).
- v. Simpson, 107 N. Y. Supp. 199, 56 Misc. Rep. 537—vi. 1000(e).
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- Parker & Co. v. Continental Ins. Co., 143 N. C. 339, 55 S. E. 717—vi. 1820(d); vii. 3532(b).
- Parkhurst-Davis Mercantile Co. v. Merchants' Underwriters at the Indemnity Exchange, 237 Ill. 492, 86 N. E. 1062—vi. 53(d), 632(c), 1432(e), 1793(h), 1858(r).
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- Parr v. Illinois Life Ins. Co., 178 Mo. App. 155, 165 S. W. 1152—vi. 997(d).
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- Parrish v. Order of United Commercial Travelers of America, 232 Fed. 425, 146 C. C. A. 419—vii. 3263(o), 3265(o), 3440(a).
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- Paschedag v. Metropolitan Life Ins. Co., 155 Mo. App. 185, 134 S. W. 102—vi. 2411(g).
- Paskusz v. Philadelphia Casualty Co., 146 App. Div. 763, 131 N. Y. Supp. 421—vii. 3323(c).
- 213 N. Y. 22, 106 N. E. 749, Ann. Cas. 1915A, 652—vii. 3323(c).
- Passaconaway Council v. Dow (N. H.) 97 Atl. 878—vii. 3748(n).
- Pate v. Insurance Co. of Virginia, 19 Ga. App. 597, 91 S. E. 888—vii. 3726(d).
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- Paterson v. St. Paul Fire & Marine Ins. Co., 164 App. Div. 902, 148 N. Y. Supp. 506—vii. 2809(l).
- Patrons' Mut. Fire Ins. Co. v. Butler, 193 Mich. 648, 160 N. W. 402—vi. 955(k).
- Patterson v. Adan, 138 N. W. 281, 119 Minn. 308, 48 L. R. A. (N. S.) 184—vii. 3343(g).
- v. American Ins. Co., 164 Mo. App. 157, 148 S. W. 448—vi. 902(c), 1654(a), 1679(k); vii. 2467(c), 2598(c), 2665(c), 2670(e).
- 174 Mo. App. 37, 160 S. W. 59—vii. 2464(b), 2617(k), 3057(b).
- (Mo. App.) 186 S. W. 552—vi. 1687(p).
- v. Equitable Life Assur. Society, 112 Ark. 171, 165 S. W. 454—vi. 2277(k); vii. 2700(b).
- v. Ocean Accident & Guarantee Corporation, 25 App. D. C. 46—vi. 632(c), 636(e); vii. 3157(a), 3176(a), 3201(h), 3450(g).
- v. Grand Lodge K. of P., 162 Ala. 430, 50 South. 377—vii. 3129(a).
- v. Standard Accident Ins. Co., 144 N. W. 491, 178 Mich. 288, 51 L. R. A. (N. S.) 583, Ann. Cas. 1915A, 632—vi. 628(a); vii. 3329(e).
- v. Supreme Commandery, United Order of Golden Cross of the World, 71 Atl. 1016, 104 Me. 355—vi. 434(l), 435(l), 610(c).
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- Patton v. Continental Casualty Co., 119 Tenn. 364, 104 S. W. 305—vi. 2314(g); vii. 3945(a), 4016(i).
- v. Women of Woodcraft, 65 Or. 33, 131 Pac. 521—vi. 68(m), 2428(c); vii. 2715(h), 2727(p).
- Pauley v. Modern Woodmen of America, 87 S. W. 990, 113 Mo. App. 473—vi. 799(b), 2214(f), 2242(f); vii. 2681(h).
- v. Sun Ins. Office, 79 W. Va. 187, 90 S. E. 552—vi. 1378(h), 1823(e); vii. 2796(e), 3537(d).
- Paulhamus v. Security Life & Annuity Co. (C. C.) 163 Fed. 554—vi. 559(a), 686(e), 1974(g), 1990(g), 2103(d).
- Paulsen v. Modern Woodmen of America, 21 N. D. 235, 130 N. W. 231—vii. 3255(l), 3257(m), 3265(o).
- Pavy v. Franklin Life Ins. Co., 51 South. 191, 125 La. 262—vi. 2411(g).
- Payne v. Minnesota Mut. Life Ins. Co., 195 Mo. App. 512, 191 S. W. 695—vi. 2411(g).

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- v. President & Directors of Ins. Co. of North America, 156 S. W. 52, 170 Mo. App. 85—vii. 2793(d), 2801(h).
- v. Supreme Ruling of Fraternal Mystic Circle, 71 S. E. 1113, 136 Ga. 705—vi. 1057(g).
- Peacock v. Our Home Life Ins. Co. (Fla.) 75 South. 799—vii. 2834(d).
- Peak v. Mutual Benefit Life Ins. Co., 189 S. W. 195, 172 Ky. 245—vi. 2407(g).
- Pearce Mfg. Co. v. Lebanon Mut. Ins. Co., 65 Atl. 663, 216 Pa. 265—vii. 3390(h).
- Pearlman v. Metropolitan Surety Co., 111 N. Y. Supp. 882, 127 App. Div. 539—vi. 215(a), 1822(e).
- Pearlstone v. Phoenix Ins. Co., 54 S. E. 372, 74 S. C. 246—vii. 2622(a).
- Pearson v. Knight Templars & Masons Indemnity Co., 89 S. W. 588, 114 Mo. App. 283—vi. 698(f), 717(n), 825(b), 900(a), 1021(c).
- Peck v. Washington Life Ins. Co., 91 App. Div. 597, 87 N. Y. Supp. 210—vi. 349(c), 1080(b), 2126(b); vii. 2478(d).
- 181 N. Y. 585, 74 N. E. 1122—vi. 349(c), 1080(b), 2126(b); vii. 2478(d).
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- Peebles v. Eminent Household of Columbian Woodmen, 111 Ark. 435, 164 S. W. 296—vii. 2496(o), 2625(a).
- Peerless Mineral Springs Co. v. German American Ins. Co., 151 Wis. 352, 138 N. W. 1023—vii. 2629(c).
- Peever Mercantile Co. v. State Mut. Fire Ass'n, 23 S. D. 1, 119 N. W. 1008, 19 Ann. Cas. 1236—vi. 458(j), 509(g).
- v. State Mut. Fire Ins. Co., 25 S. D. 406, 127 N. W. 559—vi. 509(g).
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- Pence v. Mutual Benefit Life Ins. Co., 180 Ala. 583, 61 South. 817—vi. 846(g).
- Pender v. North State Life Ins. Co., 79 S. E. 293, 163 N. C. 98—vi. 507(f), 610(c).
- Pendergast v. Royal Highlanders, 90 Neb. 117, 132 N. W. 931—vii. 2688(b).
- Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co. (D. C.) 185 Fed. 172—vi. 518(d); vii. 2982(b), 2987(e), 3002(l), 3853(e).
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- Penn v. Standard Life Ins. Co.; 76 S. E. 262, 160 N. C. 399, 42 L. R. A. (N. S.) 597—vi. 637(f); vii. 3176(a), 3200(h), 3201(h).
- v. Standard Life & Accidental Ins. Co., 73 S. E. 99, 158 N. C. 29, 42 L. R. A. (N. S.) 593—vi. 637(f); vii. 3176(a), 3200(h), 3201(h).
- Penn Furniture Co. v. Lumberman's Mut. Fire Ins. Co., 47 Pa. Super. Ct. 77—vii. 3847(e).
- v. Pennsylvania Lumbermen's Mut. Fire Ins. Co., 47 Pa. Super. Ct. 83—vii. 3847(e).
- Penn Mut. Life Ins. Co. v. Barnett's Adm'r, 124 Ky. 266, 95 S. W. 1120, 29 Ky. Law Rep. 1234—vi. 2413(h); vii. 2872(f).
- 124 Ky. 266, 99 S. W. 228—vii. 2872(f).
- v. Gordon, 104 Miss. 270, 61 South. 311—vi. 641(i).
- v. Keeton, 49 South. 736, 95 Miss. 708—vii. 3453(i).
- v. Maner, 101 Tex. 553, 109 S. W. 1084—vii. 3890(c).
- v. Senhenn, 40 Ind. App. 85, 81 N. E. 87—vi. 2310(e).
- Pennsylvania Casualty Co. v. Perdue, 164 Ala. 508, 51 South. 352—vii. 2831(b).
- Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Central Trust & Savings Co., 255 Pa. 322, 99 Atl. 910—vi. 638(g), 2454 (New); vii. 3343(g).
- Pennsylvania Fire Ins. Co. v. Draper, 187 Ala. 103, 65 South. 923—vi. 632(c); vii. 2508(d), 2777(e), 2781(f), 2782(g), 3585(a).
- v. Gold Issue Min. & Mill. Co., 37 Sup. Ct. 344, 243 U. S. 93, 61 L. Ed. 610—vii. 4001(b).
- v. Waggener, 44 Tex. Civ. App. 144, 97 S. W. 541—vi. 1742(g), 1856(q), 1864(c).
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- Pennsylvania R. Co. v. Warren, 60 Atl. 1122, 69 N. J. Eq. 706—vii. 3773(s).
- People v. American Life Ins. Co., 267 Ill. 504, 108 N. E. 679—vi. 1009 (b), 1012(d).
- v. Chapter General of America, Knights of St. John and Malta, 116 N. Y. Supp. 985, 132 App. Div. 410—vi. 2398(c).
- 198 N. Y. 15, 90 N. E. 1134—vi. 2398(c).
- v. Commercial Life Ins. Co., 247 Ill. 92, 93 N. E. 90—vi. 507(f), 1011 (d).
- v. Hartford Life Ins. Co., 96 N. E. 1049, 252 Ill. 398, 37 L. R. A. (N. S.) 778—vi. 1009(b), 1012 (d).
- v. Mutual Life Ins. Co., 72 Ill. App. 569—vi. 1012(d).
- v. Penn Mut. Life Ins. Co., 126 Ill. App. 279—vi. 1011(d).
- v. Potts, 264 Ill. 522, 106 N. E. 524—vi. 8(f).
- v. Security Life Ins. Co., 78 N. Y. 114, 34 Am. Rep. 522—vii. 2810 (m).
- v. Seddon Underwriting Co., 140 N. Y. Supp. 466, 27 N. Y. Cr. R. 146—vi. 59(g).
- v. Standard Plate Glass & Salvage Co., 174 App. Div. 501, 156 N. Y. Supp. 1012—vi. 7(c).
- v. United States Life Endowment Co., 143 Ill. App. 517—vi. 1010 (c).
- v. Western Life Indemnity Co., 181 Ill. App. 116—vi. 2314(h).
- People ex rel. Daily Credit Service Corporation v. May, 162 App. Div. 215, 147 N. Y. Supp. 487—vi. 11(h).
- 212 N. Y. 561, 106 N. E. 1039—vi. 11(h).
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- v. National Fire Ins. Co., 130 La. 951, 58 South. 826—vii. 2498 (a).
- People's Fire Ins. Ass'n v. Gorham, 95 S. W. 152, 79 Ark. 160—vi. 1828(f).
- v. Goynes, 96 S. W. 365, 79 Ark. 315, 16 L. R. A. (N. S.) 1180, 9 Ann. Cas. 373—vii. 2508(d), 2606(f), 2651(s).
- People's Fire Ins. Co. v. Bird (Ark.) 96 S. W. 365, 16 L. R. A. (N. S.) 1180—vii. 2651(s).
- v. H. J. Freeland & Bro. (Ark.) 96 S. W. 365, 16 L. R. A. (N. S.) 1180—vii. 2651(s).
- People's Mut. Life, Accident & Health Ins. Co. v. Powell, 98 Ark. 166, 135 S. W. 823—vi. 539(e).
- People's Nat. Fire Ins. Co. v. Jackson, 155 Ky. 150, 159 S. W. 688—vii. 2604 (e), 2618(k), 2650(r), 2781(f).
- People's Sav. Bank v. Retail Merchants' Mut. Fire Ins. Ass'n, 146 Iowa, 536, 123 N. W. 198, 31 L. R. A. (N. S.) 455—vi. 1228(b), 1526(d).
- Peoria Life Ass'n v. Goodwin, 134 Ill. App. 464—vi. 2096(a).
- v. Hines, 132 Ill. App. 642—vi. 268 (g), 294(n), 1963(m).
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- Perkins v. Empire Life Ins. Co., 17 Ga. App. 658, 87 S. E. 1094—vi. 636(e), 2324(n), 2408(g).
- v. Philadelphia Life Ins. Co., 76 S. E. 29, 93 S. C. 88—vi. 2404(e).
- Perkinson v. Clarke, 135 Wis. 584, 116 N. W. 229—vii. 3779(u).
- Perrin v. Stuyvesant Ins. Co., 140 La. 812, 74 South. 110—vi. 629(a), 1378(h).
- Perry v. Caledonian Ins. Co., 103 App. Div. 113, 93 N. Y. Supp. 50—vii. 2518(k), 3347(a), 3496(e), 3550(c).
- v. Farmers' Mut. Fire Ins. Ass'n, 139 N. C. 374, 51 S. E. 1025, 2 L. R. A. (N. S.) 165, 111 Am. St. Rep. 791—vi. 950(g).
- v. Greenwich Ins. Co., 49 S. E. 889, 137 N. C. 402—vii. 3529(h), 3651(m).
- v. John Hancock Mut. Life Ins. Co., 143 Mich. 290, 106 N. W. 860—vi. 687(f), 1974(g), 2049(l), 2144(j); vii. 2781(f).
- 147 Mich. 645, 111 N. W. 195—vi. 2142(h); vii. 2521(c), 2562 (b).
- v. London Assur. Corp., 167 Fed. 902, 93 C. C. A. 302—vi. 1422 (c).
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- v. Prudential Ins. Co. of America, 144 App. Div. 780, 129 N. Y. Supp. 751—vi. 681(b), 694(c), 2409(g).
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- Peters v. Equitable Life Assur. Soc., 200 Mass. 579, 86 N. E. 885—vi. 124(d).
- v. Queen Ins. Co., 137 Ga. 440, 73 S. E. 664—vii. 3949(d), 4006(e).
- Peters & Roberts Furniture Co. v. Queen City Fire Ins. Co., 63 Or. 382, 126 Pac. 1005—vi. 421(f).

- Peterson v. Grand Lodge, A. O. U. W., 36 S. D. 539, 156 N. W. 70, L. R. A. 1916F, 751—vii. 2690(d).
- v. Hartford Fire Ins. Co., 140 N. W. 761, 93 Neb. 448—vii. 3588 (b).
- v. Independent Order of Foresters, 156 N. W. 951, 162 Wis. 562—vi. 1997(j), 2156(a).
- v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n, 123 Minn. 505, 144 N. E. 160, 49 L. R. A. (N. S.) 1022, Ann. Cas. 1915A, 536—vii. 3184(c), 3185 (c).
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- v. National Council of Knights and Ladies of Security, 189 Mo. App. 662, 175 S. W. 284—vi. 809(i), 2199(a).
- v. Prudential Ins. Co., 115 Minn. 232, 132 N. W. 277—vii. 3265 (o).
- v. Time Indemnity Co., 140 N. W. 286, 152 Wis. 562—vi. 2041(e); vii. 3246(h).
- Petite v. Atlas Ins. Co., 142 Iowa, 265, 120 N. W. 642—vii. 2827(g), 3951(d).
- Petow v. North British & Mercantile Ins. Co., 92 Atl. 272, 86 N. J. Law, 384—vii. 3121(c).
- Pettijohn v. St. Paul Fire & Marine Ins. Co., 100 Kan. 482, 164 Pac. 1096—vi. 348(b), 1832(a); vii. 2525(d), 2741 (b).
- Pettus v. Hendricks, 113 Va. 326, 74 S. E. 191—vi. 800(c); vii. 3776(t).
- Pfeifer v. Supreme Tribe of Ben Hur, 191 Mo. App. 38, 176 S. W. 710—vii. 3129(a), 3131(a).
- Pfeiler v. Penn. Allen Portland Cement Co., 87 Atl. 623, 240 Pa. 468—vii. 3907(f).
- Pfiester v. Missouri State Life Ins. Co., 116 Pac. 245, 85 Kan. 97—vi. 554(j), 616(f), 864(g), 879(t), 2304(b); vii. 2524(d).
- Pfingston v. Grand Lodge Ancient Order of United Workmen, 41 Ind. App. 9, 83 N. E. 254—vi. 2391(u).
- Phenix Ins. Co. v. Ceaphus (Okl.) 151 Pac. 568—vi. 854(a).
- v. Grove, 215 Ill. 299, 74 N. E. 141, 25 L. R. A. (N. S.) 1—vii. 2602(d), 2665(c), 2670(e), (1904) 116 Ill. App. 529—vii. 2602(d), 2665(c), 2670(e).
- v. Hilliard, 59 Fla. 590, 52 South. 799, 138 Am. St. Rep. 171—vi. 249(c), 864(g), 1369(a), 1371(c), 1376(g).
- Phenix Ins. Co. v. Hunter, 95 Miss. 754, 49 South. 740—vii. 2808(i).
- v. Jones, 16 Ga. App. 261, 85 S. E. 206—vii. 3021(f), 3029(h), 3434(a).
- v. Perkins, 101 N. W. 1110, 19 S. D. 59—vi. 529(j); vii. 3966(c).
- v. Stahl, 83 Pac. 614, 72 Kan. 578—vii. 2735(a).
- Philadelphia Casualty Co. v. Cannon & Byers Millinery Co., 118 S. W. 1004, 133 Ky. 745—vi. 635(d); vii. 3323(c), 3326(c), 3338(e), 3341(e).
- v. Fechheimer, 220 Fed. 401, 136 C. C. A. 25, Ann. Cas. 1917D, 64—vi. 635(d), 846(i); vii. 3338 (e), 3434(a).
- v. Teacher, 236 Fed. 869, 150 C. C. A. 131—vii. 3972(g), 3989(k).
- Philadelphia Life Ins. Co. v. Arnold, 81 S. E. 964, 97 S. C. 418, Ann. Cas. 1916C, 706—vii. 2755(b).
- v. Farnsley's Adm'r, 162 Ky. 27, 171 S. W. 1004—vii. 3171(f), 3253(k).
- Philadelphia Pickling Co. v. Maryland Casualty Co. (N. J. Sup.) 94 Atl. 889—vii. 3968(f).
- 89 N. J. Law, 330, 98 Atl. 433—vi. 1114(i); vii. 3334(b).
- Philadelphia Underwriters Agency of Fire Ass'n v. Brown (Tex. Civ. App.) 151 S. W. 899—vii. 3038 (b).
- v. Neurenberg (Tex. Civ. App.) 144 S. W. 357—vi. 636(e), 1760(g).
- Phillips v. Home Ins. Co., 112 N. Y. Supp. 769, 128 App. Div. 528—vii. 3085(e).
- Phillips' Estate, In re, 86 Atl. 289, 238 Pa. 423, 45 L. R. A. (N. S.) 982, Ann. Cas. 1914C, 282—vi. 268(g), 289(j).
- Phillips & Co. v. Fishback, 84 Wash. 124, 146 Pac. 181—vi. 1011(d).
- Phillips v. The Homesteaders, 140 Iowa, 562, 118 N. W. 880—vii. 3302(f).
- Phipps v. Union Mut. Ins. Co. (Okl.) 150 Pac. 1083—vi. 348(b); vii. 2484(g), 2828(h).
- Phenix Accident & Sick Ben. Ass'n v. Lathrop, 41 Ind. App. 141, 81 N. E. 227—vii. 3171(f), 3187(d), 3961(c), 3966(c).
- v. Stiver, 42 Ind. App. 636, 84 N. E. 772—vii. 3156(a), 3157(a), 3516(c).
- Phenix Assur. Co. v. Boyett, 90 S. W. 284, 77 Ark. 41—vi. 864(g); vii. 3531(a).
- v. Eppstein (Fla.) 75 South. 537, L. R. A. 1917F, 540—vii. 3033(i), 3037(a).
- Phenix Fire Assur. Co. v. Murray, 187 Fed. 809, 109 C. C. A. 569—vii. 3612(k).
- Phenix Ins. Co., Ex parte, 67 S. E. 134—vii. 3923(m).
- 86 S. C. 52, 68 S. E. 21—vii. 3923(m).

- Phoenix Ins. Co. v. Adams (Ky.)** 127 S. W. 1008—vii. 3612(k).
- v. Bourgeois**, 105 Miss. 698, 63 South. 212—vi. 1822(e).
- v. Boyette**, 77 Ark. 41, 90 S. W. 284—vi. 355(h).
- v. Ceaphus**, 119 Pac. 583, 29 Okl. 608—vii. 2653(t).
- v. Dorsey**, 102 Miss. 81, 58 South. 778—vi. 1820(d).
- v. Fleenor**, 104 Ark. 119, 148 S. W. 650—vi. 1691(b), 1770(d); vii. 3890(c).
- v. Flowers (Ky.)** 124 S. W. 403—vii. 3959(b).
- v. Hall (Okl.)** 158 Pac. 903—vi. 525(i).
- v. Hunter**, 95 Miss. 754, 49 South. 740—vii. 2801(h).
- v. Pacific Lumber Co.**, 1 Cal. App. 156, 81 Pac. 976—vii. 3923(m).
- v. Quinette**, 36 Okl. 384, 128 Pac. 722—vi. 1382(k), 1745(i).
- v. Sherman**, 110 Va. 435, 66 S. E. 81—vi. 1814(a), 1821(d), 1822(e), 1824(e).
- v. Smith**, 95 Miss. 347, 48 South. 1020—vii. 2812(o), 3989(k).
- v. State**, 76 Ark. 180, 88 S. W. 917, 6 Ann. Cas. 440—vi. 350(d), 854(a), 866(h); vii. 2807(k), 2819(b).
- v. Wintersmith**, 98 S. W. 987, 30 Ky. Law Rep. 369—vii. 3094(g), 3125(c), 3424(i).
- Physicians' Defense Co. v. Cooper (C. C.)** 188 Fed. 832—vi. 8(e), 89(c).
- 199 Fed. 576, 118 C. C. A. 50, 47 L. R. A. (N. S.) 290—vi. 8(e).
- v. O'Brien**, 100 Minn. 490, 111 N. W. 396—vi. 8(e); vii. 3329(e).
- Picek v. Modern Brotherhood of America**, 177 Ill. App. 113—vii. 2559(b), 2777(e).
- Pierce v. Bankers' Union of the World**, 140 Ill. App. 495—vi. 709(k), 712(l).
- v. New York Life Ins. Co.**, 174 Mo. App. 383, 160 S. W. 40—vi. 444(a); vii. 3755(g).
- v. Sun Ins. Office**, 147 N. Y. Supp. 947, 86 Misc. Rep. 1—vii. 3641(i).
- Piercy v. Frankfort Marine, Accident & Plate Glass Ins. Co., etc.**, 127 N. Y. Supp. 354, 142 App. Div. 839—vii. 3347(a), 3582(g).
- Pierre v. Kansas City Casualty Co.**, 141 Pac. 690, 80 Wash. 347—vii. 3312(i).
- Pilcher v. Puckett**, 77 Kan. 284, 94 Pac. 132, 17 L. R. A. (N. S.) 1083—vi. 803(e); vii. 3722(b), 3767(s), 3774(s), 3781(u), 3783(u).
- Pilgrims' Health & Life Ins. Co. v. Scott**, 78 S. E. 469, 12 Ga. App. 749—vi. 2314(h); vii. 2840(e).
- Pine v. Supreme Circle Brotherhood of the Union**, 77 N. J. Law, 344, 71 Atl. 1130—vii. 3815(b).
- Pioneer Life Ins. Co. v. Cox**, 112 Ark. 582, 166 S. W. 951—vi. 484(j), 505(e); vii. 2781(f), 2831(b), 2834(d), 3533(b).
- Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n**, 104 App. Div. 571, 93 N. Y. Supp. 575—vi. 608(b), 2026(d).
- Pittman v. Milton**, 69 Fla. 304, 68 So. 658—vii. 3805(i).
- Pittsburgh, C. & St. L. Ry. Co. v. German Ins. Co.**, 44 Ind. App. 268, 87 N. E. 995—vii. 3893(a).
- v. Home Ins. Co.**, 183 Ind. 355, 108 N. E. 525, Ann. Cas. 1918A, 828—vii. 3899(b, c).
- Pixley v. Illinois Commercial Men's Ass'n**, 195 Ill. App. 135—vii. 3161(b), 3194(f).
- Placa v. Polizzi Generosa Soc. (Sup.)** 138 N. Y. Supp. 822—vi. 2338(b); vii. 3677(b).
- Planters' Fire Ins. Co. v. Crockett**, 115 Ark. 606, 170 S. W. 1012—vi. 926(h).
- v. Nichols**, 103 Ark. 387, 147 S. W. 68—vi. 1818(c); vii. 3531(a).
- v. Steele**, 178 S. W. 910, 119 Ark. 597, Ann. Cas. 1917B, 667—vi. 1634(g), 1680(k).
- Planters' Mut. Ins. Ass'n v. Hamilton**, 90 S. W. 283, 77 Ark. 27, 7 Ann. Cas. 55—vi. 1378(h), 3532(b), 3549(c).
- Platauer v. American Bonding Co. (Sup.)** 92 N. Y. Supp. 238—vii. 2467(c), 2764(a).
- Pleasants v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n**, 70 W. Va. 389, 73 S. E. 976, Ann. Cas. 1913E, 490—vi. 632(c), 797(a), 816(l).
- Plockzek v. St. Paul Fire & Marine Ins. Co. (N. J. Ch.)** 91 Atl. 812—vi. 854(a), 1716(b).
- Plumer v. Continental Casualty Co.**, 77 S. E. 917, 12 Ga. App. 594—vi. 2259(a), 2777(e).
- Plummer v. Insurance Co. of North America**, 95 Atl. 605, 114 Me. 128—vi. 642(i), 1045(g), 1253(a), 1271(p); vii. 2904(d).
- Plum Trees Lime Co. v. Keeler**, 92 Conn. 1, 101 Atl. 509—vi. 148(c), 173(e); vii. 3695(d).
- Plunkett v. Piedmont Mut. Ins. Co.**, 61 S. E. 893, 80 S. C. 407—vii. 2460(a), 2462(a), 2501(a), 2521(c), 2622(a), 2633(c), 2644(m), 3430(m).
- v. Supreme Conclave, Improved Order of Heptasophs**, 105 Va. 643, 55 S. E. 9—vi. 706(h), 709(k), 717(n); vii. 3233(c), 3236(c), 3253(k).
- Podlesak v. Royal Neighbors of America**, 192 Ill. App. 73—vi. 2121(o).
- Poe v. Cameron**, 153 N. W. 129, 130 Minn. 15—vi. 934(o).

- Point Gratiot Sand & Gravel Co. v. Hartford Fire Ins. Co., 136 N. Y. Supp. 877, 77 Misc. Rep. 221—vi. 1382(k); vii. 2740(b).
- Pold v. North American Union, 261 Ill. App. 433, 104 N. E. 4—vi. 703(h), 707(i), 709(k); vii. 3228(b).
- 180 Ill. App. 448—vi. 409(k), 703(h), 707(i); vii. 3228(b).
- Polemanakos v. Austin Fire Ins. Co. (Tex. Civ. App.) 160 S. W. 1134—vii. 2801(h), 2815(a), 2820(c).
- Polhill v. Battle, 52 S. E. 87, 124 Ga. 111—vii. 3785(u).
- Polish National Alliance of United States v. Nagrabski, 71 N. J. Eq. 621, 64 Atl. 471—vii. 3770(s).
- Polizzi v. Commercial Fire Ins. Co., 255 Pa. 297, 99 Atl. 907—vi. 1818(c), 1820(d); vii. 3550(c).
- Polk v. Mutual Reserve Fund Life Ass'n (C. C.) 137 Fed. 273—vi. 660(i), 698(f), 702(g).
- v. State Mut. Fire Ins. Co. (Tex. Civ. App.) 151 S. W. 1126—vi. 1077(h).
- v. Western Assur. Co., 90 S. W. 397, 114 Mo. App. 514—vi. 1832(a), 1834(b); vii. 2670(e), 2777(e), 2782(g).
- Pollock v. Household of Ruth, 150 N. C. 211, 63 S. E. 940—vi. 253(f), 257(g), 258(h), 797(a); vii. 3756(g), 3762(r), 3765(r).
- Polstein v. General Acc. Fire & Life Assur. Corporation, 173 App. Div. 938, 158 N. Y. Supp. 868—vii. 3042(c).
- Pomeroy v. Aetna Ins. Co., 86 Kan. 214, 120 Pac. 344, 38 L. R. A. (N. S.) 142, Ann. Cas. 1913C, 170—vi. 1715(a), 1737(e).
- Pond v. Royal League, 127 Ill. App. 476—vi. 126(f).
- Pontiac Mut. County Fire & Lightning Ins. Co. v. Sheibley, 279 Ill. 118, 116 N. E. 644—vii. 3927(u).
- Pool v. New England Mut. Life Ins. Co., 108 N. Y. Supp. 431, 123 App. Div. 885—vi. 566(h); vii. 3779(u).
- Poole v. Grand Circle, Women of Woodcraft, 18 Cal. App. 457, 123 Pac. 349—vi. 2112(j).
- v. Supreme Circle, Brotherhood of America (N. J. Ch.) 85 Atl. 453—vi. 1023(c).
- (N. J.) 85 Atl. 821—vi. 709(k).
- 80 N. J. Eq. 259, 87 Atl. 1118—vi. 709(k).
- Popa v. Northern Ins. Co., 158 N. W. 945, 192 Mich. 237—vii. 3122(c), 3491(c), 3531(a), 3959(b).
- Pope v. New York Life Ins. Co., 181 S. W. 1047, 192 Mo. App. 383—vi. 2259(a), 2411(g).
- Popovitz v. United States Health & Accident Ins. Co., 137 N. Y. Supp. 788, 78 Misc. Rep. 148—vi. 2398(c).
- Port Blakeley Mill Co. v. Hartford Fire Ins. Co., 50 Wash. 657, 97 Pac. 781—vi. 1174(a), 1175(a), 1511(e), 1803(f).
- Port Blakely Mill Co. v. Royal Ins. Co., 186 Fed. 716, 108 C. C. A. 586—vi. 1803(f).
- v. Springfield Fire & Marine Ins. Co., 56 Wash. 681, 106 Pac. 194, 28 L. R. A. (N. S.) 593—vi. 636(e), 1127(b), 1132(c), 1142(g), 1147(k), 1468(c), 1803(f), 1884(b), 1890(b).
- 59 Wash. 501, 110 Pac. 36, 140 Am. St. Rep. 863—vi. 636(e), 1142(g), 1468(c), 1803(f), 1884(b), 1890(h).
- Porter v. Casualty Co. of America, 126 N. Y. Supp. 669, 70 Misc. Rep. 246—vi. 632(c); vii. 3977(g).
- v. General Acc. Fire & Life Assur. Corporation, 157 Pac. 825, 30 Cal. App. 198—vi. 346(b), 444(a), 458(j), 1984(a), 2096(a); vii. 2499(a), 2559(b), 2570(e).
- v. Holmes, 122 Ga. 780, 50 S. E. 923—vi. 513(a), 528(i).
- v. Insurance Co. of North America, 29 Pa. Super. Ct. 75—vi. 636(e), 1679(k); vii. 2616(j), 2621(a), 2629(c).
- v. Loyal Americans of the Republic, 167 S. W. 578, 180 Mo. App. 538—vi. 434(l), 607(a), 1043(f).
- v. Preferred Acc. Ins. Co., 95 N. Y. Supp. 682, 109 App. Div. 103—vii. 3197(g).
- 186 N. Y. 599, 79 N. E. 1114—vii. 3197(g).
- v. State Mut. Life Ins. Co., 89 S. E. 609, 145 Ga. 543—vii. 3949(d).
- Portland Flouring Mills Co. v. Portland & Asiatic S. S. Co. (D. C.) 158 Fed. 113—vii. 2953(c).
- Posey County Fire Ass'n v. Hogan, 37 Ind. App. 573, 77 N. E. 670—vi. 392(b), 412(b), 476(g), 1314(d).
- Post v. American Cent. Ins. Co., 51 Pa. Super. Ct. 352—vi. 1816(f); vii. 3627(s), 3827(c).
- v. Supreme Court, I. O. F., 103 N. W. 841, 146 Mich. 666—vii. 3247(h).
- Postler v. Travelers' Ins. Co., 173 Cal. 1, 158 Pac. 1022—vii. 3157(a).
- Potievskia v. Independent Western Star Order, 134 Mo. App. 471, 114 S. W. 572—vii. 3677(b).
- Potomac Ins. Co. v. Atwood, 118 Ill. App. 349—vi. 762(p); vii. 2793(d), 2794(d), 2808(i), 3959(b).
- Potter v. Aetna Life Ins. Co., 71 Wash. 374, 128 Pac. 647—vii. 3174(g).
- Pottle v. Liverpool & London & Globe Ins. Co., 108 Me. 401, 81 Atl. 481—vii. 3423(h), 3432(m).
- 109 Me. 584, 85 Atl. 1058—vii. 3424(i), 3432(m).

- Potvin v. Prudential Ins. Co., 114 N. E. 292, 225 Mass. 247—vi. 253(f), 264 (c), 1100(b).
- Poultry Producers' Union v. Williams, 107 Pac. 1040, 58 Wash. 64, 137 Am. St. Rep. 1041—vi. 2435(a), 2437(b), 2439(c).
- Powell v. Commonwealth Ins. Co., 60 S. E. 120, 3 Ga. App. 436—vi. 1712(m), 1828(f), 1829(g).
- v. Continental Ins. Co., 81 S. E. 654, 97 S. C. 375—vii. 2480(e), 2521 (c), 2665(c), 2670(e).
- v. North State Mut. Life Ins. Co., 69 S. E. 12, 153 N. C. 124—vi. 352(f), 442(a), 444(a), 456(h).
- v. Prudential Ins. Co., 153 Ala. 611, 45 South. 208—vi. 454(g); vii. 2510(f).
- v. Travelers' Protective Ass'n, 160 Mo. App. 571, 140 S. W. 939—vii. 3189(d), 3216(m), 3220(m), 3223(m).
- Powell & Powell v. Wake Water Co., 171 N. C. 290, 88 S. E. 426, Ann. Cas. 1917A, 1302—vii. 3893(a), 3927(n).
- Power v. Modern Brotherhood of America, 158 Pac. 870, 98 Kan. 487, 701—vii. 3248(i), 3265(o).
- Prather v. Connecticut Fire Ins. Co., 188 Mo. App. 653, 176 S. W. 527—vii. 3624(q), 3633(c).
- Pratt v. Hill, 124 Md. 252, 92 Atl. 543—vii. 3778(u).
- Preferred Accident Ins. Co. v. Fielding, 83 Pac. 1013, 35 Colo. 19, 9 Ann. Cas. 916—vii. 3172(g), 3174(g), 3200(h), 3366(h), 3448 (e), 3515(b), 3960(b).
- v. Patterson, 213 Fed. 595, 130 C. C. A. 175—vii. 3157(a), 3175(h).
- Prentice v. Security Ins. Co. (Tex. Civ. App.) 153 S. W. 925—vi. 1064(a); vii. 3715(m).
- Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 105 N. W. 801, 110 Am. St. Rep. 919—vi. 564(g), 586(d), 591(h).
- President, etc., of Ins. Co. v. Pitts, 88 Miss. 587, 41 South. 5, 7 L. R. A. (N. S.) 627, 117 Am. St. Rep. 756, 9 Ann. Cas. 54—vi. 1376(g), 1378(h), 1673 (h), 1680(k), 1884(b), 1886(d).
- Press Pub. Co. v. General Accident, Fire & Life Assur. Corporation of Perth, Scotland, 145 N. Y. Supp. 711, 160 App. Div. 537—vii. 3582(g).
- Preston v. Aetna Ins. Co., 118 App. Div. 784, 103 N. Y. Supp. 638—vi. 637(f); vii. 3025(f).
- 193 N. Y. 142, 85 N. E. 1006, 19 L. R. A. (N. S.) 133—vi. 637(f); vii. 3025(f).
- Price v. Brotherhood of Railroad Trainmen, 116 Minn. 275, 133 N. W. 793—vi. 1016(b), 2375(o).
- Price v. Mutual Reserve Life Ins. Co., 102 Md. 683, 62 Atl. 1040, 4 L. R. A. (N. S.) 870—vii. 2834 (d), 3732(f).
- 107 Md. 374, 68 Atl. 689—vii. 2834(d), 3998(l).
- v. National Accident Society, 37 Pa. Super. Ct. 299—vii. 3223(m), 3309(h).
- v. North American Accident Ins. Co., 152 Pac. 805, 28 Idaho, 136—vii. 2479(e), 2683(b), 3531(a).
- v. Occidental Life Ins. Co., 169 Cal. 800, 147 Pac. 1175—vii. 3156(a), 3172(g).
- Prichard v. Security Mut. Life Ins. Co., 140 App. Div. 879, 124 N. Y. Supp. 650—vii. 2841(e).
- Priddy v. Baum, 140 N. Y. Supp. 481, 79 Misc. Rep. 607—vi. 459(j).
- Pride v. Continental Casualty Co., 125 Pac. 787, 69 Wash. 428—vi. 2314(g).
- v. Switchmen's Union of North America, 178 Ill. App. 434—vi. 688(f), 709(k).
- Priest v. Bankers' Life Ass'n, 161 Pac. 631, 99 Kan. 295—vi. 2286(b); vii. 2831(b).
- Primrose v. Casualty Co. of America, 81 Atl. 212, 232 Pa. 210, 37 L. R. A. (N. S.) 618—vii. 3163(c).
- Prince v. State Mut. Life Ins. Co., 77 S. C. 187, 57 S. E. 766—vi. 457(i), 1038(a).
- Prine v. American Central Ins. Co., 171 Ala. 343, 54 South. 547—vii. 2484(g).
- Pringle v. Aetna Life Ins. Co., 101 S. W. 130, 123 Mo. App. 710—vii. 3571(b).
- v. Modern Woodmen of America, 76 Neb. 384, 107 N. W. 756—vii. 2683(b), 2690(d), 2695(h).
- 76 Neb. 384, 113 N. W. 231—vi. 68(m); vii. 2683(b), 2690 (d), 2695(h).
- 87 Neb. 548, 127 N. W. 876—vi. 658(g).
- v. Spring Garden Ins. Co., 91 N. E. 209, 205 Mass. 88—vi. 1622 (m); vii. 2663(b).
- Pringle Bros. v. Philadelphia Casualty Co., 218 N. Y. 1, 112 N. E. 465—vii. 3338(e).
- 138 N. Y. Supp. 330, 153 App. Div. 180—vi. 901(b), 3338(e).
- Proctor v. United Order of The Golden Star, 89 N. E. 1042, 203 Mass. 587, 25 L. R. A. (N. S.) 370—vi. 2398(c); vii. 2717(h).
- Progresso S. S. Co. v. St. Paul Fire & Marine Ins. Co., 79 Pac. 967, 146 Cal. 279—vi. 650(b); vii. 2921(a).
- Progress Spinning & Knitting Mills Co. v. Southern Nat. Ins. Co., 130 Pac. 63, 42 Utah, 263, 45 L. R. A. (N. S.) 122—vi. 1636(i); vii. 2464(b), 2660(b).

- Prospect Dye Works v. Federal Ins. Co., 33 Pa. Super. Ct. 223—vi. 191(d), 1377(g).
- Prosser Power Co. v. United States Fidelity & Guaranty Co., 73 Wash. 304, 132 Pac. 48—vi. 449(d), 607(a), 1858(r), 2439(c), 2450(c).
- Protzman's Ex'r v. Joseph, 65 S. E. 461, 65 W. Va. 788—vii. 3805(i).
- Providence Saving Life Ins. Soc. v. Pruett, 157 Ala. 540, 47 South. 1019—vi. 1967(c).
- Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co. (C. C.) 166 Fed. 548—vii. 3932(a), 3935(b).
- Providence-Washington Ins. Co. v. Kennington, 111 Miss. 244, 71 South. 378—vii. 3627(s).
- v. Levy & Rosen (Tex. Civ. App.) 189 S. W. 1035—vi. 1457(c).
- v. Paducah Towing Co., 89 S. W. 722, 28 Ky. Law Rep. 622—vii. 2994(i).
- v. Wolf, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395—vii. 3490(c), 3651(l), 3658(a), 3660(b).
- (Ind. App.) 72 N. E. 606—vii. 3529(h).
- (Ind. App.) 73 N. E. 1093—vii. 3529(h).
- v. Youmans, 143 N. Y. Supp. 941, 82 Misc. Rep. 433—vii. 3898(b).
- Provident Life & Accident Ins. Co. v. Black (Ala. App.) 73 South. 757—vi. 2042(e).
- v. Elliott (Ala.) 73 South. 476—vii. 3442(a), 3464(d).
- Provident Life & Trust Co. v. Spring Garden Ins. Co., 53 Pa. Super. Ct. 66—vi. 351(d).
- Provident Sav. Life Assur. Soc. v. Dees, 120 Ky. 285, 86 S. W. 522, 27 Ky. Law Rep. 670—vi. 1990(g), 2053(b), 2054(c); vii. 3776(t).
- v. Ellinger (Tex. Civ. App.) 164 S. W. 1024—vii. 2833(c).
- v. Elliott's Ex'r, 93 S. W. 659, 29 Ky. Law Rep. 552—vi. 407(a), 408(a), 421(f), 533(k).
- v. Georgia Industrial Co., 52 S. E. 289, 124 Ga. 399—vii. 2800(g).
- v. King, 75 N. E. 166, 216 Ill. 416—vi. 2324(n).
- 117 Ill. App. 556—vi. 2324(n).
- v. Marshall, 125 Ill. App. 101—vi. 632(c).
- v. Shearer, 151 Ky. 298, 151 S. W. 933—vi. 1039(a).
- v. Taylor, 142 Fed. 709, 74 C. C. A. 41—vi. 101(c).
- v. Wayne's Adm'r, 131 Ky. 84, 93 S. W. 1049, 29 Ky. Law Rep. 160—vi. 1953(c), 1962(k), 1979(j), 1992(h), 2082(i), 2183(b); vii. 2775(d), 3261(n).
- Provident Sav. Life Ins. Co. v. Schoolfield, 97 S. W. 345, 29 Ky. Law Rep. 1230—vi. 2395(b).
- Provident Savings Loan Assur. Co. v. Statler, 34 Ohio Cir. Ct. R. 391—vi. 1039(a).
- 106 N. E. 1073, 88 Ohio St. 549—vi. 1039(a).
- Province v. Travelers' Ins. Co., 132 Mo. App. 394, 111 S. W. 1193—vii. 3312(i).
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- Prudential Fire Ins. Co. v. Alley, 51 S. E. 812, 104 Va. 356—vi. 1616(h), 1821(d), 1822(e), 1823(e), 1829(g); vii. 3386(f), 3432(m).
- Prudential Ins. Co. v. Chestnut, 8 Ga. App. 246, 68 S. E. 952—vi. 628(a), 632(c), 2409(g).
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- v. Cushman, 106 N. W. 934, 130 Iowa, 378—vi. 582(a).
- v. Dolan, 46 Ind. App. 40, 91 N. E. 970—vii. 3256(l), 3263(o).
- v. Dugger, 163 Ill. App. 609—vi. 1099(a).
- v. Gilligan, 28 Ohio Cir. Ct. R. 609—vi. 680(b); vii. 2757(b).
- v. Godfrey, 75 N. J. Eq. 484, 72 Atl. 456—vii. 3740(k).
- v. Hummer, 36 Colo. 208, 84 Pac. 61—vi. 1935(d), 1950(a), 1951(b); vii. 2733(a), 3472(d), 3989(k), 3991(k).
- v. Lear, 31 App. D. C. 184—vi. 1941(g), 2159(c).
- v. Mohr (C. C.) 185 Fed. 936—vii. 2757(b).
- v. Moore, 34 Sup. Ct. 191, 231 U. S. 560, 58 L. Ed. 367—vi. 1990(g), 2072(b); vii. 2537(k), 2653(t).
- v. Morris (N. J. Ch.) 70 Atl. 924—vii. 3735(g).
- v. Sellers, 54 Ind. App. 326, 102 N. E. 894—vi. 1932(a), 1956(f), 1979(j), 2163(e).
- v. Shively, 1 Ohio App. 238, 34 Ohio Cir. Ct. R. 357—vi. 449(d); vii. 2690(d).
- v. Stewart, 237 Fed. 70, 150 C. C. A. 272—vi. 995(c).
- v. Union Trust Co., 56 Ind. App. 418, 105 N. E. 505—vi. 2395(b).
- v. Williams, 113 Ark. 373, 168 S. W. 1114—vi. 249(c), 268(g).
- Prudential Life Ins. Co. v. Fusco's Adm'r, 140 S. W. 566, 145 Ky. 378—vi. 564(g), 567(k), 656(f), 2088(e).
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- v. Terrell, 135 S. W. 416, 142 Ky. 732—vi. 744(f); vii. 3588(b).

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- Public Savings Ins. Co. v. Coombes**, 59 Ind. App. 523, 108 N. E. 244—vi. 636(e), 2259(a).
- v. Manning**, 61 Ind. App. 239, 111 N. E. 945—vii. 2506(d), 2699(b).
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- Puryear v. Farmers' Mut. Ins. Ass'n**, 137 Ga. 579, 73 S. E. 851—vi. 61(h), 693(c), 1877(e).
- Putnam v. Phenix Preferred Acc. Ins. Co.**, 155 Mich. 134, 118 N. W. 922—vii. 3223(m).
- P. W. Ziegler Co. v. Commercial Union Assur. Co.**, 38 Pa. Super. Ct. 532—vii. 3860(h).

Q

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- Quackenbush v. Citizens' Ins. Co.**, 150 Mich. 555, 114 N. W. 388—vi. 146(b), 190(b); vii. 3703(h).
- Queatham v. Modern Woodmen of America**, 148 Mo. App. 33, 127 S. W. 651—vi. 2254(b); vii. 3134(b), 3452(h).
- Queen City Fire Ins. Co. v. First Nat. Bank**, 18 N. D. 603, 120 N. W. 545, 22 L. R. A. (N. S.) 509—vi. 359(j).
- Queen City Ins. Co. v. Long** (Tex. Civ. App.) 132 S. W. 82—vi. 1820(d).
- Queen Ins. Co. v. Dalrymple** (Okl.) 158 Pac. 1154—vi. 1822(e).
- v. Hartwell Ice & Laundry Co.**, 7 Ga. App. 787, 68 S. E. 310—vi. 535(b), 537(c); vii. 2465(b), 3076(l).
- v. Patterson Drug Co.** (Fla.) 74 South. 807, L. R. A. 1917D, 1091—vi. 636(e); vii. 2506(d), 2527(e), 2673(f), 3019(e), 3076(m).
- v. Peters**, 10 Ga. App. 289, 73 S. E. 536—vi. 786(a); vii. 3889(c).
- v. Van Giesen**, 136 Ga. 741, 72 S. E. 41—vi. 1711(l); vii. 3039(b).
- v. Vines**, 174 Ala. 568, 57 South. 444—vi. 1819(c).
- Queen of Arkansas Ins. Co. v. Bramlett**, 103 Ark. 1, 145 S. W. 541—vii. 3887(c).
- v. Cooper-Cryer Co.**, 81 Ark. 160, 98 S. W. 694—vii. 2781(f).
- v. Dillard**, 96 Ark. 376, 131 S. W. 946—vi. 1814(a).
- v. Dumas**, 113 Ark. 598, 168 S. W. 561—vii. 2779(f), 2782(g).

- Queen of Arkansas Ins. Co. v. Forlines**, 94 Ark. 227, 126 S. W. 719—vi. 1541(f), 1820(d), 1829(g); vii. 2464(b), 2472(e), 2487(i), 2604(e), 2658(a), 2740(b), 3490(c), 3531(a), 3561(d).
- v. Laster**, 108 Ark. 261, 156 S. W. 848—vii. 2520(c), 2622(a), 2781(f), 3349(a), 3526(g), 3531(a).
- v. Malone**, 111 Ark. 229, 163 S. W. 771—vi. 1818(c), 1822(e); vii. 2485(g), 2658(a), 2777(e), 3531(a).
- v. Pendola**, 94 Ark. 594, 128 S. W. 559—vi. 1746(j).
- v. Taylor**, 100 Ark. 9, 138 S. W. 990—vi. 146(b), 152(f); vii. 2521(c), 2621(a), 3385(e), 3887(c).
- Quick v. Modern Woodmen of America**, 91 Neb. 106, 135 N. W. 433—vi. 2256(c).
- v. Quick**, 147 N. Y. Supp. 149, 161 App. Div. 878—vii. 3731(e).
- Quill v. Boston Ins. Co.**, 197 Mass. 216, 83 N. E. 401—vi. 422(f).
- Quillian v. Johnson**, 49 S. E. 801, 122 Ga. 49—vi. 273(o), 308(h).
- Quinn v. Mutual Life Ins. Co.**, 158 Pac. 82, 91 Wash. 543—vi. 1984(a); vii. 2549(t).
- v. North American Union**, 162 Ill. App. 319—vi. 545(b), 677(a), 697(e), 698(f), 2212(e); vii. 3138(d).

R

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- Rabb v. North American Acc. Ins. Co.**, 154 Pac. 493, 28 Idaho, 321—vii. 3302(f).
- Rabinowitz v. Vulcan Ins. Co.** (N. J.) 100 Atl. 175—vi. 1283(f).
- Raburn v. Pennsylvania Casualty Co.**, 141 N. C. 425, 54 S. E. 283—vii. 3291(b).
- Raffety v. Romer**, 122 Ill. App. 57—vi. 934(o).
- Ragley Lumber Co. v. Insurance Co. of North America**, 42 Tex. Civ. App. 511, 94 S. W. 185—vii. 2807(k).
- Rahders, Merritt & Hagler v. People's Bank**, 113 Minn. 496, 130 N. W. 16, Ann. Cas. 1912A, 299—vi. 297(o), 1100(b).
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- v. Moseley**, 211 Fed. 1, 127 C. C. A. 427—vi. 632(c); vii. 3150(f), 3207(j).
- Rainer v. Schulte**, 133 Wis. 130, 113 N. W. 396—vi. 336(c), 341(g), 344(i).

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176 App. Div. 918, 162 N. Y. Supp. 539—vi. 1961(j).
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- Ralston v. Royal Ins. Co., Limited, 79 Wash. 557, 140 Pac. 552—vii. 2793(d), 2794(d).
- Ramat v. California Ins. Co., 164 Pac. 219, 95 Wash. 571—vi. 1439(b); vii. 3477(a).
- Rambousek v. Supreme Council of Mystic Tilters, 133 Iowa, 375, 106 N. W. 947—vi. 2375(o).
- Ramsey v. General Accident, Fire & Life Ins. Co., 160 Mo. App. 236, 142 S. W. 763—vii. 3294(c), 3550(c).
v. Travelers' Protective Ass'n of America, 147 Wis. 405, 133 N. W. 634—vii. 2464(b), 2706(c), 2769(a).
- Rancier v. Women of Woodcraft, 50 Wash. 68, 96 Pac. 829—vi. 428(i).
- Randall v. McClain, 94 Neb. 487, 143 N. W. 478—vi. 124(e).
- Randolph Mut. Ins. Co. v. Lorenz, 147 Ill. App. 154—vi. 137(d).
- Rankin v. Northern Assur. Co., 98 Neb. 172, 152 N. W. 324—vi. 347(b), 397(d), 924(g).
v. Rankin, 83 N. J. Law, 282, 84 Atl. 197—vii. 3779(u).
v. United States Fidelity & Guaranty Co., 99 N. E. 314, 86 Ohio St. 267—vi. 635(d); vii. 3320(b), 3321(b), 3579(e).
- Ranta v. Supreme Tent. Knights of Maccabees of the World, 107 N. W. 156, 97 Minn. 454—vi. 2132(f), 2174(b).
- Raschke v. Haderer, 138 Wis. 129, 119 N. W. 812—vii. 3775(t).
- Rasicot v. Royal Neighbors of America, 18 Idaho, 85, 108 Pac. 1048, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180—vi. 68(m), 453(f), 1932(a), 1946(j), 2108(h), 2110(i); vii. 2683(b).
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- Rathjen v. Woodmen Acc. Ass'n, 93 Neb. 629, 141 N. W. 815—vii. 3200(h).
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- Raven v. Prudential Ins. Co., 129 Iowa, 725, 106 N. W. 198—vi. 679(b), 680(b), 686(e); vii. 3871(d).
- Raulet v. Northwestern Nat. Ins. Co., 157 Cal. 213, 107 Pac. 292—vi. 482(i), 495(o), 628(a), 762(p), 924(f), 1373(c), 1418(b), 1420(c), 1869(a); vii. 2630(d), 2650(g), 2772(b), 3434(a).
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- Rawls v. American Central Ins. Co., 97 S. C. 189, 81 S. E. 505—vi. 1774(g); vii. 3076(k), 3915(j).
- Rawson v. Bethesda Baptist Church, 77 N. E. 560, 221 Ill. 216, 6 L. R. A. (N. S.) 448—vii. 3707(i).
123 Ill. App. 239—vii. 3707(i).
- Ray v. Fidelity-Phoenix Fire Ins. Co., 187 Ala. 91, 65 South. 536—vii. 3526(g), 3527(g), 3535(c), 3560(c).
- Rayburn v. Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548—vi. 445(b), 507(f), 632(c), 844(g), 845(g).
- Raymer v. Modern Brotherhood, 157 Ill. App. 510—vi. 1946(j), 1956(f), 2159(c).
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207 Mass. 79, 92 N. E. 1025—vi. 1984(a), 1994(i); vii. 2755(b).
- Rearden v. State Mut. Life Ins. Co., 79 S. C. 526, 60 S. E. 1106—vii. 2524(d), 2650(r), 2651(s), 2775(d).
- Rebman v. General Acc. Ins. Co., 66 Atl. 859, 217 Pa. 518, 10 L. R. A. (N. S.) 957—vii. 3216(m), 3220(m).
- Reddick v. Northern Accident Co., 180 Mo. App. 277, 165 S. W. 354—vii. 3205(i), 3298(e).
- Redding v. Security Mut. Life Ins. Co. (Mo. App.) 144 S. W. 185—vi. 54(e), 620(c).
- Redman v. Fidelity Acc. Ins. Co., 91 Neb. 89, 135 N. W. 373—vi. 2314(g).
- Red Men's Fraternal Accident Ass'n of America v. Rippey, 181 Ind. 454, 103 N. E. 345, 50 L. R. A. (N. S.) 1006—vii. 3135(c), 3184(b).
181 Ind. 454, 104 N. E. 641, 50 L. R. A. (N. S.) 1006—vii. 3135(c), 3184(b).
- Redmond v. United States Health & Accident Ins. Co., 148 N. W. 913, 96 Neb. 744—vii. 3308(h).

- Red River Nat. Bank v. De Berry, 47 Tex. Civ. App. 96, 105 S. W. 998—vii. 3797(d).
- Reed v. Bankers' Reserve Life Ins. Co. (C. C.) 192 Fed. 408—vi. 2267(e), 2271(g), 2324(n).
- v. Bankers' Union of the World, 99 S. W. 55, 121 Mo. App. 419—vii. 2719(i), 2727(p).
- v. Continental Ins. Co., 6 Pennewill (Del.) 204, 65 Atl. 569—vii. 3382(b), 3481(c), 3490(c), 3502(b), 3839(b).
- v. Firemen's Ins. Co., 69 Atl. 724, 76 N. J. Law, 11—vii. 3119(a), 81 N. J. Law, 523, 80 Atl. 462, 35 L. R. A. (N. S.) 343—vi. 1228(b); vii. 3050(a), 3353(c).
- v. Loyal Protective Ass'n, 117 N. W. 600, 154 Mich. 161—vii. 3456(i), 3462(d).
- v. Newark Fire Ins. Co., 74 N. J. Law, 400, 65 Atl. 1053—vi. 1526(d); vii. 3037(a), 3627(b).
- v. Provident Sav. Life Assur. Soc., 112 App. Div. 922, 98 N. Y. Supp. 1111—vi. 249(c), 294(n), 299(b), 301(d), 2330(q); vii. 3793(c).
- 190 N. Y. 111, 82 N. E. 734—vi. 90(d), 249(c), 253(f), 294(n), 299(b), 301(d), 2330(q); vii. 3793(c).
- v. St. Paul Fire & Marine Ins. Co., 165 App. Div. 660, 151 N. Y. Supp. 274—vi. 1283(f).
- Reeder v. Harborecreek Mut. Fire Ins. Co., 43 Pa. Super. Ct. 437—vii. 3042(c).
- Reese v. Fidelity & Deposit Co., 156 N. Y. Supp. 408, 93 Misc. Rep. 31—vi. 1288(a); vii. 3040(b), 3959(b).
- Reich v. Maryland Casualty Co., 104 N. Y. Supp. 984, 54 Misc. Rep. 585—vii. 2768(a), 3381(b).
- Reilley v. Buffalo German Ins. Co., 147 N. Y. Supp. 1086, 86 Misc. Rep. 69—vi. 160(d).
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- Reisser v. Minnesota Farmers' Mut. Ins. Co., 123 N. W. 1085, 109 Minn. 527—vi. 586(d).
- Reiter v. National Council of Knights and Ladies of Security, 154 N. W. 665, 131 Minn. 82—vi. 903(d), 2378(p); vii. 3286(f).
- Relfe v. Commercial Ins. Co., 10 Mo. App. 393—vii. 2810(m).
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- (Tex. Civ. App.) 180 S. W. 668—vi. 1530(d), 1857(q); vii. 2601(d).
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- v. Witherington, 88 S. W. 967, 76 Ark. 373—vi. 1004(f).
- Renfro v. Metropolitan Life Ins. Co., 148 Mo. App. 458, 129 S. W. 444—vii. 3740(k), 3787(a), 3888(c).
- Renick v. Mutual Life Assur. Co. of New York, 106 S. W. 310, 32 Ky. Law Rep. 506—vii. 3867(c).
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- v. Boreing, 157 Ky. 730, 163 S. W. 1085—vi. 1969(f); vii. 2625(a), 2633(e).
- v. Hockett, 73 N. E. 842, 35 Ind. App. 89—vi. 454(g).
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- Review Printing Co. v. Hartford Fire Ins. Co., 133 Minn. 213, 158 N. W. 39—vi. 755(j).
- Rewitzer v. Switchmen's Union of North America, 98 N. Y. Supp. 974, 112 App. Div. 708—vi. 2338(b), 2398(c); vii. 2715(h).
- Reynolds v. German American Ins. Co., 107 Md. 110, 68 Atl. 262, 15 L. R. A. (N. S.) 345—vi. 830(a), 1814(a), 1820(d), 1829(g).
- v. Globe Fire Underwriters, 64 South. 396, 134 La. 515—vii. 3949(d).
- v. Maryland Casualty Co., 30 Pa. Super. Ct. 456—vii. 3356(a), 3457(a).
- v. Supreme Council Royal Arcanum, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776—vi. 713(m), 714(m), 717(n), 1021(c).
- Rhea v. Planters' Mut. Ins. Ass'n, 77 Ark. 57, 90 S. W. 850—vi. 1420(c).
- Rheinheimer v. Aetna Life Ins. Co., 77 Ohio St. 360, 83 N. E. 491, 15 L. R. A. (N. S.) 245—vii. 3200(h).
- Rhodes v. Illinois Commercial Men's Ass'n, 185 Ill. App. 439—vi. 513(a), 693(c).
- v. Royal Union Mut. Life Ins. Co., 56 Pa. Super. Ct. 233—vi. 2277(k); vii. 2709(d), 2726(n).

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- Ribble v. Roberts (Tex. Civ. App.) 180 S. W. 620—vi. 615(f).
- Rice v. Detroit Fire Marine Ins. Co. (Mo. App.) 176 S. W. 1113—vii. 3042(c).
- v. Hartford Ins. Co., 50 Wash. 346, 97 Pac. 238—vi. 1832(a), 1835(b), 1838(c).
- Richard v. Springfield Fire & Marine Ins. Co., 38 South. 563, 114 La. 794, 69 L. R. A. 278, 108 Am. St. Rep. 359—vi. 347(b); vii. 2478(d), 2479(e).
- Richard D'Aigle Co. v. Western Ins. Co., 67 South. 827, 136 La. 777—vii. 3429(l).
- Richards v. King, 107 N. Y. Supp. 720, 57 Misc. Rep. 177—vi. 806(f), 1933(b).
- Richardson v. Northwestern Mut. Life Ins. Co., 143 Ill. App. 279—vi. 455(h).
- Richey v. Woodmen of the World, 163 Mo. App. 235, 146 S. W. 461—vii. 3256(l), 3257(m), 3265(o).
- Richmond v. Kelsey, 114 N. E. 319, 225 Mass. 209—vi. 173(e).
- v. Travelers' Ins. Co., 123 Tenn. 307, 130 S. W. 790, 30 L. R. A. (N. S.) 954—vi. 427(h), 432(k).
- Richmond Cedar Works v. Buckner (C. C.) 181 Fed. 424—vii. 2885(d).
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- 169 Fed. 746, 95 C. C. A. 178, 17 Ann. Cas. 1092—vii. 3028(g).
- Riddell v. Rochester German Ins. Co., 36 R. I. 240, 89 Atl. 833—vii. 3598(a), 3626(s), 3631(b), 3635(d), 3639(h), 3657(p).
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- Ridgely v. Aetna Life Ins. Co., 145 N. Y. Supp. 1075, 160 App. Div. 719—vii. 3165(d), 3306(h).
- Ridgeway v. Modern Woodmen of America, 157 Pac. 1191, 98 Kan. 240, L. R. A. 1917A, 1062—vii. 2688(b), 2748(g).
- Rieden v. Brotherhood of Railroad Trainmen (Tex. Civ. App.) 184 S. W. 689—vii. 3298(e).
- Rief v. Continental Casualty Co., 111 N. W. 502, 131 Wis. 368—vii. 3312(i).
- Riess v. Supreme Conclave, Improved Order of Heptasophs, 177 App. Div. 845, 164 N. Y. Supp. 878—vi. 2373(n), 2382(r); vii. 2718(i).
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- Rigby v. Metropolitan Life Ins. Co., 240 Pa. 332, 87 Atl. 428—vi. 1979(j), 2156(a).
- 248 Pa. 351, 93 Atl. 1079—vi. 2169(i).
- Righter v. Loyal Protective Ass'n, 131 Mo. App. 496, 110 S. W. 11—vii. 2683(b), 2690(d).
- Riley v. Aetna Ins. Co. (W. Va.) 92 S. E. 417, L. R. A. 1917E, 983—vi. 449(d), 1394(b), 1774(g); vii. 2544(o), 3355(d), 3415(c), 3431(m).
- v. American Cent. Ins. Co., 117 Mo. App. 229, 92 S. W. 1147—vii. 2479(e), 2644(m), 2665(c), 2760(e), 2775(d).
- v. Interstate Business Men's Accident Ass'n (Iowa) 152 N. W. 617—vii. 3156(a), 3161(b), 3194(f).
- 177 Iowa, 449, 159 N. W. 203—vii. 3194(f).
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- Riner v. Southwestern Surety Ins. Co., 85 Or. 293, 165 Pac. 684—vii. 3334(b).
- Ring v. Phoenix Assur. Co., Limited, 100 Kan. 341, 164 Pac. 303—vii. 3524(f), 3892(d).
- Rinker v. Aetna Life Ins. Co., 64 Atl. 82, 214 Pa. 608, 112 Am. St. Rep. 773—vi. 2127(c).
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- Risinger v. Supreme Court, I. O. F., 158 Mo. App. 226, 138 S. W. 552—vii. 3677(b).
- Risley v. President & Directors of Ins. Co. of North America (D. C.) 189 Fed. 529—vii. 2995(j).
- Rivard v. Continental Casualty Co., 116 Me. 46, 100 Atl. 101—vi. 448(c), 995(c); vii. 2683(b).
- Riverside Development Co. v. Hartford Fire Ins. Co., 105 Miss. 184, 62 South. 169, Ann. Cas. 1916D, 1274—vi. 352(f), 607(a), 612(d).
- Rizzo v. Catholic Order of Foresters, 176 Ill. App. 165—vi. 800(c), 815(l), 2070(d).
- Roach v. Aetna Ins. Co., 121 N. W. 613, 108 Minn. 127—vi. 1686(p).
- v. Farmers' Mut. Ins. Ass'n, 102 S. C. 478, 86 S. E. 950—vi. 692(b), 696(d).
- Roane v. Union Pac. Life Ins. Co., 67 Or. 264, 135 Pac. 892—vii. 3585(a), 3590(e).
- Roark v. City Trust, Safe Deposit & Surety Co., 110 S. W. 1, 130 Mo. App. 401—vi. 635(d), 830(a), 846(i), 2437(b); vii. 2764(a), 3580(e).
- Robb v. Millers' Mut. Fire Ins. Co., 230 Pa. 44, 79 Atl. 150—vi. 1605(c); vii. 2598(c).
- Robbins v. Hennessey, 99 N. E. 319, 86 Ohio St. 181—vi. 576(f), 1084(c).

- Roberta Mfg. Co. v. Royal Exch. Assur. Co.**, 161 N. C. 88, 76 S. E. 865—vi. 392(b), 411(b), 442(a), 449(d); vii. 2820(c).
- Roberts v. Brotherhood of Locomotive Firemen and Enginemen**, 160 S. W. 924, 156 Ky. 189—vi. 2386(s).
- v. Modern Woodmen**, 133 Mo. App. 207, 113 S. W. 726—vi. 559(a), 564(g); vii. 3966(c), 3967(e).
- v. Northwestern Nat. Life Ins. Co.**, 85 S. E. 1043, 143 Ga. 780—vii. 2863(b).
- v. Roberts (Tex. Civ. App.)** 99 S. W. 886—vi. 1106(e).
- v. W. H. Hughes Co.**, 86 Vt. 76, 83 Atl. 807—vii. 3722(b).
- Robertson v. Covenant Mut. Life Ins. Co.**, 123 Mo. App. 238, 100 S. W. 686—vi. 615(f), 1038(a).
- v. Fraternal Union**, 85 S. C. 221, 67 S. E. 247—vi. 1997(j), 2235(d), 2242(f).
- v. Ridenour-Baker Grocery Co.**, 100 Kan. 133, 163 Pac. 655—vii. 3716(m).
- Roberts & Son v. National Ins. Co.**, 2 Ohio App. 463, 35 Ohio Cir. Ct. R. 212—vi. 851(c).
- Robert Williams & Co. v. Auto Exp. Co.**, 78 N. J. Eq. 165, 78 Atl. 670—vii. 3692(c).
- Robey v. State Ins. Co.**, 146 Iowa, 170, 124 N. W. 775—vi. 1874(d).
- Robinson v. Brotherhood of Locomotive Firemen and Engineers**, 170 N. C. 545, 87 S. E. 537—vi. 577(g), 2023(a); vii. 2625(a).
- v. Brotherhood of Railroad Trainmen (W. Va.)**, 92 S. E. 730, L. R. A. 1917E, 995—vi. 27(b).
- v. Insurance Co. of North America**, 129 App. Div. 1, 113 N. Y. Supp. 105—vi. 1566(m); vii. 2892(h), 198 N. Y. 523, 91 N. E. 373—vi. 1566(m); vii. 2892(h).
- v. Masonic Protective Ass'n**, 87 Vt. 138, 88 Atl. 531, 47 L. R. A. (N. S.) 924—vii. 3168(e), 3174(g), 3185(c).
- v. Mennonite Mut. Fire Ins. Co.**, 139 Pac. 420, 91 Kan. 850—vi. 1669(f).
- v. Mutual Reserve Life Ins. Co. (C. C.)**, 159 Fed. 564—vi. 696(d), (C. C.) 162 Fed. 794—vii. 2832(c), (C. C.) 182 Fed. 850—vi. 2378(p); vii. 2715(h), 2834(d), 2841(f), 2849(j).
- v. National Fraternal League**, 71 Atl. 1096, 81 Conn. 707—vii. 3675(a).
- v. New York Life Ins. Co.**, 153 S. W. 534, 168 Mo. App. 259—vii. 3762(r).
- v. Postal Life Ins. Co.**, 218 Fed. 347, 134 C. C. A. 155—vii. 3943(d).
- Robinson v. Robinson**, 121 Ark. 276, 181 S. W. 300—vii. 3770(s).
- v. Security Life & Annuity Co.**, 79 S. E. 681, 163 N. C. 415—vi. 1012(d), 1048(h).
- v. Sun Ins. Office**, 90 Misc. Rep. 390, 152 N. Y. Supp. 1022—vii. 3411(f).
- v. Union Central Life Ins. Co. (C. C.)**, 144 Fed. 1005—vi. 410(a), 422(f), 431(j), 488(k).
- v. Western Assur. Co. (D. C.)**, 211 Fed. 747—vi. 1873(c); vii. 2665(c), 2704(b).
- Robison v. Union Cent. Life Ins. Co.**, 150 Fac. 564, 96 Kan. 237—vii. 3754(p).
- v. United States Health & Accident Ins. Co.**, 192 Ill. App. 475—vii. 3156(a), 3198(b), 3466(e).
- Robl's Estate, In re**, 127 Pac. 55, 163 Cal. 801, Ann. Cas. 1914A, 319—vii. 3690(b).
- Rocci v. Massachusetts Acc. Co.**, 222 Mass. 336, 110 N. E. 972—vi. 637(f), 2259(a), 2277(k), 2330(g); vii. 3294(c), 3464(d), 226 Mass. 545, 116 N. E. 477—vii. 3294(c), 3299(e).
- Rochester German Ins. Co. v. Monumental Sav. Ass'n**, 107 Va. 701, 60 S. E. 93—vi. 1385(b), 1386(d), 1387(e), 1506(a), 1514(f), 1716(b), 1717(b), 1737(e).
- v. Peaslee-Gaulbert Co.**, 89 S. W. 3, 28 Ky. Law Rep. 130, 1 L. R. A. (N. S.) 364, 120 Ky. 752, 9 Ann. Cas. 324—vi. 838(c).
- v. Rodenhouse**, 36 Okl. 378, 128 Pac. 508—vii. 2653(t), 3616(m).
- v. Schmidt (C. C.)**, 151 Fed. 681—vi. 1317(f), 1334(e), 1369(a), 1371(c), 1382(j); vii. 2642(k), 3042(c), 3531(a), 162 Fed. 447, 89 C. C. A. 333—vi. 1334(e), 1369(a), 1371(c), 1382(j); vii. 3860(h), 175 Fed. 720, 99 C. C. A. 296—vii. 3860(h).
- Rochester Mining Co. v. Maryland Casualty Co.**, 128 S. W. 204, 143 Mo. App. 555—vii. 3334(b).
- Rock v. Travelers' Ins. Co.**, 172 Cal. 462, 156 Pac. 1029, L. R. A. 1916E, 1196—vii. 3157(a).
- Rockford Ins. Co. v. Winfield**, 57 Kan. 576, 47 Pac. 511—vi. 351(e).
- Rock's Estate, In re**, 99 N. Y. Supp. 157, 49 Misc. Rep. 286—vii. 3748(n).
- Rock Springs Distilling Co. v. Employers' Indemnity Co.**, 169 S. W. 730, 160 Ky. 317—vii. 3329(e).
- Rockwell v. Hamburg-Bremen Fire Ins. Co.**, 212 Mass. 318, 98 N. E. 1086—vii. 3487(a), 3510(a), 3527(g).
- v. Knights Templars & Masonic Mut. Aid Ass'n**, 134 App. Div. 736, 119 N. Y. Supp. 515—vii. 614(e), 695(d).

- Roder, Succession of, 46 So. 697, 121 La. 692, 15 Ann. Cas. 526—vii. 3737 (i), 3755(g).
- Rodgers v. Pacific Coast Casualty Co. (Cal.) 164 Pac. 1115—vii. 3329(e).
- Rodier v. Life Ins. Co. of Virginia, 32 App. D. C. 159—vi. 2142(h).
- Roe v. National Life Ins. Ass'n, 137 Iowa, 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144—vi. 2012(f), 2098(b); vii. 2561(b), 2758(c).
- Roedel v. John Hancock Mut. Life Ins. Co., 176 Mo. App. 584, 160 S. W. 44—vi. 2096(a), 2126(b), 2185(d), 2186(e).
- Roeh v. Business Men's Protective Ass'n, 164 Iowa, 199, 145 N. W. 479, 51 L. R. A. (N. S.) 221, Ann. Cas. 1915C, 813—vii. 3172(g), 3174(g).
- Rogers v. American Nat. Ins. Co., 89 S. E. 700, 145 Ga. 570—vi. 441 (c), 2308(d), 2432(e).
- v. Connecticut Fire Ins. Co., 157 Mo. App. 671, 139 S. W. 265—vii. 2646(o), 2683(b), 2690(d), 3046(a), 3057(b), 3887(c).
- v. Home Ins. Co., 155 Mo. App. 276, 136 S. W. 743—vi. 1832(a); vii. 2464(b), 2646(o), 2665(c), 2670 (e).
- v. Modern Brotherhood of America, 131 Mo. App. 353, 111 S. W. 518—vi. 629(a), 632(c); vii. 3175 (h), 3302(f).
- v. Rollins, 185 Ill. App. 153—vii. 3718(n).
- v. Shawnee Fire Ins. Co., 111 S. W. 592, 593, 132 Mo. App. 275—vi. 5(a), 85(a).
- v. Western Indemnity Co., 173 S. W. 1087, 189 Mo. App. 82—vii. 3330(a), 3576(d).
- Rohloff v. Aid Ass'n for Lutherans in Wisconsin, 109 N. W. 989, 130 Wis. 61—vii. 3261(n), 3264(o), 3265(o), 3956 (a).
- Rolfe v. Patrons' Androscoggin Mut. Fire Ins. Co., 105 Me. 58, 72 Atl. 732—vii. 3657(p).
- 106 Me. 345, 76 Atl. 879—vi. 529(j).
- Roloff v. Farmers' Home Mut. Ins. Co., 130 Wis. 402, 110 N. W. 261—vi. 1362 (j).
- Romano v. Concordia Fire Ins. Co., 106 N. Y. Supp. 63, 121 App. Div. 489—vi. 525(i), 786(a); vii. 2490(l).
- Romayne v. Hawkeye Commercial Men's Ass'n (Iowa) 135 N. W. 735—vii. 3184(b).
- Rome Industrial Ins. Co. v. Eidson, 138 Ga. 592, 75 S. E. 657—vi. 2400(d); vii. 2499(a), 2509(e).
- 142 Ga. 253, 82 S. E. 641—vi. 2398(c), 2428(c), 2430(d).
- Rome Ins. Co. v. Thomas, 75 S. E. 894, 11 Ga. App. 539—vii. 2625(a).
- Rondinella v. Metropolitan Life Ins. Co., 30 Pa. Super. Ct. 223—vii. 3470(b).
- Root v. London Guarantee & Accident Co., 86 N. Y. Supp. 1055, 92 App. Div. 578, 15 N. Y. Ann. Cas. 100—vii. 3185(c), 3381 (a), 3450(g).
- 180 N. Y. 527, 72 N. E. 1150—vii. 3185(c), 3381(a), 3450(g).
- Roper v. Nat. Fire Ins. Co., 76 S. E. 869, 161 N. C. 151—vi. 1337(f), 1402 (e), 1448(j), 1526(d), 1747(a), 1779(j); vii. 2529(g), 2650(r), 3702(g).
- Rosater v. Peoria Life Ass'n, 149 Ill. 536—vii. 2606(f).
- Rose v. Commonwealth Beneficial Ass'n, 4 Boyce (Del.) 144, 86 Atl. 673—vii. 3137(c).
- v. Franklin Life Ins. Co., 153 Mo. App. 90, 132 S. W. 613—vi. 2410 (g), 2432(e).
- v. Missouri State Life Ins. Co., 165 Mo. App. 646, 148 S. W. 181—vi. 2410(g).
- v. Mutual Life Ins. Co., 240 Ill. 45, 88 N. E. 204—vi. 449(d), 643 (j), 658(g), 846(g), 994(c), 2259 (a), 2277(k), 2290(c), 2302(a).
- 144 Ill. App. 434—vi. 643(j), 658 (g), 846(g), 994(c), 2302(a).
- Roseberry v. American Benev. Ass'n, 142 Mo. App. 552, 121 S. W. 785—vi. 632(c), 633(c), 636(e); vii. 3306(h), 3311 (i), 3462(d).
- Rosen v. German Alliance Ins. Co., 106 Me. 229, 76 Atl. 688—vii. 2792(c), 2803 (l), 2811(n).
- Rosenberg v. People's Surety Co., 125 N. Y. Supp. 257, 140 App. Div. 436—vi. 1822(e).
- Rosenbloom v. Maryland Casualty Co., 137 N. Y. Supp. 1064, 153 App. Div. 23—vii. 2768(d).
- Rosenborg v. Johnson, 45 Colo. 53, 99 Pac. 315—vi. 484(j).
- Rosenfeld v. Boston Mut. Life Ins. Co., 110 N. E. 304, 222 Mass. 284—vi. 993(b), 1038(a).
- v. Travelers' Ins. Co., 161 N. Y. Supp. 12, 96 Misc. Rep. 672—vii. 3163(c).
- Rosenstein v. Court of Honor, 142 N. W. 331, 122 Minn. 310—vii. 3516(c), 3969(f).
- v. Traders' Ins. Co., 102 App. Div. 147, 92 N. Y. Supp. 326—vi. 1743(h).
- Rosenthal v. American Bonding Co. of Baltimore (Sup.) 124 N. Y. Supp. 905—vi. 635(d); vii. 3033(i).
- 143 App. Div. 362, 128 N. Y. Supp. 553—vii. 3033(i).
- 207 N. Y. 162, 100 N. E. 716, 46 L. R. A. (N. S.) 561—vii. 3033(i).
- v. Insurance Co. of North America, 149 N. W. 155, 158 Wis. 550, L. R. A. 1915B, 361, Ann. Cas. 1916E, 395—vi. 632(c), 733(b).

- Rosenthal v. Supreme Ruling of Fraternal Mystic Circle, 152 N. W. 404, 129 Minn. 214—vi. 2425(a).
- Rosman v. Travelers' Ins. Co., 96 Atl. 875, 127 Md. 689—vii. 3755(g).
- Ross v. Erickson Const. Co., 89 Wash. 634, 155 Pac. 153, L. R. A. 1916F, 319—vii. 3297(e).
- v. Liverpool & London & Globe Ins. Co., 83 N. J. Law, 340, 84 Atl. 1050—vii. 3028(g).
- v. Phenix Ins. Co., 114 Pac. 1054, 84 Kan. 572—vii. 3528(h), 3654(p).
- v. Rogers, 96 Ark. 154, 131 S. W. 336—vii. 3756(q), 3774(s).
- Ross & Co. v. German Alliance Ins. Co., 86 Kan. 145, 119 Pac. 366, Ann. Cas. 1913B, 1045—vii. 3651(m).
- 86 Kan. 352, 119 Pac. 1126—vii. 3651(m).
- Rostetter v. American Ins. Co., 184 Ill. App. 157—vi. 1763(g); vii. 3561(d).
- Roth v. Massachusetts Bonding & Ins. Co., 149 N. W. 143, 158 Wis. 469—vii. 3337(d).
- v. Mutual Reserve Life Ins. Co., 162 Fed. 282, 89 C. C. A. 262—vii. 2748(g), 2834(d).
- v. Travelers' Protective Ass'n, 102 Tex. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97—vi. 701(g) 2368(l), 2400(d).
- Roth Tool Co. v. New Amsterdam Casualty Co., 161 Fed. 709, 88 C. C. A. 569—vii. 3315(a), 3332(a).
- Rouleau v. Continental Life Ins. & Inv. Co., 45 Utah, 234, 144 Pac. 1096—vi. 2308(d), 2432(e).
- Roulo v. Schiller Bund, 172 Mich. 557, 138 N. W. 244—vi. 701(g), 2338(b).
- Rounsville v. North Carolina Home Fire Ins. Co., 138 N. C. 191, 50 S. E. 619—vi. 389(o).
- Rousseau v. Brotherhood of American Yeomen, 152 N. W. 939, 186 Mich. 101—vi. 2428(c).
- Rovinsky v. Northern Assur. Co., 60 Atl. 1025, 100 Me. 112—vii. 3423(h), 3424(i).
- Rowe v. United States Industrial Life Ins. Co., 72 S. E. 1018, 90 S. C. 168—vi. 693(c); vii. 2779(f).
- Rowland v. Home Ins. Co., 82 Kan. 220, 108 Pac. 118, 136 Am. St. Rep. 104—vi. 1775(h).
- Royal Arcanum v. Riley, 143 Ga. 75, 84 S. E. 428—vii. 3868(c).
- v. Vitzthum, 128 Md. 523, 97 Atl. 923, L. R. A. 1917A, 179—vi. 712(l), 713(m).
- Royal Benefit Society v. Naylor, 14 Ga. App. 202, 80 S. E. 545—vi. 2400(d).
- Royal Casualty Co. v. Nelson (Tex. Civ. App.) 153 S. W. 674—vii. 3174(g), 3185(c), 3442(a), 3458(b).
- Royal Circle of Friends of the World v. Paine, 103 Ark. 171, 146 S. W. 142—vi. 2368(l), 2387(t), 2432(e).
- Royal Exch. Assur. v. Gilmore, 89 S. E. 1047, 18 Ga. App. 515—vi. 1829(g).
- v. Graham & Morton Transp. Co., 166 Fed. 32, 92 C. C. A. 66—vi. 639(h), 642(i); vii. 2929(a), 2930(a), 2933(c), 2941(g), 2944(g), 2945(h), 2952(b), 3569(e).
- v. Rosborough (Tex. Civ. App.) 142 S. W. 70—vi. 1824(e).
- v. Thrower (D. C.) 240 Fed. 811—vi. 632(c), 1499(i), 1607(d); vii. 3076(k).
- Royal Fraternal Union v. Lunday, 51 Tex. Civ. App. 637, 113 S. W. 185—vi. 2393(a); vii. 2830(b).
- v. Stahl (Tex. Civ. App.) 126 S. W. 920—vi. 2375(o).
- Royal Indemnity Co. v. Schwartz (Tex. Civ. App.) 172 S. W. 581—vii. 3329(e), 3343(g).
- Royal Ins. Co. v. Caledonian Ins. Co. of Edinburgh, Scotland, 20 Cal. App. 504, 129 Pac. 597—vii. 3934(b), 3941(c).
- v. Kline Bros. & Co., 198 Fed. 468, 117 C. C. A. 228—vi. 1829(g).
- v. Miller, 26 Sup. Ct. 46, 199 U. S. 353, 50 L. Ed. 226—vi. 733(b); vii. 3711(j).
- v. Morgan, 122 Ark. 243, 183 S. W. 198—vi. 1821(d), 1823(e); vii. 2476(b).
- v. Okasaki (Tex. Civ. App.) 177 S. W. 200—vi. 628(a), 1828(f), 1829(g).
- v. O. L. Walker Lumber Co., 23 Wyo. 264, 148 Pac. 340—vi. 397(d), 422(f), 632(c), 1717(b).
- 24 Wyo. 59, 155 Pac. 1101, Ann. Cas. 1917E, 1174—vi. 397(d), 422(f), 632(c), 1717(b).
- v. Ries, 88 N. E. 638, 80 Ohio St. 272—vii. 3648(l).
- v. Scritchfield (Okla.) 152 Pac. 97—vi. 1821(d); vii. 3412(a), 3431(m).
- v. Texas & G. Ry. Co., 53 Tex. Civ. App. 154, 115 S. W. 117—vi. 632(c), 736(b).
- v. W. P. Wright & Co. (Tex. Civ. App.) 148 S. W. 824—vi. 220(c), 1820(d).
- Royal League v. Kasey, 144 Ill. App. 1—vii. 3748(n).
- v. Kolin, 169 Ill. App. 646—vi. 533(i), 698(f), 709(k), 817(m); vii. 3750(n).
- Royal League v. Shields, 96 N. E. 45, 251 Ill. 250, 36 L. R. A. (N. S.) 208—vi. 65(k), 813(k); vii. 3748(n), 3766(r).
- 159 Ill. App. 54—vi. 800(c), 805(f); vii. 3722(b), 3776(t).

- Royall v. Hartford Fire Ins. Co., 158 Ill. App. 463—vii. 3112(f).
- Royal Neighbors of America v. Bratcher (Tex. Civ. App.) 151 S. W. 885—vi. 2101(d), 2113(k).
- v. Hayes, 150 S. W. 845, 150 Ky. 626—vi. 578(h).
- v. Laufman, 164 S. W. 966, 158 Ky. 358—vi. 2432(e).
- v. Sinon, 135 Ill. App. 599—vi. 1966 (b).
- v. Spore, 169 S. W. 984, 160 Ky. 572—vi. 1048(h), 1978(i).
- v. Wallace, 5 Neb. (Unof.) 519, 99 N. W. 256—vi. 1953(c), 1958 (h), 2108(h).
- 73 Neb. 409, 102 N. W. 1020—vi. 1953(c), 1958(h), 2108(h).
- Royal Union Mut. Life Ins. Co. v. McLendon, 4 Ga. App. 620, 62 S. E. 101—vi. 632(c).
- v. Wynn (C. C.) 177 Fed. 289—vi. 649(a), 1991(g), 2051(a), 2185 (d).
- Royle Min. Co. v. Fidelity & Casualty Co., 126 Mo. App. 104, 103 S. W. 1098—vi. 545(b); vii. 2768(d), 3319(a).
- 161 Mo. App. 185, 142 S. W. 438—vii. 2768(d), 2769(a), 3332(a), 3561(d).
- Ruane v. Manhattan Life Ins. Co., 194 Mo. App. 214, 186 S. W. 1188—vi. 2411(g); vii. 3287(f).
- Rubenstein v. Dixie Fire Ins. Co., 51 Pa. Super. Ct. 447—vii. 3600(b).
- Rudd v. American Guarantee Fund Mut. Fire Ins. Co., 120 Mo. App. 1, 96 S. W. 237—vii. 2467(c), 2504 (c), 2644(m), 2742(c).
- v. Great Eastern Casualty & Indemnity Co., 131 N. W. 633, 114 Minn. 512, 34 L. R. A. (N. S.) 1205. Ann. Cas. 1912C, 606—vii. 3163(c).
- Ruder v. National Council, Knights and Ladies of Security, 145 N. W. 118, 124 Minn. 431—vi. 706(h), 2433(f).
- Rudolph v. United States, 36 App. D. C. 379—vii. 3225(a).
- Ruffner Bros. v. Dutchess Ins. Co., 53 S. E. 943, 59 W. Va. 432, 115 Am. St. Rep. 924, 8 Ann. Cas. 866—vi. 1820 (d), 1821(d); vii. 2660(b), 2681(h).
- Rumsey v. New York Life Ins. Co., 59 Colo. 71, 147 Pac. 337—vii. 3769(s).
- Runbeck v. Farmers' & Bankers' Life Ins. Co., 150 Pac. 586, 96 Kan. 186—vii. 2715(h), 3934(b).
- Rundell & Hough v. Anchor Fire Ins. Co., 105 N. W. 112, 128 Iowa. 575, 25 L. R. A. (N. S.) 20—vii. 2668(d), 2733 (a).
- Runyan v. Runyan, 101 Ark. 353, 142 S. W. 519—vi. 702(g), vii. 3749(n).
- Rupert v. Supreme Court of United Order of Foresters, 102 N. W. 715, 94 Minn. 293—vi. 629(a), 1946(j), 1950 (a), 1953(c), 2108(h), 2113(k), 2159 (c).
- Rupp v. Western Life Indemnity Co., 138 Ky. 18, 127 S. W. 490, 29 L. R. A. (N. S.) 675—vi. 247(b), 253(f), 257 (g).
- Rush v. Boston Ins. Co., 88 Misc. Rep. 48, 150 N. Y. Supp. 457—vii. 3033(i), 3042(c).
- v. Howkins, 135 Ga. 128, 68 S. E. 1035—vi. 297(o).
- Rushing v. Manhattan Life Ins. Co. of New York, 224 Fed. 74, 139 C. C. A. 520—vi. 843(g).
- Russell v. Fraternities Health & Acc. Ass'n, 113 Me. 559, 92 Atl. 820—vii. 3312(i).
- v. German Fire Ins. Co., 111 N. W. 400, 100 Minn. 528, 10 L. R. A. (N. S.) 326—vii. 3018(e), 3034 (j), 3042(c).
- v. Grigsby, 168 Fed. 577, 94 C. C. A. 61—vi. 271(j), 566(j), 653(c), 1079(a), 1081(b), 1092(f); vii. 2464(b), 3804(h).
- v. O'Connor, 120 Minn. 66, 139 N. W. 148—vi. 340(f).
- v. O'Donoghue (C. C.) 178 Fed. 106—vi. 1013(a).
- v. Oxford County Patrons of Husbandry, Mut. Fire Ins. Co., 107 Me. 362, 78 Atl. 459—vi. 664(b), 693(c), 1541(f), 1871(b), 1877(e).
- Rustin v. Aetna Life Ins. Co. of Hartford, Conn., 98 Neb. 426, 153 N. W. 548—vi. 2411(g).
- Rust Lumber Co. v. General Accident, Fire & Life Assur. Corp., 64 South. 122, 134 La. 309—vii. 3316(a).
- Ruterbusch v. Supreme Court, I. O. F., 162 Mich. 213, 127 N. W. 288—vii. 3257(m), 3685(d).
- Rutherford v. Prudential Ins. Co., 73 N. E. 202, 34 Ind. App. 531—vi. 2330(g); vii. 2708(c), 3531(a), 3966(c).
- Ruth v. Flynn, 26 Colo. App. 171, 142 Pac. 194—vi. 316(f); vii. 3731(e).
- Ryan v. Agricultural Ins. Co., 73 N. E. 849, 188 Mass. 11—vi. 193(e).
- v. Boston Letter Carriers' Mut. Ben. Ass'n, 110 N. E. 281, 222 Mass. 237, L. R. A. 1916C, 1130—vii. 3775(t).
- v. Continental Casualty Co., 94 Neb. 35, 142 N. W. 288, 48 L. R. A. (N. S.) 524. Ann. Cas. 1914C, 1234—vii. 3303(g).
- v. Firemen's Mut. Benev. Ass'n No. 1, 77 N. J. Law. 399, 72 Atl. 53—vi. 803(e), 1082(c).
- v. Knights of Columbus, 82 Conn. 91, 72 Atl. 574—vi. 120(d), 697 (e), 698(f), 702(g).
- v. Metropolitan Life Ins. Co., 93 S. W. 347, 117 Mo. App. 688—vi. 290(k), 325(f).
- v. Prudential Ins. Co., 33 Pa. Super. Ct. 364—vii. 2717(h).
- Ryder-Gougar Co. v. Garretson, 53 Wash. 71, 101 Pac. 498, 132 Am. St. Rep. 1053—vii. 2801(h), 2808(j).

- Rye v. New York Life Ins. Co., 88 Neb. 707, 130 N. W. 434—vi. 637(f), 2290(c), 2411(g).
 Ryer v. Prudential Ins. Co., 82 N. Y. Supp. 971, 85 App. Div. 7—vii. 3556(a).
 95 N. Y. Supp. 1158, 110 App. Div. 897—vii. 3556(a).
 185 N. Y. 6, 77 N. E. 727—vii. 3556(a).
 Rylander v. Allen, 125 Ga. 206, 53 S. E. 1032, 6 L. R. A. (N. S.) 128, 5 Ann. Cas. 355—vi. 268(g), 273(o).

S

- Sachs v. Maryland Casualty Co., 156 N. Y. Supp. 419, 170 App. Div. 494—vii. 3331(a).
 Sage v. Finney, 156 Mo. App. 30, 135 S. W. 996—vi. 249(c), 251(e), 253(f), 257(g), 300(c), 691(a).
 St. Francis Box & Lumber Co. v. E. F. Perry & Co., 125 Ark. 413, 189 S. W. 47—vi. 561(c).
 St. Landry Wholesale Mercantile Co. v. New Hampshire Fire Ins. Co., 38 South. 87, 114 La. 146, 3 Ann. Cas. 821—vi. 1154(a), 1819(d), 1909(m).
 v. Springfield Fire & Marine Ins. Co., 114 La. 1, 37 South. 988—vi. 1828(f); vii. 3481(c), 3491(c), 3531(a), 3559(c).
 v. Teutonia Ins. Co. of New Orleans, 113 La. 1053, 1054, 37 South. 967—vi. 1828(f); vii. 3481(c), 3491(c), 3531(a), 3559(c).
 St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co., 26 Sup. Ct. 400, 201 U. S. 173, 50 L. Ed. 712—vii. 3334(b).
 St. Louis Police Relief Ass'n v. American Bonding Co., 197 Mo. App. 430, 196 S. W. 1148—vi. 10(g), 2439(c), 2451(c); vii. 2764(a).
 St. Paul Fire & Marine Ins. Co. v. Balfour, 168 Fed. 212, 93-C. C. A. 498—vi. 1253(p).
 v. Beacham, 97 Atl. 708, 128 Md. 414, L. R. A. 1916F, 1168—vii. 2920(a), 2941(g), 2969(a).
 v. Cooper, 25 Okl. 38, 105 Pac. 198—vii. 2699(b), 2722(k).
 v. Cronin, 62 Tex. Civ. App. 440, 131 S. W. 649—vii. 2777(e).
 v. Garnier (Tex. Civ. App.) 196 S. W. 980—vi. 1204(a), 1316(f), 1984(a).
 v. Griffin, 33 Okl. 178, 124 Pac. 300—vii. 3550(c).
 v. Huff (Tex. Civ. App.) 172 S. W. 755—vi. 1161(e), 1797(a), 1978(i).
 v. Kendle, 163 Ky. 146, 173 S. W. 373—vi. 1807(h), 1810(k).

- St. Paul Fire & Marine Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 164 S. W. 1186—vii. 2741(b), 3606(e), 3627(s), 3655(p), 3661(b), 3887(c).
 v. Laster (Tex. Civ. App.) 187 S. W. 969—vii. 3120(b).
 v. McQuary (Tex. Civ. App.) 194 S. W. 491—vi. 163(h).
 v. Mittendorf, 24 Okl. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651—vi. 1174(a); vii. 3382(b), 3383(b), 3562(d).
 v. Mountain Park Stock Farm Co., 99 Pac. 647, 23 Okl. 79—vii. 3490(c).
 v. Pacific Cold Storage Co., 157 Fed. 625, 87 C. C. A. 14, 14 L. R. A. (N. S.) 1161—vii. 2898(b), 2964(j), 2991(h), 3590(e), 3946(a).
 v. Peck, 37 Okl. 85, 130 Pac. 805—vi. 1765(a); vii. 2653(b), 2801(h), 3890(d).
 40 Okl. 396, 139 Pac. 117—vii. 2801(h), 3890(d).
 v. Penman, 81 C. C. A. 151, 151 Fed. 961—vi. 1693(c); vii. 2537(k), 2653(t).
 v. Stogner, 44 Tex. Civ. App. 60, 98 S. W. 218—vi. 607(a); vii. 2524(c).
 v. Womack, 122 Ark. 396, 183 S. W. 203—vii. 3889(c), 3955(a).
 Salene v. Queen City Ins. Co., 59 Or. 297, 116 Pac. 1114, 35 L. R. A. (N. S.) 438, Ann. Cas. 1916D, 1276—vi. 352(f).
 Salig v. United States Life Ins. Co., 84 Ala. 826, 236 Pa. 460—vi. 2276(i).
 Salmon v. Farm Property Mut. Ins. Ass'n, 168 Iowa, 521, 150 N. W. 680—vi. 878(s), 1877(e); vii. 3955(a), 3959(b).
 Salomon v. North British & Mercantile Ins. Co., 135 N. Y. Supp. 806, 150 App. Div. 728—vi. 864(g); vii. 3353(c), 3972(f).
 215 N. Y. 214, 109 N. E. 121, L. R. A. 1917C, 106—vi. 864(g).
 Salts v. Prudential Ins. Co., 140 Mo. App. 142, 120 S. W. 714—vi. 1932(a), 1951(b), 2098(b), 2185(d); vii. 3133(b).
 Salvin v. Salvin, 165 App. Div. 362, 366, 151 N. Y. Supp. 60, 63—vii. 3736(h).
 Salzano v. Marine Ins. Co., 159 N. Y. Supp. 277, 173 App. Div. 275—vi. 683(l); vii. 2531(i).
 Salzman v. Machinery Mut. Ins. Ass'n, 142 Iowa, 99, 120 N. W. 697—vi. 67(l), 1158(d), 1176(b); vii. 2521(c), 2531(i).
 Samberg v. Knights of Modern Macabees, 158 Mich. 568, 123 N. W. 25, 133 Am. St. Rep. 396—vi. 706(h); vii. 3129(a).
 Sammons v. American Home Fire Ins. Co., 94 S. C. 366, 77 S. E. 1108, Ann. Cas. 1915B, 1095—vi. 171(c).
 Sammons & Bishop v. American Fire Ins. Co., 77 S. E. 1108, 94 S. C. 366, Ann. Cas. 1915B, 1095—vii. 3068(e).

- Samuels v. Life Ass'n of America, 152 Ill. App. 245—vi. 1953(c).
- Sanders v. Grand Lodge, A. O. U. W., 153 Ill. App. 7—vi. 812(j); vii. 3748(n).
- Sandoval Zinc Co. v. New Amsterdam Casualty Co., 85 N. E. 219, 235 Ill. 306—vii. 2777(e).
- 140 Ill. App. 247—vii. 2777(e).
- San Francisco Sav. Union v. Western Assur. Co. (C. C.) 157 Fed. 695—vii. 3403(a).
- Sanson's Estate, In re, 217 Pa. 203, 66 Atl. 334—vii. 3802(g).
- Saratoga Trap Rock Co. v. Standard Accident Ins. Co., 143 App. Div. 852, 128 N. Y. Supp. 822—vii. 3334(b).
- Sargent v. Hancock Mut. Life Ins. Co., 49 Pa. Super. Ct. 239—vii. 3775(t).
- v. Modern Brotherhood of America, 148 Iowa, 600, 127 N. W. 52—vi. 1940(f), 1949(l), 1951(b), 1952(c), 1969(f), 1997(j), 2096(a), 2113(k), 2163(e), 2183(b), 2561(b), 2562(b), 2758(c).
- Sargent Mfg. Co. v. Travelers' Ins. Co., 165 Mich. 87, 130 N. W. 211, 34 L. R. A. (N. S.) 491—vii. 2768(d).
- Sasse v. Order of United Commercial Travelers of America, 154 N. Y. S. 558, 168 App. Div. 746—vi. 638(g).
- Satterfield v. Fidelity Mut. Life Ins. Co., 171 Ala. 429, 55 South. 200—vi. 677(a), 688(f), 2269(f).
- Satterlee v. Modern Brotherhood, 15 N. D. 92, 106 N. W. 561—vi. 1954(d), 1990(g), 2096(a).
- Saucerman v. Court of Honor, 150 Ill. App. 550—vi. 68(m); vii. 2496(o), 2715(h), 2719(i).
- Sauerbrunn v. Hartford Life Ins. Co., 143 N. Y. Supp. 1009, 159 App. Div. 121—vi. 1020(c).
- 220 N. Y. 363, 115 N. E. 1001—vi. 52(c).
- Sauerwein v. Grand Lodge of Order of Sons of Hermann, 121 Minn. 229, 141 N. W. 174—vii. 2495(o), 2713(f), 2779(f).
- Saul v. Supreme Court of Daughters of Columbia, 172 Ill. App. 272—vii. 3548(b).
- Sauthof v. American Cent. Ins. Co., 34 R. I. 324, 83 Atl. 441—vii. 3652(m).
- Sautter v. Supreme Conclave Improved Order of Heptasophs, 62 Atl. 529, 72 N. J. Law, 325—vi. 717(n); vii. 3236(c).
- 74 N. J. Law, 608, 65 Atl. 990—vi. 717(n); vii. 3236(c).
- 76 N. J. Law, 763, 71 Atl. 232—vi. 717(n); vii. 3236(c).
- Savage v. Modern Woodmen of America, 84 Kan. 63, 113 Pac. 802, 33 L. R. A. (N. S.) 773—vii. 3765(r).
- Sawyer v. Masonic Protective Ass'n, 73 Atl. 168, 75 N. H. 276—vii. 3294(c).
- Scales v. National Life & Acc. Ins. Co. (Mo. App.) 186 S. W. 948—vii. 3181(b), 3237(d), 3303(g).
- Scarborough v. American Nat. Ins. Co. 88 S. E. 482, 171 N. C. 353, Ann. Cas. 1917D, 1181—vii. 3152(g).
- Scarlett v. National Live Stock Ins. Co. 193 Ill. App. 438—vii. 2521(c), 2567(d), 3352(b).
- Scarritt Estate Co. v. Casualty Co. of America, 149 S. W. 1049, 166 Mo. App. 567—vi. 846(i); vii. 2621(a), 2767(d), 3313(a).
- Schack v. Supreme Lodge of Fraternal Brotherhood, 9 Cal. App. 584, 99 Pac. 989—vi. 697(e), 698(f), 706(h), 715(n); vii. 3247(h).
- Schambelan v. Preferred Accident Ins. Co., 62 Pa. Super. Ct. 445—vii. 3532(g).
- Scharles v. N. Hubbard, Jr. & Co., 131 N. Y. Supp. 848, 74 Misc. Rep. 72—vi. 336(c), 341(g), 529(j), 642(i), 1445(f).
- Schas v. Equitable Life Assur. Society 170 N. C. 420, 87 S. E. 222, Ann. Cas. 1918A, 679—vi. 2112(j).
- v. Equitable Life Ins. Co., 81 S. E. 1014, 166 N. C. 55—vi. 688(f), 1953(c), 2156(a).
- Scheel v. German-American Ins. Co., 76 Atl. 507, 228 Pa. 44—vi. 85(a), 837(c); vii. 2791(b), 2807(k), 2808(l), 2809(l).
- Scheeler v. Casualty Co. of America (Sup.) 137 N. Y. Supp. 811—vii. 2499(a); 2668(d), 3510(a).
- Scheiber v. Protected Home Circle, 146 Ill. App. 574—vi. 1030(f), 2336(a), 2380(q), 2398(c).
- Scheuerman v. Mathison, 74 Or. 40, 144 Pac. 1177—vi. 795(h).
- Schiavoni v. Dubuque Fire & Marine Ins. Co., 48 Pa. Super. Ct. 252—vi. 1375(e); vii. 2631(d).
- Schiller-Bund v. Knack, 184 Mich. 95, 150 N. W. 337—vii. 3765(r).
- Schindler v. United States Fidelity & Guaranty Co., 109 N. Y. Supp. 723, 58 Misc. Rep. 532—vii. 3042(c).
- Schmedding v. Northern Assur. Co., 170 Mich. 528, 136 N. W. 361—vi. 1869(a).
- Schmid v. Heath, 173 Ill. App. 649—vii. 3033(i).
- v. Indiana Travelers' Acc. Ass'n, 42 Ind. App. 483, 85 N. E. 1032—vii. 3156(a), 3157(a).
- Schmidt v. Hauer, 139 Iowa, 531, 111 N. W. 966—vii. 3736(h).
- v. National Council of Knights and Ladies of Security, 176 Ill. App. 213—vi. 1978(i), 2179(f).
- v. Supreme Court, United Order of Foresters, 228 Mo. 675, 129 S. W. 653—vi. 2171(a); vii. 3237(d), 3239(d).
- 259 Mo. 491, 168 S. W. 626—vii. 3239(d).
- 191 Mo. App. 415, 177 S. W. 706—vii. 3239(d).

- Schmidt v. United Order of Foresters, 101 S. W. 625, 124 Mo. App. 165—vi. 2171(a); vii. 3237(d), 3239(d).
- v. Williamsburgh City Fire Ins. Co., 95 Neb. 43, 144 N. W. 1044, 51 L. R. A. (N. S.) 261—vi. 1045(g); vii. 2521(c), 2746(e).
- 98 Neb. 61, 151 N. W. 920—vi. 1663(e); vii. 3046(a), 3409(d).
- Schmidt & Sons Brewing Co. v. Travelers' Ins. Co., 90 Atl. 653, 244 Pa. 286, 52 L. R. A. (N. S.) 126—vii. 3330(a).
- Schmierer v. Mutual Reserve Fund Life Ass'n, 153 Cal. 208, 94 Pac. 887, 16 L. R. A. (N. S.) 1047—vi. 1021(b).
- Schmitt v. Michigan Mut. Life Ins. Co., 91 N. Y. Supp. 448, 101 App. Div. 12—vi. 2144(j), 2179(f).
- Schmohl v. Travelers' Ins. Co. (Mo. App.) 177 S. W. 1108—vi. 644(1); vii. 3163(c).
- (Mo. App.) 189 S. W. 597—vi. 632(c); vii. 3163(c), 3174(g).
- Schneider v. Modern Woodmen of America, 148 N. W. 334, 96 Neb. 545—vii. 3781(u).
- Schneps v. Fidelity & Casualty Co. (Sup.) 101 N. Y. Supp. 106—vii. 3293(c).
- Schoeller v. Grand Lodge A. O. U. W., 110 App. Div. 456, 96 N. Y. Supp. 1088—vi. 2368(1); vii. 2467(c), 2673(f).
- Schoenich v. American Ins. Co., 124 N. W. 5, 109 Minn. 388—vii. 3641(i), 3648(1), 3657(p).
- Schofield v. Turner, 62 Atl. 1068, 213 Pa. 548—vi. 981(d).
- 28 Pa. Super. Ct. 177—vi. 981(d).
- Schofield's Adm'x v. Metropolitan Life Ins. Co., 64 Atl. 1107, 79 Vt. 161, 8 Ann. Cas. 1152—vi. 1934(c), 1969(f), 2110(i), 2142(h), 2159(c).
- Schon v. Modern Woodmen of America, 99 Pac. 25, 51 Wash. 482—vi. 2055(d), 2232(b), 2256(c).
- Schornak v. St. Paul Fire & Marine Ins. Co., 104 N. W. 1087, 96 Minn. 299—vii. 3039(b), 3042(c).
- Schrader v. Modern Brotherhood of America, 90 Neb. 683, 134 N. W. 267—vii. 3257(m), 3263(o).
- Schroeder v. Jarmulowsky (Sup.) 139 N. Y. Supp. 45—vi. 919(c).
- Schuler v. Metropolitan Life Ins. Co., 191 Mo. App. 52, 176 S. W. 274—vi. 658(g), 686(e); vii. 2521(c), 2782(g).
- Schultz v. Des Moines Mut. Hail & Cyclone Ins. Ass'n, 153 N. W. 884, 35 S. D. 627, Ann. Cas. 1917D, 78—vi. 692(b), 1541(f); vii. 2476(b).
- Schumacher v. Great Eastern Casualty & Indemnity Co., 132 App. Div. 929, 117 N. Y. Supp. 1146—vi. 632(c); vii. 3200(h).
- 197 N. Y. 58, 90 N. E. 353, 27 L. R. A. (N. S.) 480—vi. 632(c); vii. 3200(h).
- Schuster v. Knights and Ladies of Security, 60 Wash. 42, 110 Pac. 680, 140 Am. St. Rep. 905—vi. 2373(n), 2395(b); vii. 2715(h).
- Schutte v. Kibler, 55 Pa. Super. Ct. 199—vi. 2214(f).
- Schwanekamp v. Modern Woodmen of America, 44 Mont. 526, 120 Pac. 806—vi. 545(b), 2212(e), 2245(g), 2252(a).
- Schwartz v. Metropolitan Surety Co. (Sup.) 113 N. Y. Supp. 66—vi. 1822(e).
- v. Murphysboro Mutual County Fire Ins. Co., 161 Ill. App. 254—vi. 2277(k).
- v. Royal Neighbors of America, 108 Pac. 51, 12 Cal. App. 595—vi. 2127(c), 2142(h); vii. 2562(b), 2569(e).
- v. St. Elizabeth Roman & Greek Catholic Union, 29 Ohio Cir. Ct. R. 471—vi. 2245(g).
- Schwerdt v. Schwerdt, 235 Ill. 386, 85 N. E. 613—vi. 288(h).
- Schworm v. Fraternal Bankers' Reserve Society, 168 Iowa, 579, 150 N. W. 714, Ann. Cas. 1917B, 373—vi. 434(1); vii. 2768(a).
- Scott v. Dixie Fire Ins. Co., 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. (N. S.) 152—vi. 148(c), 150(e), 154(i), 175(g), 1380(i).
- v. Homesteaders, The, 149 Iowa, 541, 129 N. W. 310—vii. 3257(m), 3263(o).
- v. Liverpool & London & Globe Ins. Co., 102 S. C. 115, 86 S. E. 484—vi. 150(e), 1331(c); vii. 2690(d).
- v. Mutual Reserve Fund Life Ass'n, 50 S. E. 221, 137 N. C. 515—vi. 1054(d).
- v. Pennsylvania Casualty Co., 87 Atl. 963, 240 Pa. 341—vii. 3173(g), 3181(b).
- v. Sovereign Camp of Woodmen of the World, 149 Iowa, 562, 129 N. W. 302—vii. 3257(m), 3262(n), 3265(o).
- Scott & Callaway v. Dixie Ins. Co., 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. (N. S.) 152—vii. 3537(d).
- Scottish Fire Ins. Co. v. Stuyvesant Ins. Co., 161 N. C. 485, 76 S. E. 728—vii. 2665(c).
- Scottish National Ins. Co. v. Adams, 122 Ill. App. 471—vi. 1176(b), 1384(a), 1385(b), 1453(p); vii. 3036(a).
- Scottish Union & Nat. Ins. Co. v. Andrews & Matthews, 40 Tex. Civ. App. 184, 89 S. W. 419—vi. 633(c), 1068(d), 1824(e), 1865(d).

- Scottish Union & Nat. Ins. Co. v. Bailey, 114 Miss. 732, 75 South. 593—vii. 2863(b).
- v. Colvard, 135 Ga. 188, 68 S. E. 1097—vii. 2741(b), 3915(j).
- v. Cornett Bros., 142 Pac. 315, 42 Okl. 645—vi. 1829(g).
- v. Encampment Smelting Co., 166 Fed. 231, 92 C. C. A. 139—vi. 1606(c); vii. 3409(d), 3504(h).
- v. Jordan, 134 Ga. 673, 68 S. E. 613—vi. 864(g).
- v. McKone, 227 Fed. 813, 142 C. C. A. 337—vi. 732(b); vii. 3526(g).
- v. Moore Mill. & Gin Co., 43 Okl. 370, 143 Pac. 12—vi. 521(f), 1818(c); vii. 3108(e), 3121(c), 3125(c).
- v. Skaggs, 114 Miss. 618, 75 South. 437—vii. 3633(c).
- v. Virginia Shirt Co., 113 Va. 353, 74 S. E. 228—vi. 1814(a), 1818(c), 1821(d), 1828(f), 1829(g).
- v. Wade, 59 Tex. Civ. App. 631, 127 S. W. 1186—vi. 1190(a), 1471(e), 1832(a).
- v. Weeks Drug Co., 55 Tex. Civ. App. 263, 118 S. W. 1086—vi. 1438(i), 1823(e), 1829(g); vii. 2735(a).
- v. Wylie, 110 Miss. 681, 70 South. 835—vii. 2555(a), 2683(b).
- Scow v. Supreme Council of Royal League, 223 Ill. 32, 79 N. E. 42—vi. 709(k), 717(n); vii. 3236(c), 3275(c).
- Scrivner v. Anchor Fire Ins. Co., 144 Iowa, 328, 122 N. W. 942—vii. 2540(m).
- Scruggs & Echols v. American Cent. Ins. Co., 176 Fed. 224, 100 C. C. A. 142—vii. 3860(h).
- Sea v. Conrad, 159 S. W. 622, 155 Ky. 51, 47 L. R. A. (N. S.) 1074, Ann. Cas. 1915C, 318—vii. 3736(h).
- Sea Ins. Co. v. Vicksburg, S. & P. Ry. Co., 159 Fed. 676, 86 C. C. A. 544, 17 L. R. A. (N. S.) 925—vii. 3893(a).
- Seaback v. Metropolitan Life Ins. Co., 113 N. E. 862, 274 Ill. 516—vi. 451(f), 1040(c), 2156(a); vii. 2460(a).
- Seaman v. Anchor Fire Ins. Co., 149 Iowa, 583, 128 N. W. 934—vi. 1650(g), 1737(e), 1893(i).
- Searcy v. Kelly (Tex. Civ. App.) 98 S. W. 1080—vii. 3790(b).
- Searles v. Northwestern Mut. Life Ins. Co., 148 Iowa, 65, 126 N. W. 801, 29 L. R. A. (N. S.) 405—vi. 1106(e); vii. 3819(c).
- v. Western Assur. Co., 40 South. 866, 88 Miss. 260, 117 Am. St. Rep. 741—vii. 2882(c), 2930(a), 2933(c), 2943(g), 2964(j).
- Seattle Merchants' Ass'n v. Germania Fire Ins. Co., 64 Wash. 115, 116 Pac. 585—vii. 3391(i), 3514(b).
- Seattle & S. F. Ry. & Nav. Co. v. Maryland Casualty Co., 96 Pac. 509, 50 Wash. 44, 18 L. R. A. (N. S.) 121—vii. 3334(b).
- Seay v. Commercial Union Assur. Co., Limited, 42 Okl. 83, 140 Pac. 1164—vii. 3966(c), 3969(f).
- v. Georgia Life Ins. Co., 179 S. W. 312, 132 Tenn. 673, Ann. Cas. 1916E, 1167—vi. 629(a); vii. 3314(a).
- Sebesta v. Supreme Court of Honor, 77 Neb. 249, 109 N. W. 166—vii. 3241(f).
- 80 Neb. 760, 115 N. W. 300—vii. 3240(e), 3265(o).
- Second Society of Universalists v. Royal Ins. Co., 109 N. E. 384, 221 Mass. 518, Ann. Cas. 1917E, 491—vii. 3597(a), 3648(l), 3657(p).
- Security Bank of Richmond v. Equitable Life Assur. Society, 71 S. E. 647, 112 Va. 462, 35 L. R. A. (N. S.) 159, Ann. Cas. 1913B, 836—vii. 3448(e), 3456(i), 3476(g).
- Security Ins. Co. v. Kelly (Tex. Civ. App.) 196 S. W. 874—vii. 3079(a), 3648(l), 3651(m), 3657(p), 3673(l).
- v. Laird, 182 Ala. 121, 62 South. 182—vi. 1779(j); vii. 2467(c), 2473(f), 2680(h), 2690(d).
- v. Slack, 183 Ill. App. 579—vii. 3079(a), 3407(c).
- Security Life Ins. Co. of America v. Allen (Tex. Civ. App.) 170 S. W. 131—vi. 1007(h), 1011(d).
- v. Booms, 159 Pac. 1000, 31 Cal. App. 119—vi. 2102(d).
- v. Dillard, 117 Va. 401, 84 S. E. 656, Ann. Cas. 1917D, 1187—vii. 3225(a), 3244(h), 3253(k).
- v. Eades' Adm'x, 153 S. W. 989, 152 Ky. 577, L. R. A. 1917D, 1198—vii. 2702(b).
- v. Stephenson (Tex. Civ. App.) 136 S. W. 1137—vi. 1004(f), 1088(a).
- Security, Life & Annuity Co. v. Costner, 149 N. C. 293, 63 S. E. 304—vi. 990(a), 1000(e), 1002(e).
- v. Underwood (Tex. Civ. App.) 150 S. W. 293—vi. 2269(f), 2277(k), 2324(n); vii. 2464(b), 2724(l), 2773(c), 2779(f).
- Security Mut. Ins. Co. v. Berry, 81 Ark. 92, 98 S. W. 693—vi. 1818(c); vii. 2634(f).
- v. Woodson, 79 Ark. 266, 95 S. W. 481, 116 Am. St. Rep. 75—vi. 1823(e), 1824(e); vii. 2555(a), 3531(a).
- Security Mut. Life Ins. Co. v. Aetna Indemnity Co., 108 N. Y. Supp. 171, 124 App. Div. 50—vii. 3338(d).
- v. Calvert (Tex. Civ. App.) 100 S. W. 1033—vi. 2142(h), 2169(i); vii. 2521(c), 2524(d), 2625(a), 2777(e), 2781(f), 3544(a).
- 101 Tex. 128, 105 S. W. 320—vi. 2142(h), 2169(i); vii. 2521(c), 2524(d), 2625(a), 2777(e), 2781(f), 3544(a).
- 39 Tex. Civ. App. 382, 87 S. W. 889—vi. 2144(j), 2169(i).

- Security Mut. Life Ins. Co. v. J. M. Schott & Sons Co., 30 Ohio Cir. Ct. R. 656—vi. 297(p).
- v. Kleutsch, 169 Fed. 104, 95 C. C. A. 432—vi. 1005(g), 2432(e).
- v. Little, 119 Ark. 498, 178 S. W. 418, L. R. A. 1917A, 475—vi. 1043(e).
- 157 Ky. 276, 162 S. W. 1131—vi. 2142(h).
- v. Miller, 75 Neb. 257, 106 N. W. 229—vi. 75(d), 610(c).
- v. Riley, 47 South. 735, 157 Ala. 553—vi. 2259(a); vii. 2478(d), 2509(e), 2606(f), 2715(h), 2719(i).
- Seely v. Manhattan Life Ins. Co., 61 Atl. 585, 73 N. H. 339—vi. 2296(f).
- v. Tioga County Patrons' Fire Relief Ass'n, 165 App. Div. 685, 151 N. Y. Supp. 126—vi. 1870(b).
- Seery v. Catholic Order of Foresters, 176 Ill. App. 307—vi. 854(a).
- Seibel v. Firemen's Ins. Co., 62 Atl. 101, 212 Pa. 604—vii. 3392(i).
- 24 Pa. Super. Ct. 154—vii. 3392(i).
- Seibert Bros. & Co. v. Germania Fire Ins. Co., 106 N. W. 507, 132 Iowa, 58—vii. 3635(d), 3657(p).
- Seidel v. Equitable Life Assur. Society, 119 N. W. 818, 138 Wis. 66—vii. 2659(a), 2709(d).
- Seitz v. Scottish Union & Nat. Ins. Co., 37 Pa. Super. Ct. 261—vi. 1337(f), 1375(e).
- Sejo Ice Cream Co., In re (D. C.) 181 Fed. 627—vii. 3714(l).
- Selman v. Manhattan Life Ins. Co. (Ga. App.) 93 S. E. 60—vi. 489(l).
- Seltz v. Scottish Union & National Ins. Co., 37 Pa. Super. Ct. 261—vii. 2490(l).
- Semancik v. Continental Casualty Co., 56 Pa. Super. Ct. 392—vii. 3157(a).
- Sergeant v. Goldsmith Dry Goods Co. (Tex. Civ. App.) 159 S. W. 1036—vi. 938(c).
- Settle v. Farmers' & Laborers' Co-operative Ins. Ass'n, 150 Mo. App. 520, 131 S. W. 136—vi. 636(e), 969(s), 1871(b), 1873(b).
- Seubert v. Fidelity-Phenix Ins. Co., 29 S. D. 261, 136 N. W. 103, 40 L. R. A. (N. S.) 58—vi. 1668(f).
- Severa v. Beranak, 138 Wis. 144, 119 N. W. 814—vii. 3735(g).
- Sevigny v. Societe St. Jean Baptiste, 90 Atl. 744, 36 R. I. 374—vi. 2338(b).
- Sewell v. Continental Casualty Co., 46 South. 714, 92 Miss. 857—vi. 2259(a).
- v. Home Ins. Co., 131 App. Div. 131, 115 N. Y. Supp. 345—vi. 1724(e).
- Sexton v. Greensboro Life Ins. Co., 72 S. E. 863, 157 N. C. 142—vi. 2271(g), 2327(p).
- 160 N. C. 597, 76 S. E. 535—vi. 2411(g), 2430(d), 2432(e).
- Sexton v. National Life Ins. Co., 40 Colo. 60, 90 Pac. 58, 12 L. R. A. (N. S.) 504—vii. 3229(b).
- Seyler v. British American Assur. Co., 72 W. Va. 120, 77 S. E. 555—vi. 1738(f); vii. 3960(b).
- Seymour v. German-American Ins. Co., 83 N. J. Eq. 37, 90 Atl. 674—vi. 864(g).
- Seymour v. Mutual Protective League, 155 Ill. App. 21—vi. 636(e); vii. 2757(b), 3240(e).
- 171 Ill. App. 114—vii. 3236(c), 3240(e).
- Shackelford & Dickey v. Indemnity Fire Ins. Co., 106 N. W. 771, 75 Neb. 680—vi. 906(g).
- Shafer v. United States Casualty Co., 156 Pac. 861, 90 Wash. 687—vii. 3462(d), 3570(a), 3582(g), 3890(d).
- Shamokin Mfg. Co. v. Ohio German Fire Ins. Co., 39 Pa. Super. Ct. 553—vi. 352(f).
- Shanberg v. Fidelity & Casualty Co. (C. C.) 143 Fed. 651—vii. 3156(a), 3157(a).
- 158 Fed. 1, 85 C. C. A. 343, 19 R. A. (N. S.) 1206—vii. 3156(a), 3157(a).
- Shanley, In re, 160 N. Y. Supp. 733, 95 Misc. Rep. 427—vii. 3734(g), 3742(k).
- Shannon v. Knights of Maccabees, 54 Pa. Super. Ct. 634—vi. 2179(f).
- Sharman v. Continental Ins. Co., 167 Cal. 117, 138 Pac. 708, 52 L. R. A. (N. S.) 670—vi. 1375(f); vii. 2525(d).
- Sharp v. Niagara Fire Ins. Co., 147 S. W. 154, 164 Mo. App. 475—vi. 215(a), 691(a); vii. 3059(c), 3065(b), 3095(g), 3097(g), 3627(s).
- v. Sovereign Camp Woodmen of the World, 137 Tenn. 77, 191 S. W. 529—vii. 3748(n).
- Sharpless v. Grand Lodge A. O. U. W., 135 Minn. 35, 159 N. W. 1086, L. R. A. 1917B, 670—vii. 3154(h), 3722(b).
- Shartle v. Modern Brotherhood of America, 139 Mo. App. 433, 122 S. W. 1139—vi. 434(l), 435(l), 609(b), 697(e).
- Shawnee Fire Ins. Co. v. Beaty (Ok.) 166 Pac. 84—vii. 3347(a).
- v. Chapman, 63 Tex. Civ. App. 61, 132 S. W. 854—vi. 359(j), 1340(g); vii. 2622(a).
- v. Cosgrove, 85 Kan. 296, 116 Pac. 819, 41 L. R. A. (N. S.) 719—vii. 3913(i), 3927(n).
- 86 Kan. 374, 121 Pac. 488—vii. 3913(i).
- v. Knerr, 83 Pac. 611, 72 Kan. 385—vi. 1819(c), 1828(f); vii. 2740(b).
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- Shawnee Fire Ins. Co. v. Roll, 145 Ky. 113, 140 S. W. 49—vi. 392(b), 405(0), 412(b); vii. 3531(a).
- v. Thompson & Rowell, 30 Okl. 466, 119 Pac. 985—vi. 1814(a), 1815(b), 1818(c), 1821(d), 1822(e), 1823(e), 1824(e), 1828(f), 1829(g); vii. 3085(e).
- Shawnee Life Ins. Co. v. Watkins (Okl.) 156 Pac. 181—vi. 1979(j), 2079(h).
- Shawnee Mut. Fire Ins. Co. v. Cannedy, 36 Okl. 733, 129 Pac. 865, 44 L. R. A. (N. S.) 376—vi. 1868(a); vii. 2464(b), 2727(o).
- v. McClure, 39 Okl. 535, 135 Pac. 1150, 49 L. R. A. (N. S.) 1054—vi. 413(c).
- v. School Board of School Dist. No. 31, 44 Okl. 3, 143 Pac. 194—vi. 644(l).
- Shay v. Phoenix Accident & Sick Ben. Ass'n, 28 Pa. Super. Ct. 527—vii. 2658(a), 2659(a), 2680(b), 2727(p).
- Shearlock v. Mutual Life Ins. Co., 193 Mo. App. 430, 182 S. W. 89—vi. 636(e); vii. 3454(i), 3458(b), 3477(a).
- Shedd v. American Credit-Indemnity Co., 95 N. E. 316, 48 Ind. App. 23—vii. 3581(f), 3582(f).
- Sheets v. Iowa State Ins. Co., 153 Mo. App. 620, 135 S. W. 80—vi. 583(b), 1071(f), 1746(k), 1843(g).
- Sheetz v. Protected Home Circle, 256 Pa. 172, 100 Atl. 749—vi. 707(i).
- Shelley v. McLean, 66 Misc. Rep. 231, 121 N. Y. Supp. 61—vi. 128(g), 131(h).
- Shelton v. Minnis, 107 Miss. 133, 65 South. 114—vi. 803(e).
- Shepard v. Boone County Home Mut. Fire Ins. Co., 138 Mo. App. 20, 119 S. W. 984—vi. 397(d), 398(f).
- v. Germania Fire Ins. Co., 165 Mich. 172, 130 N. W. 626, 33 L. R. A. (N. S.) 156—vi. 744(f).
- Shepard & Co. v. New York Life Ins. Co., 89 Atl. 186, 87 Conn. 500—vii. 3781(u), 3802(g).
- Sheppard v. Crowley, 61 Fla. 735, 55 South. 841—vii. 3769(s), 3781(u).
- Shepperd v. Bankers' Union of the World, 77 Neb. 85, 108 N. W. 188—vi. 1021(c); vii. 3286(f).
- Sheridan v. Modern Woodmen of America, 44 Wash. 230, 87 Pac. 127, 7 L. R. A. (N. S.) 973, 120 Am. St. Rep. 987—vi. 2350(e), 2380(q), 2391(n).
- Sheridan v. Prudential Ins. Co. of America, 82 N. E. 426, 230 Ill. 33—vii. 3740(k).
- 123 Ill. App. 519—vii. 3740(k).
- Sherman v. Howes, 38 R. I. 174, 94 Atl. 490—vii. 3776(u).
- v. Mutual Life Ins. Co., 53 Wash. 523, 102 Pac. 419—vii. 2831(b).
- Sherrod v. Farmers' Mut. Fire Ins. Ass'n, 51 S. E. 910, 139 N. C. 167—vi. 1877(e).
- Sherry v. Women's Catholic Order of Foresters, 166 Ill. App. 254—vi. 578(h), 622(e).
- Sherwood Ice Co. v. United States Casualty Co. (R. I.) 100 Atl. 572—vii. 3570(a), 3582(g).
- Shipman v. National Live Stock Ins. Co., 187 Mo. App. 400, 173 S. W. 735—vii. 2820(c).
- Shivers v. Farmers' Mut. Fire Ins. Co., 99 Miss. 744, 55 South. 965, 35 L. R. A. (N. S.) 789—vi. 632(c), 730(a), 732(a), 1278(c).
- Shockey v. Fidelity-Phenix Fire Ins. Co. (Mo. App.) 191 S. W. 1049—vi. 1903(j); vii. 2555(a), 3588(b).
- Shoemaker v. Commercial Union Assur. Co., 106 N. W. 316, 75 Neb. 587—vi. 495(o), 2427(b).
- Shook v. Retail Hardware Mut. Fire Ins. Co., 154 Mo. App. 394, 134 S. W. 589—vi. 345(b), 612(d); vii. 2476(b), 2481(e), 2510(f), 2779(f), 3662(d).
- Shoop v. Fidelity & Deposit Co., 91 Atl. 753, 124 Md. 130, Ann. Cas. 1916D, 954—vii. 2629(c).
- Shorey v. Webb, 89 Atl. 391, 122 Md. 209—vi. 1118(k).
- Short's Adm'x v. Reserve Loan Life Ins. Co., 175 Ky. 554, 194 S. W. 773—vi. 2411(g).
- Shoshone Concentrating Co. v. Hamburg-Bremen Fire Ins. Co., 64 Wash. 638, 117 Pac. 500—vi. 1806(h).
- Shoucair v. North British & Merc. Ins. Co., 16 N. M. 563, 120 Pac. 328—vi. 1369(a), 1383(k), 1402(e).
- Showalter v. Modern Woodmen of America, 156 Mich. 390, 120 N. W. 994—vii. 2494(o), 2688(b), 2692(e), 2748(g).
- Shuford v. Life Ins. Co., 167 N. C. 547, 83 S. E. 821—vii. 3129(a), 3514(b), 3556(a).
- Shuler v. American Benev. Ass'n, 111 S. W. 618, 132 Mo. App. 123—vii. 3137(c), 3452(h).
- Shultice v. Modern Woodmen of America, 67 Wash. 65, 120 Pac. 531—vi. 2404(e); vii. 2496(o), 2552(v), 2719(i).
- Shumaker v. Security Life & Annuity Co. (C. C.) 153 Fed. 332—vi. 2393(a).
- Shumega v. First Catholic Slovak Union, 61 Pa. Super. Ct. 126—vi. 798(b).
- Shutts v. Milwaukee Mechanics' Ins. Co., 141 S. W. 15, 159 Mo. App. 436—vi. 1621(l); vii. 2665(c), 2670(e), 2772(b).
- Sidebotham v. Merchants' Fire Ass'n, 83 Pac. 1028, 41 Wash. 436—vii. 3511(a).
- Siegel v. Union Assur. Society, 90 Misc. Rep. 550, 153 N. Y. Supp. 662—vii. 3033(i).
- Siegele v. Des Moines Mut. Hail Ins. Ass'n, 28 S. D. 142, 132 N. W. 697—vii. 3632(b).
- Siemers v. Meeme Mut. Home Protection Ins. Co., 143 Wis. 114, 126 N. W. 669, 139 Am. St. Rep. 1083—vi. 609(b), 632(c), 1638(j), 1789(e), 1797(a); vii. 2777(e), 3076(m).

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- Sikes v. Life Ins. Co. of Va.**, 144 N. C. 626, 57 S. E. 391—vi. 555(j).
- Silcox v. Grand Fraternity**, 79 N. J. Law, 502, 76 Atl. 1018—vi. 1933(b), 1950(a); vii. 2563(c), 2577(g).
- Silliman v. International Life Ins. Co.**, 131 Tenn. 303, 174 S. W. 1131, L. R. A. 1915F, 707—vii. 3229(b).
- 135 Tenn. 646, 188 S. W. 273—vii. 3887(c).
- Silver v. London Assur. Corp.**, 61 Wash. 593, 112 Pac. 666—vi. 1472(e), 1625(b), 1649(q), 1650(q), 1671(g), 1673(h), 1679(k), 1680(k), 1884(b), 1886(d), 1889(h).
- Silverman v. Pittsburgh Life & Trust Co.**, 176 App. Div. 749, 163 N. Y. Supp. 1011—vi. 1114(i).
- v. **Safety Mut. Fire Ins. Co.**, 44 Pa. Super. Ct. 618—vii. 3126(d).
- Silverstein v. Knights & Ladies of Security**, 129 Minn. 340, 152 N. W. 724—vi. 1978(i).
- v. **Standard Acc. Ins. Co.**, 162 N. Y. Supp. 601, 175 App. Div. 639—vii. 3343(g).
- Silverstone v. London Assur. Corporation**, 176 Mich. 525, 142 N. W. 776—vii. 3042(c).
- Simmons v. Modern Woodmen of America**, 185 Mo. App. 483, 172 S. W. 492—vii. 2552(v), 2661(b), 3967(e), 3975(g).
- 194 Mo. App. 29, 188 S. W. 932—vii. 2683(b), 3972(g).
- v. **National Live Stock Ins. Co.**, 187 Mich. 551, 153 N. W. 696, Ann. Cas. 1917D, 42—vi. 1798(b); vii. 2572(e).
- v. **Sovereign Camp, Woodmen of the World**, 188 S. W. 941, 136 Tenn. 233—vii. 2514(g).
- v. **Western Travelers' Acc. Ass'n**, 112 N. W. 365, 79 Neb. 20—vi. 2207(b); vii. 3456(a), 3561(d).
- Simms v. Randall**, 117 Tenn. 543, 96 S. W. 971—vii. 3781(u).
- Simon v. Queen Ins. Co. of America**, 45 South. 396, 120 La. 477, 14 Ann. Cas. 847—vii. 3115(b).
- Simon Cloak & Suit Co. v. Aetna Ins. Co. (City Ct. N. Y.)**, 141 N. Y. Supp. 553—vii. 3417(d).
- Simons v. Vaughn & Blackwell**, 165 Ky. 167, 176 S. W. 995—vi. 360(k).
- Simpkins v. Hawkeye Commercial Men's Ass'n**, 148 Iowa. 543, 126 N. W. 192—vi. 632(c); vii. 3195(f), 3200(h), 3447(d), 3458(b).
- Simpson v. Goodman**, 92 Miss. 89, 45 South. 615—vi. 1007(h).
- v. **Mecca Fire Ins. Co. (Tex. Civ. App.)**, 133 S. W. 491—vi. 1607(d).
- v. **Ohio Farmers' Ins. Co.**, 184 Mich. 547, 151 N. W. 610—vii. 2641(k).
- Sims v. Jefferson Standard Life Ins. Co.**, 89 S. E. 445, 18 Ga. App. 347—vi. 2267(e).
- Sinclair v. Fitzpatrick**, 138 N. Y. S. 272, 78 Misc. Rep. 60—vi. 701(g), 706(h), 797(a), 802(d); vii. 3762(r).
- Sinclair & Co. v. National Surety Co.**, 132 Iowa. 549, 107 N. W. 184—vi. 2441(e), 2448(b), 2450(c); vii. 2764(a), 3320(b), 3531(a), 3580(e).
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- Singleton v. Progressive Ben. Ass'n**, 58 S. E. 609, 77 S. C. 531—vii. 2727(p).
- Sisson v. Union Mut. Life Ins. Co.**, 177 Ill. App. 588—vi. 2409(g).
- Skaneateles Paper Co. v. American Underwriters' Fire Ins. Co.**, 61 Misc. Rep. 457, 114 N. Y. Supp. 200—vi. 938(c), 940(c), 946(f), 952(h).
- Skinner v. Commercial Travelers' Mut. Acc. Ass'n**, 190 Mich. 353, 157 N. W. 105—vii. 3200(h).
- Sklenscher v. Fire Ass'n of Philadelphia**, 60 Atl. 232, 72 N. J. Law, 48—vii. 3023(f).
- Slack v. Milwaukee-Mechanics' Ins. Co.**, 186 Ill. App. 565—vii. 3043(d), 3079(a).
- Slafter v. Concordia Fire Ins. Co.**, 142 Iowa. 116, 120 N. W. 706—vi. 1326(n).
- Slater v. Williamsburg City Fire Ins. Co.**, 71 S. E. 197, 68 W. Va. 779—vii. 3504(h).
- Slaughter v. Grand Lodge**, 192 Ala. 301, 63 South. 367—vi. 698(f); vii. 3722(b), 3756(q), 3758(q), 3762(r).
- v. **Slaughter**, 186 Ala. 302, 65 South. 348—vii. 3735(g), 3767(s).
- Slavik v. Supreme Lodge of all Bohemian Ladies' Aid Societies**, 59 Misc. Rep. 183, 110 N. Y. Supp. 347—vi. 643(k).
- Sleet v. Farmers' Mut. Fire Ins. Co. (Ky.)**, 113 S. W. 515, 19 L. R. A. (N. S.) 421—vii. 3013(b).
- Sleeting v. Supreme Tribe of Ben Hur**, 161 Ill. App. 449—vii. 3149(f).
- Sleight v. Supreme Council of the Mystic Toilers**, 107 N. W. 183, 133 Iowa. 379—vi. 2375(o), 2428(c); vii. 3753(o).
- Slepski v. German Fire Ins. Co.**, 141 Ill. App. 614—vii. 3627(s), 3628(t).
- Sloan v. Boston Ins. Co.**, 186 Ill. App. 81—vi. 643(j), 771(e); vii. 3125(c).
- v. **Massachusetts Bonding & Ins. Co.**, 177 App. Div. 483, 164 N. Y. Supp. 206—vii. 3033(t).
- v. **Queen Ins. Co. of America**, 186 Ill. App. 82—vi. 643(j); vii. 3125(c).
- Slocum v. New York Life Ins. Co.**, 33 Sup. Ct. 523, 228 U. S. 364, 57 L. Ed. 879, Ann. Cas. 1914D 1029—vi. 2310(e).

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- v. Saratoga & Washington Fire Ins. Co.*, 134 N. Y. Supp. 72, 149 App. Div. 867—vii. 3347(a), 3363(d), 3383(b).
- Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co.*, 74 N. J. Eq. 635, 70 Atl. 380—vi. 346(b), 854(a), 864(g), 866(h); vii. 2504(c).
- Sluder v. National Americans (Kan.)*, 166 Pac. 482—vii. 3775(t).
- Small v. Court of Honor*, 117 S. W. 116, 136 Mo. App. 434—vi. 632(c), 715(n), 717(n); vii. 3236(c), 3758(q).
- Smathers v. Bankers' Life Ins. Co.*, 151 N. C. 98, 65 S. E. 746, 18 Ann. Cas. 756—vi. 1011(d).
- Smith v. Agnew*, 137 Ky. 83, 122 S. W. 231—vi. 273(n), 274(o), 279(a), 308(h).
- v. American Automobile Ins. Co.*, 188 Mo. App. 297, 175 S. W. 113—vi. 1283(f); vii. 2517(a), 2532(i), 2630(c).
- v. American Ins. Co.*, 177 Mich. 123, 143 N. W. 54—vi. 1848(k); vii. 3105(d).
- v. American Nat. Ins. Co.*, 111 Ark. 32, 162 S. W. 772—vii. 3538(d).
- v. Bankers' Life Ass'n*, 123 Ill. App. 392—vi. 687(f), 1948(k), 2158(b), 2159(c).
- 157 Ill. App. 236—vi. 2096(a).*
- v. Caledonian Ins. Co. (Mo. App.)*, 191 S. W. 1034—vi. 744(f).
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- v. Chapter General, Knights of St. John and Malta*, 143 App. Div. 532, 128 N. Y. Supp. 288—vi. 2044(g).
- 144 App. Div. 908, 128 N. Y. Supp. 1146—vi. 2044(g).*
- v. Columbia Ins. Co.*, 145 App. Div. 889, 129 N. Y. Supp. 775—vii. 2665(c), 2808(l).
- v. Commonwealth Life Ins. Co.*, 162 S. W. 779, 157 Ky. 146—vi. 449(d).
- v. Dotterweich*, 132 App. Div. 489, 116 N. Y. Supp. 896—vi. 1001(e).
- 200 N. Y. 299, 93 N. E. 985, 33 L. R. A. (N. S.) 892—vi. 1001(e).*
- v. Grand Lodge A. O. U. W.*, 101 S. W. 662, 124 Mo. App. 181—vii. 3779(u).
- v. Hartford Fire Ins. Co.*, 157 Ill. App. 57—vii. 2808(l).
- v. Hessey*, 63 Tex. Civ. App. 478, 134 S. W. 256—vii. 3805(i).
- v. Locomotive Engineers' Mut. Life & Acc. Ins. Ass'n*, 138 Ga. 717, 76 S. E. 44—vi. 698(f); vii. 3762(r), 3767(s), 3769(s).
- Smith v. Metropolitan Life Ins. Co.*, 71 Atl. 11, 222 Pa. 226, 20 L. R. A. (N. S.) 928, 128 Am. St. Rep. 799—vii. 3732(f), 3772(s), 3779(u).
- 34 Pa. Super. Ct. 72—vii. 3759(r).*
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- v. Mutual Reserve Fund Life Ass'n*, 140 Ill. App. 409—vi. 708(j), 709(k), 711(l), 712(l); vii. 3585(a), 3871(d).
- v. Mutual Reserve Life Ins. Co.*, 87 Pac. 347, 44 Wash. 315—vi. 2296(f).
- v. Mystic Workers of the World (Mo. App.)*, 196 S. W. 62—vi. 2400(d).
- v. National Credit Ins. Co.*, 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511—vii. 2810(m).
- v. National Surety Co.*, 77 Or. 17, 149 Pac. 1040—vii. 3040(b).
- v. Northwestern Nat. Life Ins. Co.*, 102 N. W. 57, 123 Wis. 586—vi. 2398(c); vii. 2840(e), 3281(e), 3442(a).
- v. Our United Brotherhood (Tex. Civ. App.)*, 191 S. W. 199—vi. 706(h).
- v. Provident Sav. Life Assur. Society*, 123 N. W. 588, 159 Mich. 167—vii. 3949(d).
- v. Prudential Ins. Co.*, 147 App. Div. 580, 132 N. Y. Supp. 529—vii. 3129(a).
- 83 N. J. Law, 719, 85 Atl. 190, 43 L. R. A. (N. S.) 431—vi. 2105(f).*
- v. Republic County Mut. Fire Ins. Co.*, 82 Kan. 697, 109 Pac. 390—vi. 694(c), 946(f).
- v. Retail Merchants' Fire Ins. Co.*, 29 S. D. 332, 137 N. W. 47, 42 L. R. A. (N. S.) 173—vi. 1719(b), 1747(a).
- v. Royal Highlanders*, 148 N. W. 952, 96 Neb. 790—vii. 3468(b).
- v. Royal League*, 177 Ill. App. 326—vii. 3149(f).
- v. Scottish Union & National Ins. Co.*, 85 N. E. 841, 200 Mass. 50—vii. 2820(c), 3347(a), 3359(b), 3409(d), 3410(e).
- v. Security Mut. Fire Ins. Co.*, 29 S. D. 328, 137 N. W. 46, Ann. Cas. 1914D, 930—vi. 1747(a).
- 37 S. D. 418, 158 N. W. 991—vi. 1747(a).*
- v. Smith*, 110 S. W. 1038, 86 Ark. 284—vii. 2849(j).
- v. State*, 134 N. W. 1123, 149 Wis. 63—vi. 586(d).
- v. Supreme Tent Knights of Macca-bees*, 127 Iowa, 115, 102 N. W. 830, 69 L. R. A. 174—vi. 812(j); vii. 3721(b).

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- 76 Misc. Rep. 441, 135 N. Y. Supp. 18—vi. 2113(k), 2154(f), 2159(c), 2169(i).
- v. West Branch Mut. Fire Ins. Co.**, 31 Pa. Super. Ct. 29—vii. 2664 (b).
- v. Western Assur. Co.**, 18 Ga. App. 461, 89 S. E. 533—vii. 3527(g).
- Smith Ins. Agency v. Hamilton Fire Ins. Co.**, 69 W. Va. 129, 71 S. E. 194—vi. 566(i); vii. 3366(h), 4011(h).
- Smith Lumber Co. v. Colonial Assurance Co.**, 172 App. Div. 149, 158 N. Y. S. 193—vii. 2801(b).
- Smith's Adm'r v. Hatke**, 115 Va. 230, 78 S. E. 584—vii. 3749(n), 3784(u).
- Smith & Marsh v. Northern Neck Mut. Fire Ass'n of Virginia**, 112 Va. 192, 70 S. E. 482, 38 L. R. A. (N. S.) 1016—vii. 3966(c).
- Smith & Son v. Phoenix Ins. Co. of Hartford, Conn.**, 168 S. W. 831, 181 Mo. App. 455—vii. 3898(b).
- Smoot v. Bankers' Life Ass'n**, 138 Mo. App. 438, 120 S. W. 719—vi. 54(e), 60(h), 577(g), 641(i), 697(e), 2259 (a), 2263(b), 2400(d); vii. 2709(d), 2840(e).
- S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.**, 69 W. Va. 129, 71 S. E. 194—vi. 566(i); vii. 3366(h), 4011 (h).
- Smyth v. Supreme Lodge, K. P.**, 220 Fed. 438, 137 C. C. A. 32—vi. 717(n).
- Smythe v. Home Life & Accident Ins. Co.**, 64 South. 142, 134 La. 368—vii. 3952(d).
- v. Supreme Lodge, K. P. (D. C.)** 198 Fed. 967—vi. 708(j), 709(k), 711(l), 715(n), 717(n).
- Snedeker v. Metropolitan Life Ins. Co.**, 169 S. W. 570, 160 Ky. 119—vi. 449 (d), 509(g).
- Snyder v. Globe Mut. Live Stock Ins. Co.**, 38 Pa. Super. Ct. 623—vi. 682(c).
- v. Home Ins. Co.**, 148 Fed. 1021, 79 C. C. A. 536—vi. 1812(n), (D. C.) 133 Fed. 848—vi. 1812 (n).
- v. Loyal Protective Ins. Co. (Mo. App.)** 196 S. W. 1022—vii. 2559 (b).
- v. Supreme Ruler of Fraternal Mystic Circle**, 122 S. W. 981, 122 Tenn. 248, 45 L. R. A. (N. S.) 209—vii. 2680(h), 3141(e), 3736 (h).
- Social Benev. Soc. No. 1 v. Holmes**, 56 S. E. 775, 127 Ga. 586—vi. 405(l), 533(l), 698(f).
- Societa Unione Fratellanza Italiana v. Leyden**, 114 N. E. 738, 225 Mass. 540, L. R. A. 1917C, 256—vi. 2400 (d), 2404(e).
- Soehner v. Grand Lodge of Order of Sons of Herman**, 104 N. W. 871, 74 Neb. 399—vi. 27(b), 633(c), 2373(n); vii. 2658(a).
- Solem v. Connecticut Fire Ins. Co.**, 109 Pac. 432, 41 Mont. 351—vii. 3430(m), 3631(b).
- Solomon v. American Guild**, 151 Ala. 297, 44 South. 387—vii. 3273(b).
- Somo v. Supreme Court I. O. F.**, 83 Or. 654, 164 Pac. 187—vi. 68(m), 127(f), 1048(h); vii. 3736(h).
- Soules v. Brotherhood of American Yeomen**, 19 N. D. 23, 120 N. W. 760—vi. 1984(a), 1987(c); vii. 3258(m), 3265(o).
- South Atlantic Life Ins. Co. v. Hurt's Adm'r**, 79 S. E. 401, 115 Va. 398—vi. 2174(b), 2178(d); vii. 2528(f), 2535(j), 3255(l), 3257(m), 3263(o), 3265(o), 3267 (o).
- South Bay Co. v. Merrill**, 77 N. H. 1, 86 Atl. 351—vii. 3972(g).
- Southern Cotton Oil Co. v. Merchants' & Miners' Transp. Co. (C. C.)** 179 Fed. 133—vii. 3001(l).
- Southern Home Ins. Co. v. Faulkner**, 49 South. 542, 57 Fla. 194, 131 Am. St. Rep. 1098—vii. 3607 (g).
- v. Murphy**, 57 Fla. 191, 49 South. 537—vi. 1649(q).
- v. Putnal**, 57 Fla. 199, 49 So. 922—vi. 1482(a); vii. 2772(b), 3355 (d), 3429(l).
- Southern Idaho Conference Ass'n of Seventh Day Adventists v. Hartford Fire Ins. Co.**, 145 Pac. 502, 26 Idaho, 712—vii. 3561(d).
- Southern Ins. Co. v. Anderson**, 172 S. W. 318, 130 Tenn. 482, Ann. Cas. 1916B, 737—vi. 2208(c).
- Southern Life Ins. Co. v. Hazard**, 146 S. W. 1107, 148 Ky. 465—vi. 2393(a); vii. 3531(a).
- v. Hill**, 70 S. E. 186, 8 Ga. App. 857—vi. 451(f), 687(e), 1974(g).
- v. Logan**, 9 Ga. App. 503, 71 S. E. 742—vi. 687(e), 1965(b), 2378 (p); vii. 3278(d), 3956(a).
- Southern Mut. Aid Ass'n v. Cobb**, 60 Fla. 198, 53 South. 505—vi. 561(b), 697(e).
- Southern Mut. Life Ins. Ass'n v. Durdin**, 132 Ga. 495, 64 S. E. 264, 131 Am. St. Rep. 210—vi. 1101(b), 1117 (k).
- Southern Nat. Ins. Co. v. Barr (Tex. Civ. App.)** 148 S. W. 845—vi. 1541(f), 1835(b); vii. 3101(b).
- v. Cobb (Tex. Civ. App.)** 180 S. W. 155—vi. 1634(g), 1663(e); vii. 3101(b).
- v. Wood**, 133 S. W. 286, 63 Tex. Civ. App. 319—vii. 3080(b).
- Southern Pants Co. v. Rochester German Ins. Co.**, 159 N. C. 78, 74 S. E. 812—vi. 1747(a).
- Southern R. Co. v. Blunt & Ward (C. C.)** 165 Fed. 258—vii. 3893(a).
- v. Stonewall Ins. Co.**, 163 Ala. 161, 50 South. 940—vii. 3893(a).

- Southern States Fire Ins. Co. v. Hand-Jordan Co., 73 South. 578, 112 Miss. 565—vii. 3331(a), 3575(c), 3943(d).
- v. Kronenberg (Ala.) 74 South. 63—vii. 2460(a), 2467(c), 2484(g).
- v. Vann, 69 Fla. 544, 68 South. 645—vi. 860(d).
- 69 Fla. 549, 68 South. 647, L. R. A. 1916B, 1189—vii. 2464(b), 2506(d), 2508(d).
- Southern States Fire & Casualty Ins. Co. v. Nelson (Miss.) 62 South. 426—vi. 1858(r); vii. 2818(b).
- Southern States Life Ins. Co. v. Warrnack, 89 S. E. 843, 145 Ga. 791—vii. 3422(g).
- Southern States Mut. Life Ins. Co. v. Herlihy, 138 Ky. 359, 128 S. W. 91—vi. 686(e), 1980(k).
- Southern Surety Co. v. First State Bank (Tex. Civ. App.) 167 S. W. 833—vi. 2451(c).
- v. Tyler & Simpson Co., 30 Okl. 116, 120 Pac. 936—vi. 635(d), 2437(b), 2439(c), 2449(c), 2451(c).
- Southern Union Life Ins. Co. v. White (Tex. Civ. App.) 188 S. W. 266—vii. 2755(b), 3884(a).
- Southern Woodmen v. Davis, 124 Ark. 518, 187 S. W. 638—vii. 3165(d), 3447(d).
- v. Morris, 14 Ala. App. 464, 70 South. 952—vii. 3302(f), 3442(a).
- South Knoxville Brick Co. v. Empire State Surety Co., 126 Tenn. 402, 150 S. W. 92, Ann. Cas. 1913E, 107—vi. 2447(new); vii. 3316(a), 3331(a).
- Southwestern Ins. Co. v. Woods Nat. Bank (Tex. Civ. App.) 107 S. W. 114—vii. 3286(f), 3864(b), 3888(c).
- Southwestern Surety Ins. Co. v. Stein Double Cushion Tire Co. (Tex. Civ. App.) 180 S. W. 1165—vii. 3942(d).
- v. Thompson (Tex. Civ. App.) 180 S. W. 947—vi. 851(c); vii. 2768(d), 3331(a).
- Sovereign Camp Woodmen of the World v. Bailey (Tex. Civ. App.) 163 S. W. 683—vii. 3152(f).
- v. Boehme, 49 Tex. Civ. App. 159, 97 S. W. 847—vii. 3257(m).
- v. Bridges, 165 Fed. 342, 91 C. C. A. 328—vii. 3588(b).
- 7 Ind. T. 433, 104 S. W. 672—vii. 3265(o), 3588(b).
- v. Broadwell, 89 S. W. 891, 114 Mo. App. 471—vii. 3765(r), 3775(t).
- v. Brown (Tex. Civ. App.) 88 S. W. 372—vi. 459(j).
- v. Carrington, 41 Tex. Civ. App. 29, 90 S. W. 921—vi. 452(f), 456(b); vii. 3285(e), 3886(b).
- Sovereign Camp Woodmen of the World v. Cox (Ind. App.) 75 N. E. 290—vi. 2432(e).
- (Ind. App.) 76 N. E. 888—vi. 2428(c), 2432(e).
- 40 Ind. App. 266, 78 N. E. 683—vi. 2428(c), 2432(e).
- 40 Ind. App. 266, 89 N. E. 850—vi. 2428(c).
- v. Dees, 45 Tex. Civ. App. 318, 100 S. W. 366—vi. 454(g).
- v. Dismukes (Miss.) 38 South. 351—vi. 452(f), 469(e), 507(f).
- v. Ethridge, 179 S. W. 1022, 166 Ky. 795—vii. 3246(h), 3267(o).
- v. Hackworth (Ala.) 75 South. 463—vii. 3257(m).
- v. Hall, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517—vi. 456(h), 460(j), 470(e), 500(c); vii. 2523(f), 2681(h).
- v. Hodges, 72 Fla. 467, 73 South. 347—vi. 1964(a); vii. 3257(m), 3263(o).
- v. Hutchins, 39 Okl. 267, 134 Pac. 1116—vi. 2253(b), 2242(f).
- (Okl.) 159 Pac. 920—vi. 1969(f).
- v. Israel, 117 Ark. 121, 173 S. W. 855—vii. 3767(s), 3770(s).
- v. Jackson (Okl.) 157 Pac. 92, L. R. A. 1916F, 166—vi. 607(a), 2110(i).
- (Tex. Civ. App.) 138 S. W. 1137—vii. 3149(f).
- v. Jones, 11 Ala. App. 433, 66 South. 834—vii. 2715(h).
- v. Keen, 16 Ga. App. 703, 86 S. E. 88—vi. 700(f); vii. 3152(f).
- v. Landrum, 166 S. W. 598, 158 Ky. 841—vii. 3250(i), 3267(o).
- v. Latham, 59 Ind. App. 290, 107 N. E. 749—vi. 677(a), 698(f), 1951(b), 2142(h); vii. 2552(o), 2683(b), 2733(a).
- v. Lillard (Tex. Civ. App.) 174 S. W. 619—vi. 1950(a); vii. 2529(f), 2570(e), 2577(g).
- v. McCulloch (Tex. Civ. App.) 192 S. W. 1154—vii. 3255(l).
- v. McDonald, 109 Miss. 167, 68 South. 74—vii. 3152(f).
- v. Noel, 34 Okl. 596, 126 Pac. 787, 41 L. R. A. (N. S.) 648—vi. 813(k).
- v. Ogden, 107 N. W. 860, 76 Neb. 643—vi. 1015(b), 2344(d), 2425(a).
- v. Porch, 184 Ind. 92, 110 N. E. 659—vii. 3257(m).
- v. Purdom, 143 S. W. 1021, 147 Ky. 177—vii. 3149(f), 3152(f).
- v. Salmon (Ky.) 120 S. W. 358—vi. 686(e), 2254(b).
- v. Shaw, 85 S. E. 827, 143 Ga. 559—vi. 2344(d); vii. 2717(h).
- v. Valentine, 190 S. W. 712, 173 Ky. 182—vii. 3248(i), 3257(m).
- v. Wagnon (Tex. Civ. App.) 164 S. W. 1082—vi. 2378(p), 2380(q), 2400(d).

- Sowell v. London Assur. Corp., 32 Cal. App. 443, 163 Pac. 242—vii. 2521(c).
 Sowersby v. Royal League, 159 Ill. App. 626—vi. 578(h), 622(e), 1040(c).
 Sowiczki v. Modern Woodmen of America, 158 N. W. 891, 192 Mich. 265—vi. 2096(a), 2156(a); vii. 2499(a).
 Spahr v. Mutual Life Ins. Co., 98 Minn. 471, 108 N. W. 4—vii. 3129(a).
 Spande v. Western Life Indemnity Co., 61 Or. 220, 117 P. 973—vi. 432(k), 662(a).
 61 Or. 220, 122 Pac. 38—vi. 432(k), 662(a).
 68 Or. 171, 136 Pac. 1189—vii. 3281(e).
 Spann v. Phoenix Ins. Co., 83 S. C. 262, 65 S. E. 232—vi. 1439(b), 1832(a); vii. 2746(e), 2769(a).
 Spear v. Boston Police Relief Ass'n, 195 Mass. 351, 81 N. E. 196—vii. 3722(b), 3723(b).
 Speegle v. Sovereign Camp of Woodmen of the World, 58 S. E. 435, 77 S. C. 517—vii. 3776(u).
 Spence v. Central Acc. Ins. Co., 236 Ill. 444, 86 N. E. 104, 19 L. R. A. (N. S.) 88—vi. 678(a), 1931(a), 1932(a), 1933(b), 1934(c), 1935(d), 1939(f), 1953(c), 1980(j), 2033(i).
 v. Phoenix Assur. Co., Ltd., of London, 104 S. C. 403, 89 S. E. 319—vii. 2690(d).
 Spencer v. Court of Honor, 139 N. W. 815, 120 Minn. 422—vii. 4016(i).
 v. Travelers' Ins. Co., 86 S. W. 899, 112 Mo. App. 86—vi. 2433(f).
 Spickard v. Fire Ass'n of Philadelphia, 146 S. W. 808, 164 Mo. App. 1—vii. 2735(a), 3094(g), 3125(c).
 v. Franklin Fire Ins. Co., 146 S. W. 811—vii. 2735(a), 3094(g), 3125(c).
 Spiegel v. Empire Life Ins. Co. (Sup.) 96 N. Y. Supp. 201—vi. 2082(i).
 Spiker v. American Relief Soc., 103 N. W. 611, 140 Mich. 225—vii. 4004(c).
 Spingarn v. National Surety Co., 134 N. Y. Supp. 817, 76 Misc. Rep. 248—vi. 1508(b); vii. 3430(m).
 Spinks v. Mutual Reserve Fund Life Ass'n (C. C.) 137 Fed. 169—vi. 2365(j); vii. 3964(e).
 Spoeri v. Modern Brotherhood of America, 184 Ill. App. 32—vi. 1969(f), 2400(d).
 Springfield Fire & Marine Ins. Co. v. Boon (Tex. Civ. App.) 194 S. W. 1006—vi. 1065(b), 1716(b), 1717(b), 1719(b).
 v. Chandlee, 41 App. D. C. 209—vi. 1765(a).
 v. Ferrell, 14 Ala. App. 527, 71 South. 615—vi. 356(i).
 v. Fields (Ind.) 113 N. E. 756—vii. 3531(a), 3890(d).
 v. Griffin (Okla.) 166 Pac. 431—vi. 636(e), 1818(c).
 Springfield Fire & Marine Ins. Co. v. Halsey, 34 Okl. 383, 126 Pac. 237—vi. 1814(a).
 (Okla.) 153 Pac. 145—vi. 1822(e); vii. 2650(r).
 v. Hays & Son (Okla.) 156 Pac. 673, L. R. A. 1917A, 1078—vi. 1822(e); vii. 3623(p).
 v. Homewood, 122 Pac. 196, 32 Okl. 521, 39 L. R. A. (N. S.) 1182—vii. 3047(a), 3089(g), 3624(q).
 v. Mattingly (Ky.) 90 S. W. 577—vii. 2660(b).
 v. Nelms (Tex. Civ. App.) 184 S. W. 1094—vii. 3401(m).
 v. Null, 133 Pac. 235, 37 Okl. 665—vii. 2772(b).
 v. Peterson, 140 N. W. 760, 93 Neb. 446—vii. 3588(b).
 v. Price, 132 Ga. 687, 64 S. E. 1074—vii. 2521(c), 2524(d), 2549(t), 2572(e), 2621(a), 2622(a), 2650(q).
 v. Reynolds, 107 Md. 107, 68 Atl. 281, 126 Am. St. Rep. 379—vii. 3960(b).
 v. Snowden, 191 S. W. 439, 173 Ky. 664—vi. 527(i), 862(f).
 Spring Garden Ins. Co. v. Amusement Syndicate Co., 178 Fed. 519, 102 C. C. A. 29—vii. 3422(g), 3627(s), 3892(d).
 v. Brown (Tex. Civ. App.) 143 S. W. 292—vi. 1900(g), 1908(l).
 v. Imperial Tobacco Co., 132 Ky. 7, 116 S. W. 234, 20 L. R. A. (N. S.) 277, 136 Am. St. Rep. 164—vi. 628(a), 636(e); vii. 3021(f).
 v. International & G. N. R. Co., (Tex. Civ. App.) 131 S. W. 1147—vii. 3894(a).
 v. Whayland, 64 Atl. 925, 103 Md. 699—vii. 3390(h), 3532(b).
 v. Wood, 194 Fed. 669, 114 C. C. A. 416—vi. 352(f).
 Springfield Light, Heat & Power Co. v. Philadelphia Casualty Co., 184 Ill. App. 175—vi. 2453(f); vii. 3316(a).
 Springmeyer v. Sovereign Camp, Woodmen of the World, 163 Mo. App. 338, 143 S. W. 872—vii. 3129(a), 3131(a).
 Squires v. Modern Brotherhood of America, 68 Or. 336, 135 Pac. 774—vi. 1964(a), 2400(d), 2404(e), 2432(e).
 Sroka v. Frankfort American Ins. Co., 94 N. Y. Supp. 501, 47 Misc. Rep. 607—vii. 3319(a).
 Staats v. Georgia Home Ins. Co., 50 S. E. 815, 57 W. Va. 571, 4 Ann. Cas. 541—vii. 3710(j).
 v. Pioneer Ins. Ass'n, 55 Wash. 51, 104 Pac. 185—vi. 612(d); vii. 2480(e), 2621(a), 2690(d), 2775(d), 3964(e), 3989(k).
 Stack v. Williams, 166 App. Div. 190, 151 N. Y. Supp. 185—vi. 2338(b), 2428(c); vii. 2719(j).
 Stacy v. Parker, 63 Tex. Civ. App. 129, 132 S. W. 532—vii. 3788(a).

- Stahl v. Grand Lodge A. O. U. W.*, 44 Tex. Civ. App. 203, 98 S. W. 643—vi. 812(j).
- Stake v. Stake*, 81 N. E. 1146, 228 Ill. 630—vi. 797(a), 821(o); vii. 3732(f).
- 131 Ill. App. 634—vii. 3732(f).
- Stamets v. Piano Mfg. Co.*, 82 N. E. 122, 923, 40 Ind. App. 620—vi. 846(i).
- Stamey v. Royal Exch. Assur. Co.*, 150 Pac. 227, 93 Kan. 707—vii. 3700(g).
- Standard Acc. Ins. Co. v. Fischel* (Sup.) 163 N. Y. Supp. 92—vi. 919(c).
- v. *Hite*, 37 Okl. 305, 132 Pac. 333, 46 L. R. A. (N. S.) 986—vi. 632 (c); vii. 3181(b).
- Standard Accident & Life Ins. Co. v. Wood*, 116 Md. 575, 82 Atl. 702—vi. 848(a), 1951(b), 1979(j); vii. 3175(h).
- Standard Leather Co. v. Allemannia Fire Ins. Co.*, 224 Pa. 186, 73 Atl. 192—vii. 2798(f).
- v. *Insurance Co. of North America*, 73 Atl. 216, 224 Pa. 178—vii. 2798(f).
- v. *Mercantile Town Mut. Ins. Co.*, 111 S. W. 631, 131 Mo. App. 701—vi. 652(b), 1379(h), 1858 (s).
- v. *Northern Assur. Co. of London, England* (C. C.) 156 Fed. 689—vii. 3356(a), 3462(d).
- Standard Life & Acc. Ins. Co. v. Bamberick Bros. Const. Co.*, 163 Mo. App. 504, 143 S. W. 845—vi. 8(e), 1110(g).
- v. *McNulty*, 157 Fed. 224, 85 C. C. A. 22—vi. 638(g); vii. 3189(e).
- Stanisics v. Hartford Fire Ins. Co.*, 83 Neb. 768, 120 N. W. 435—vi. 85(a), 136(c).
- Stanley v. Firemen's Ins. Co.*, 34 R. I. 491, 84 Atl. 601, 42 L. R. A. (N. S.) 79—vi. 765(a).
- v. *Sterling Mut. Life Ins. Co.*, 12 Ga. App. 475, 77 S. E. 664—vii. 3235(e), 3544(a), 3991(k).
- Stanton v. Eccentric Ass'n of Firemen, Local Union No. 56 of International Brotherhood of Stationary Firemen*, 130 App. Div. 129, 114 N. Y. Supp. 480—vi. 697(e), 712(l), 2398(c).
- v. *Travelers' Ins. Co.*, 83 Conn. 708, 78 Atl. 317, 34 L. R. A. (N. S.) 445—vii. 3200(h), 3201(h).
- Stanton Co. v. Rochester German Underwriters' Agency* (D. C.) 206 Fed. 978—vi. 824(a), 1812(n), 1893(i).
- Stanyan v. Security Mut. Life Ins. Co.* (Vt.) 99 Atl. 417, L. R. A. 1917C, 350—vi. 1181(g), 2105(f), 2159(c), 2398 (c).
- Stapleton v. National Council, Knights and Ladies of Security*, 192 Ill. App. 482—vii. 2561(b).
- Stapleton Nat. Bank v. United States Fidelity & Guaranty Co.*, 131 App. Div. 157, 115 N. Y. Supp. 372—vi. 2435a, 60 Misc. Rep. 206, 113 N. Y. Supp. 25—vi. 2435(a).
- Starcke v. Plattduetsche Grot Gilde*, 166 Ill. App. 146—vii. 3749(n).
- Stark v. John Hancock Mut. Life Ins. Co.*, 159 S. W. 758, 176 Mo. App. 574—vi. 2413(h).
- v. *Northwestern Nat. Life Ins. Co.* (C. C.) 167 Fed. 191—vi. 696(d).
- Starr v. Aetna Life Ins. Co.*, 83 Pac. 113, 41 Wash. 199, 4 L. R. A. (N. S.) 636—vii. 3184(b), 3187 (d).
- v. *Knights of Maccabees*, 27 Ohio Cir. Ct. R. 475—vi. 814(k), 3735 (g).
- v. *Mutual Life Ins. Co.*, 83 Pac. 116, 41 Wash. 228—vi. 454(g), 538 (d).
- State v. Alley*, 96 Miss. 720, 51 South. 467—vi. 5(a), 53(c), 58(g), 60 (g), 61(h).
- v. *Arlington*, 157 N. C. 640, 73 S. E. 122—vi. 56(f).
- v. *Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404—vii. 4016(i).
- v. *Burgess*, 101 Tex. 524, 109 S. W. 922—vi. 51(c).
- v. *Howard*, 96 Neb. 278, 147 N. W. 689—vi. 528(j).
- v. *Ohio Fire Ins. Ass'n*, 27 Ohio Cir. Ct. R. 838—vi. 945(f).
- v. *Supreme Forest Woodmen Circle*, 100 Neb. 632, 160 N. W. 980—vi. 56(f).
- v. *Toledo & Lucas County Burial Ass'n*, 28 Ohio Cir. Ct. R. 397—vi. 60(h).
- v. *Wichita Mut. Burial Ass'n*, 73 Kan. 179, 84 Pac. 757—vi. 32 (e).
- v. *Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197—vi. 5(a), 23(f), 51(c), 85(a), 113 (g), 247(b), 258(i), 281(c), 292 (l), 792(f).
- State Division, Lone Star Ins. Union v. Blassengame* (Tex. Civ. App.) 162 S. W. 6—vi. 2428(c), 2430(d), 2432(e).
- State ex rel. American Fire Ins. Co. v. Ellison*, 269 Mo. 410, 190 S. W. 879—vi. 628(a).
- State ex rel. Equitable Life Assur. Soc. of United States v. Robertson* (Mo.) 191 S. W. 989—vi. 444(a), 535(b).
- State ex rel. Fishback v. Globe Casket & Undertaking Co.*, 82 Wash. 124, 143 Pac. 878, L. R. A. 1915B, 976—vi. 15(a).
- v. *Universal Service Agency*, 87 Wash. 413, 151 Pac. 768, Ann. Cas. 1916C, 1017—vi. 5(b).

- State ex rel. Inter-Insurance Auxiliary Co. v. Revelle, 257 Mo. 529, 165 S. W. 1084—vi. 5(a).
- State ex rel. Kane v. Knights of Father Mathew, 144 S. W. 896, 164 Mo. App. 361—vi. 800(c).
- State ex rel. Northwestern Mut. Life Ins. Co. v. Circuit Court of Waushara County, 162 N. W. 436, 165 Wis. 387—vii. 3444(c), 3952(d).
- State ex rel. Pacific Mut. Life Ins. Co. v. Grimm, 143 S. W. 483, 239 Mo. 135—vii. 4016(i).
- State ex rel. Physicians' Defense Co. v. Laylin, 73 Ohio St. 90, 76 N. E. 567—vi. 8(e).
- State ex rel. Schaefer v. Minnesota Title Ins. & Trust Co., 104 Minn. 447, 116 N. W. 944, 19 L. R. A. (N. S.) 639, 124 Am. St. Rep. 633—vi. 1047(g).
- State ex rel. Schmohl v. Ellison, 182 S. W. 740, 266 Mo. 580—vi. 632(c); vii. 3163(c), 3174(g).
- State ex rel. Supreme Lodge, K. P., v. Vandiver, 213 Mo. 187, 111 S. W. 911, 15 Ann. Cas. 283—vi. 63(j), 577(g).
- State Life Ins. Co. v. Bolton, 82 Neb. 622, 118 N. W. 122—vi. 1004(f).
- v. Chowning, 113 Pac. 715, 27 Okl. 722—vi. 2318(k).
- v. Ford, 101 Ark. 513, 142 S. W. 863—vii. 3149(f).
- v. Harrah, 169 Mich. 127, 134 N. W. 996—vi. 998(e).
- v. Harvey, 72 Ohio St. 174, 73 N. E. 1056—vi. 465(b), 477(h).
- v. Jones, 48 Ind. App. 186, 92 N. E. 879—vii. 2665(c), 2690(d).
- v. Murray, 159 Fed. 408, 86 C. C. A. 344—vi. 495(o), 2259(a); vii. 2460(a).
- v. Nelson, 46 Ind. App. 137, 92 N. E. 2—vii. 2853(k).
- State Mut. Fire Ins. Co. v. Cathey (Tex. Civ. App.) 153 S. W. 935—vii. 3080(b), 3126(d).
- (Tex. Civ. App.) 172 S. W. 187—vii. 3080(b).
- v. Kellner (Tex. Civ. App.) 169 S. W. 636—vi. 1903(j).
- v. Taylor (Tex. Civ. App.) 157 S. W. 950—vi. 363(a), 482(i).
- State Mut. Ins. Co. v. Clevenger, 87 Pac. 583, 17 Okl. 49—vi. 574(d).
- v. Craig, 27 Okl. 90, 111 Pac. 325—vii. 2510(f), 2563(c), 2577(g), 2653(t).
- v. Green (Okl.) 166 Pac. 105, L. R. A. 1917F, 663—vi. 162(g), 864(g); vii. 2521(c), 2690(d), 3526(g).
- v. Roark, 87 Pac. 584, 17 Okl. 48—vi. 574(d).
- State Mut. Life Ins. Co. v. Forrest, 19 Ga. App. 296, 91 S. E. 428—vi. 636(e), 2330(q), 2393(a), 2408(g).
- State Mut. Life Ins. Co. v. Rosenberry (Tex. Civ. App.) 175 S. W. 757—vii. 2676(g), 2757(b).
- State Nat. Bank v. United States Life Ins. Co., 87 N. E. 396, 238 Ill. 148—vi. 632(c), 993(b).
- 142 Ill. App. 624—vi. 632(c), 993(b).
- Stearns Lumber Co. v. Travelers' Ins. Co., 159 Wis. 627, 150 N. W. 991—vii. 2768(d).
- Stebbins v. Lancashire Ins. Co., 60 N. H. 65—vi. 408(a).
- Steele v. Fraternal Tribunes, 74 N. E. 121, 215 Ill. 190, 106 Am. St. Rep. 160—vi. 578(h), 2026(d).
- Stegner v. Modern Brotherhood of America, 24 S. D. 371, 123 N. W. 842—vi. 2186(e); vii. 3137(c).
- Steil v. Sun Ins. Office, 171 Cal. 795, 155 Pac. 72—vi. 1622(m), 1623(n), 1723(e); vii. 2670(e).
- Steinberg v. Boston Ins. Co., 144 App. Div. 110, 128 N. Y. Supp. 994—vii. 3588(b), 3631(b).
- Steiner v. Supreme Council, I. O. F., 113 N. W. 15, 149 Mich. 567—vii. 3685(d).
- Steinwender v. Philadelphia Casualty Co., 126 N. Y. Supp. 271, 141 App. Div. 432—vii. 3338(e), 3582(f).
- Stemler v. Stemler, 31 S. D. 595, 141 N. W. 780—vii. 3767(s), 3769(s).
- Stenbom v. Brown-Corliss Engine Co., 119 N. W. 308, 137 Wis. 564, 20 L. R. A. (N. S.) 956—vii. 3354(b).
- Stengel v. Colorado Nat. Life Assur. Co. (Tex. Civ. App.) 147 S. W. 1193—vi. 612(e).
- Stephens v. Fire Ass'n of Philadelphia, 123 S. W. 63, 139 Mo. App. 369—vii. 3028(g), 3035(a), 3043(d).
- v. Metropolitan Life Ins. Co., 190 Mo. App. 673, 176 S. W. 253—vi. 451(f); vii. 3472(d).
- Stephenson v. Allison, 165 Ala. 238, 51 South. 622, 138 Am. St. Rep. 26—vi. 442(a), 450(d).
- v. Empire Life Ins. Co., 139 Ga. 82, 76 S. E. 592—vi. 2269(f); vii. 2726(n).
- v. Germania Fire Ins. Co., 100 Neb. 456, 160 N. W. 962, L. R. A. 1917D, 307—vi. 1066(c), 1190(a), 1502(k).
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- Sterling v. Head Camp Pacific Jurisdiction, Woodmen of the World, 28 Utah, 505, 80 Pac. 375—vi. 439(c), 474(f), 505(e), 697(e), 2348(d), 2398(c), 2432(e); vii. 2496(o), 3770(s), 3815(b).
- 28 Utah, 526, 80 Pac. 1110—vi. 439(c), 474(f), 505(e), 697(e), 2348(d), 2398(c), 2432(e); vii. 2496(o), 3770(s), 3815(b).

- Sterling Life Ins. Co. v. Rapps*, 130 Ill. App. 121—vi. 2259(a), 2330(q); vii. 2634(f).
- Sterling Mutual Life Ins. Co. v. Stanley*, 15 Ga. App. 263, 82 S. E. 826—vii. 3285(e).
- Stern v. Metropolitan Life Ins. Co.*, 154 N. Y. Supp. 283, 90 Misc. Rep. 129—vi. 39(a).
- v. Rosenthal*, 128 N. Y. Supp. 711, 71 Misc. Rep. 422—vi. 7(c).
- Sternaman v. Metropolitan Life Ins. Co.*, 94 App. Div. 610, 87 N. Y. Supp. 904—vi. 2144(j).
- 181 N. Y. 514, 73 N. E. 1133—vi. 2144(j).
- Sternheimer v. Order of United Commercial Travelers of America (S. C.)* 93 S. E. 8—vii. 2712(e), 3966(c).
- Stetson v. Insurance Co. of North America (D. C.)* 215 Fed. 186—vi. 1257(d); vii. 2925(d).
- Steven v. Fidelity & Casualty Co.*, 178 Ill. App. 54—vii. 3318(a), 3332(a).
- Stevens v. Modern Woodmen of America*, 107 N. W. 8, 127 Wis. 606, 7 Ann. Cas. 566—vi. 2214(f).
- v. Norwich Union Fire Ins. Co.*, 96 S. W. 684, 120 Mo. App. 88—vii. 3047(a), 3064(b), 3094(g), 3125(c), 3126(d), 3606(e), 3624(g).
- v. Stewart-Warner Speedometer Corp.*, 111 N. E. 771, 223 Mass. 44—vii. 3893(a).
- Stevens & Co. v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 207 Fed. 757, 125 C. C. A. 295, 47 L. R. A. (N. S.) 1214—vii. 3331(a), 3574(c).
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- Stewart v. General Accident Ins. Co.*, 39 Pa. Super. Ct. 396—vii. 2683(b), 2686(b).
- v. Glade Mill Mut. Fire Ins. Co.*, 41 Pa. Super. Ct. 472—vi. 421(f), 609(b).
- Stewart v. Gwynn*, 41 Ind. App. 320, 83 N. E. 753—vi. 1105(d), 1118(k).
- 41 Ind. App. 320, 82 N. E. 1000—vi. 1105(d), 1118(k).
- v. Home Life Ins. Co.*, 131 N. Y. Supp. 504, 146 App. Div. 709—vi. 2308(d).
- v. National Council of Knights and Ladies of Security*, 147 N. W. 651, 125 Minn. 512—vii. 3974(g).
- v. Thorburn*, 157 N. Y. Supp. 242, 171 App. Div. 258—vi. 715(n).
- Stich v. Fidelity & Deposit Co. (Sup.)* 159 N. Y. Supp. 712—vii. 3042(c).
- Still v. Connecticut Fire Ins. Co.*, 185 Mo. App. 550, 172 S. W. 625—vi. 645(m), 743(f); vii. 3710(j).
- Stillman v. Aetna Life Ins. Co. (D. C.)* 240 Fed. 462—vi. 1941(g), 1974(g), 2083(a); vii. 2498(a), 2531(i), 3302(f).
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- Stirn v. Supreme Lodge of Bohemian Slavonian Benev. Society*, 150 Wis. 13, 136 N. W. 164—vi. 614(e), 702(g), 714(m), 717(n).
- Stitt v. Locomotive Engineers' Mut. Protective Ass'n*, 177 Mich. 207, 142 N. W. 1110—vi. 688(f); vii. 3033(i), 3383(b).
- Stix v. Travelers' Indemnity Co.*, 175 Mo. App. 171, 157 S. W. 870—vii. 3033(i), 3054(b), 3887(c).
- Stoats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185—vii. 2620(a).
- Stocker v. Dubuque Fire & Marine Ins. Co.*, 160 N. W. 1035, 164 Wis. 614—vi. 1774(g).
- Stockwell v. German Mut. Ins. Ass'n of Le Mars*, 37 S. D. 348, 158 N. W. 450—vii. 3531(a).
- v. Supreme Court, I. O. F. (D. C.)* 216 Fed. 205—vii. 3278(d).
- Stoebe v. Hanover Fire Ins. Co.*, 112 N. Y. Supp. 553, 128 App. Div. 887—vii. 3347(a).
- Stokely v. Fidelity & Casualty Co.*, 193 Ala. 90, 69 So. 64, L. R. A. 1915E, 955—vii. 3157(a).
- Stone v. Fidelity & Casualty Co.*, 133 Tenn. 672, 182 S. W. 252, L. R. A. 1916D, 536, Ann. Cas. 1917A, 86—vii. 3157(a).
- v. Insurance Co. of North America*, 105 Pac. 856, 56 Wash. 427—vi. 628(a); vii. 2880(b).
- v. New Jersey & H. R. Ry. & Ferry Co.*, 75 N. J. Law, 172, 66 Atl. 1072—vi. 1871(b).
- v. Old Colony St. Ry. Co.*, 212 Mass. 459, 99 N. E. 218—vi. 561(c), 563(f), 564(g), 592(h).
- v. Penn Yan, K. P. & B. Ry.*, 125 App. Div. 94, 109 N. Y. Supp. 374—vi. 564(g), 968(s).
- 197 N. Y. 279, 90 N. E. 843, 134 Am. St. Rep. 879—vi. 564(g).
- v. Sargent*, 220 Mass. 445, 107 N. E. 1014—vi. 1064(a).
- Stoner v. Yeomen of America*, 160 Ill. App. 432—vii. 3301(f).
- Stotlar v. Citizens' Ins. Co.*, 23 N. D. 352, 136 N. W. 794—vi. 1388(g); vii. 2622(a).
- v. German Alliance Ins. Co.*, 23 N. D. 346, 136 N. W. 792—vi. 1388(g); vii. 2622(a).
- Stout v. Missouri Fidelity & Casualty Co. (Mo. App.)* 179 S. W. 993—vi. 2302(a).
- Stramback v. Fidelity Mut. Life Ins. Co.*, 102 N. W. 731, 94 Minn. 281—vi. 2304(b).
- Strampe v. Minnesota Farmers' Mut. Ins. Co.*, 123 N. W. 1083, 109 Minn. 364, 26 L. R. A. (N. S.) 999, 134 Am. St. Rep. 781—vi. 586(d); vii. 3986(j).

- Strand v. Loyal Americans of the Republic**, 142 N. W. 10, 122 Minn. 118—vi. 2428(c).
- Strang v. Camden Lodge, A. O. U. W.**, 64 Atl. 93, 73 N. J. Law, 500—vi. 717(n), 2215(g).
- Stratton's Adm'r v. New York Life Ins. Co.**, 115 Va. 257, 78 S. E. 636—vi. 636(e), 2411(g).
- Strawbridge v. Standard Fire Ins. Co.**, 187 S. W. 79, 193 Mo. App. 687—vii. 3094(g).
- Streep v. Mutual Protective League**, 186 Ill. App. 535—vi. 712(l).
- Strehlow v. Aetna Life Ins. Co.**, 183 Ill. App. 50—vii. 3174(g).
- Strickland v. Peerless Casualty Co.**, 90 Atl. 974, 112 Me. 100—vi. 1953(c); vii. 2521(c), 2777(e), 3168(e), 3303(g), 3312(i).
- Stronge v. Supreme Lodge, K. P.**, 111 App. Div. 87, 97 N. Y. Supp. 661—vi. 610(c); vii. 3773(s), 3819(c).
- 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. (N. S.) 1206, 121 Am. St. Rep. 902, 12 Ann. Cas. 941—vi. 610(c); vii. 3765(r), 3773(s), 3819(c).
- Strother v. Business Men's Acc. Ass'n of America**, 188 S. W. 314, 193 Mo. App. 718—vi. 637(f); vii. 3208(k).
- Stroud v. Life Ins. Co.**, 148 N. C. 54, 61 S. E. 626—vi. 1089(a).
- Struzewski v. Farmers' Fire Ins. Co.**, 179 App. Div. 318, 166 N. Y. Supp. 362—vi. 398(f), 463(a), 913(a).
- Stubblefield v. Planters' Fire Ins. Co.**, 105 Ark. 697, 150 S. W. 120—vi. 925(g).
- Stubbs v. Bankers' Life Ass'n**, 55 Ind. App. 579, 101 N. E. 638—vi. 2375(o).
- Stucky Trucking & Rigging Co., Inc. re (D. C.)** 240 Fed. 427—vii. 3701(g).
- Stuht v. Maryland Motor Car Ins. Co.**, 156 Pac. 557, 90 Wash. 576—vii. 3033(i).
- Stull v. United States Health & Accident Ins. Co. (Ky.)** 115 S. W. 234—vii. 3174(g).
- Sturgeon v. Pioneer Life Ins. Co. (Mo. App.)** 186 S. W. 1192—vi. 421(f).
- Sturges v. Sturges**, 102 S. W. 884, 126 Ky. 80, 31 Ky. Law Rep. 537, 12 L. R. A. (N. S.) 1014—vi. 691(a), 803(e); vii. 3776(t).
- Sturm v. Green Bay & De Pere Mut. Fire Ins. Co.**, 143 N. W. 151, 154 Wis. 420—vi. 1871(b).
- Stutzman v. Cicero Mut. Fire Ins. Co.**, 150 Wis. 254, 136 N. W. 604—vi. 692(b), 958(n), 1540(e), 1871(b), 1877(e); vii. 2725(m), 2734(a).
- Stuyvesant Ins. Co. v. Reid**, 88 S. E. 779, 171 N. C. 513—vi. 185(a); vii. 3701(g), 3915(j).
- Styles v. American Home Ins. Co.**, 146 Ga. 92, 90 S. E. 718—vii. 3514(b), 3955(a).
- Suelflow v. Supreme Lodge, Knights and Ladies of Honor**, 165 Wis. 291, 162 N. W. 346—vii. 3757(q), 3762(r), 3767(s).
- Suess v. Imperial Life Ins. Co.**, 91 S. W. 1041, 193 Mo. 564—vi. 1052(b).
- Sugg v. Equitable Life Assur. Soc.**, 116 Tenn. 658, 94 S. W. 936—vi. 2408(g); vii. 2705(b).
- Sullivan v. Maroney**, 76 N. J. Eq. 104, 73 Atl. 842—vi. 1090(f), 1091(f); vii. 3767(s).
- 77 N. J. Eq. 565, 78 Atl. 150—vi. 1091(f); vii. 3767(s).
- v. Mercantile Town Mut. Ins. Co.**, 20 Okl. 460, 94 Pac. 676, 129 Am. St. Rep. 761—vi. 1914(p); vii. 2510(f), 2653(t).
- v. Metropolitan Life Ins. Co.**, 88 Pac. 401, 35 Mont. 1—vi. 2146(k); vii. 2605(e).
- v. Modern Brotherhood of America**, 133 N. W. 486, 167 Mich. 524, 42 L. R. A. (N. S.) 140, Ann. Cas. 1913A, 1116—vii. 3157(a), 3175(h).
- v. Radjuweit**, 82 Neb. 657, 118 N. W. 571—vii. 3952(d).
- Sulski v. Metropolitan Life Ins. Co.**, 196 Ill. App. 76—vi. 451(f), 1040(c), 2156(a); vii. 2460(a).
- Summers v. Alexander**, 30 Okl. 198, 120 Pac. 601, 38 L. R. A. (N. S.) 787—vi. 1004(f).
- Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.**, 76 S. C. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736, 121 Am. St. Rep. 941, 11 Ann. Cas. 780—vi. 1640(l), 1884(b), 1885(c).
- Sunderland Roofing & Supply Co. v. United States Fidelity & Guaranty Co.**, 122 N. W. 25, 84 Neb. 791—vi. 2435(a).
- Sun Ins. Office v. Heiderer**, 44 Colo. 293, 99 Pac. 39—vii. 3847(e), 3915(j).
- v. Mitchell**, 186 Ala. 420, 65 South. 143—vi. 347(b), 378(h), 498(b).
- Superior Lodge, Degree of Honor, v. Satchwell**, 87 S. W. 58, 112 Mo. App. 280—vii. 3819(c).
- Supreme Circle of Benevolence v. Beall**, 89 S. E. 630, 18 Ga. App. 425—vii. 4001(a).
- Supreme Colony United Order of Pilgrim Fathers v. Towne**, 89 Atl. 264, 87 Conn. 644, Ann. Cas. 1916B, 181—vi. 459(j), 691(a); vii. 3749(n), 3762(r), 3781(u).
- Supreme Commandery, United Order of the Golden Cross of the World, v. Bernard**, 26 App. D. C. 169, 6 Ann. Cas. 694—vi. 2395(b); vii. 2718(j), 2719(j).
- v. Donaghey**, 75 N. H. 197, 72 Atl. 419—vi. 296(n), 809(i).
- Supreme Conclave Improved Order of Heptasophs v. Rehan**, 85 Atl. 1035, 119 Md. 92, 46 L. R. A. (N. S.) 308, Ann. Cas. 1914D, 58—vi. 717(n); vii. 3253(k).

- Supreme Council A. L. H. v. Garrett (Tex. Civ. App.) 85 S. W. 27—vii. 2832(c).
- v. Lippincott, 134 Fed. 824, 67 C. C. A. 650, 69 L. R. A. 803—vii. 2832(c).
- v. Lyon (Tex. Civ. App.) 88 S. W. 435—vi. 1054(e).
- v. McAlarney, 135 Fed. 72, 67 C. C. A. 546—vi. 1056(f).
- Supreme Council of Catholic Benevolent Legion v. Grove, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913—vi. 632(c), 643(k), 2336(a), 2338(b), 2350(e); vii. 2708(c), 3288(b), 3310(i), 3311(i), 3662(d), 3676(b).
- Supreme Council Catholic Knights of America v. Fenwick, 183 S. W. 906, 169 Ky. 269—vi. 1033(h), 1038(a), 2375(o); vii. 3866(b).
- v. Fitzpatrick, 28 R. I. 486, 68 Atl. 367, 125 Am. St. Rep. 752—vi. 577(g), 797(a).
- v. Logsdon, 183 Ind. 183, 108 N. E. 587—vi. 691(a), 700(f), 703(h), 1033(h), 2348(d).
- Supreme Council of Ladies' Catholic Benev. Ass'n. v. Scherer, 174 Mich. 25, 140 N. W. 505—vii. 3819(c).
- Supreme Council Royal Arcanum v. Green, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771—vi. 714(m), 206 N. Y. 591, 100 N. E. 411—vi. 714(m).
- v. Heitzman, 140 Mo. App. 105, 120 S. W. 628—vii. 3765(r).
- v. Huckins, 166 Ill. App. 555—vi. 817(m); vii. 3769(s).
- v. McKnight, 238 Ill. 349, 87 N. E. 299—vi. 708(j), 709(k), 802(d); vii. 3723(b), 3748(n), 3756(q), 3762(r), 3775(t), 140 Ill. App. 421—vi. 708(j), 709(k), 802(d); vii. 3723(b), 3748(n), 3756(q), 3762(r), 3775(t).
- v. Mooney, 79 Atl. 234, 230 Pa. 22—vii. 3878(f).
- v. Urban, 137 Ill. App. 292—vi. 2045(h), 2214(f).
- v. Wishart, 192 Fed. 453, 112 C. C. A. 591—vii. 3225(a), 3236(c), 3256(l), 3259(m), 3267(o).
- Supreme Court of Independent Order of Foresters v. Fisher, 172 Ill. App. 454—vii. 3725(c).
- v. Frise, 183 Mich. 186, 150 N. W. 110—vii. 3769(s).
- v. Herlinger, 27 Ohio Cir. Ct. R. 151—vi. 698(e); vii. 3452(h), 3676(b).
- Supreme Hive of Ladies of Maccabees of the World v. Harrington, 81 N. E. 533, 227 Ill. 511—vii. 4016(i).
- v. Owens (Tex. Civ. App.) 167 S. W. 233—vi. 2371(m).
- Supreme Lodge of the Fraternal Brotherhood v. Jones (Tex. Civ. App.) 143 S. W. 247—vi. 2072(b), 2076(f), 2082(i), 2186(e); vii. 2561(b), 2580(h).
- v. Price, 27 Cal. App. 607, 150 Pac. 803—vi. 698(f); vii. 3732(f), 3756(q), 3767(s), 3772(s).
- Supreme Lodge of Fraternal Union of America v. Light, 195 Fed. 903, 115 C. C. A. 591—vi. 709(k), 711(l), 712(l).
- v. Ray (Tex. Civ. App.) 166 S. W. 46—vi. 714(m).
- Supreme Lodge of Heralds of Liberty v. Herrod, 141 Pac. 269, 42 Okl. 308—vii. 3982(h), 4007(f).
- Supreme Lodge Knights of Honor v. Bieler, 58 Ind. App. 550, 105 N. E. 244—vi. 717(n), 816(l), 2433(f).
- v. Hahn, 43 Ind. App. 75, 84 N. E. 837—vi. 1013(a), 1024(d), 2391(u).
- Supreme Lodge K. P. v. Andrews, 39 Ind. App. 1, 77 N. E. 361—vi. 127(f).
- 39 Ind. App. 1, 78 N. E. 433—vi. 127(f).
- v. Bradley, 107 S. W. 209, 32 Ky. Law Rep. 743—vi. 1974(g), 1979(j), 1980(k).
- 109 S. W. 1178—vi. 1974(g), 1979(j), 1980(k).
- 117 S. W. 275—vi. 1950(a), 1969(f), 2121(o), 2156(a), 2178(d).
- 141 Ky. 334, 132 S. W. 547—vi. 1950(a), 1969(f), 2121(o), 2156(a), 2178(d).
- v. Connelly, 185 Ala. 301, 64 South. 362—vi. 349(c), 2371(m), 2378(p), 2432(e); vii. 3532(b).
- v. Crenshaw, 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307—vii. 3129(a), 3146(f), 3152(g).
- v. Davis, 90 Ark. 264, 119 S. W. 257—vi. 2006(e).
- v. Ferrell, 83 Kan. 491, 112 Pac. 155, 33 L. R. A. (N. S.) 777—vii. 3721(b), 3758(q).
- v. Few, 138 Ga. 778, 76 S. E. 91—vi. 452(f), 2088(e), 2304(b), 142 Ga. 240, 82 S. E. 627—vii. 2625(a), 2769(a).
- v. Graham, 49 Ind. App. 535, 97 N. E. 806—vi. 413(c), 421(f), 435(l), 456(h), 677(a), 689(g), 698(f), (Ind. App.) 114 N. E. 879—vi. 421(f).
- v. Hunziker, 121 Ky. 33, 87 S. W. 1134—vi. 694(c).
- v. Lipscomb, 50 Fla. 406, 39 South. 637—vi. 1964(a), 1969(f); vii. 3152(f), 3890(d).

- Supreme Lodge K. P. v. Meyer**, 82 App. Div. 359, 81 N. Y. Supp. 813—vi. 564(g).
- 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839—vi. 564(g).
- 198 U. S. 508, 25 S. Ct. 754, 49 L. Ed. 1146—vi. 564(g).
- v. Mims**, 36 Sup. Ct. 702, 241 U. S. 574, 60 L. Ed. 1179, L. R. A. 1916F, 919—vi. 714(m).
- (Tex. Civ. App.) 167 S. W. 835—vi. 714(m), 1033(h).
- v. Neeley** (Tex. Civ. App.) 135 S. W. 1046—vi. 1048(h); vii. 2841(f), 2846(h).
- v. Reyman**, 126 Ill. App. 482—vi. 797(a); vii. 3722(b), 3790(b).
- v. Rutzler**, 86 N. J. Eq. 327, 98 Atl. 836—vii. 3724(b).
- (N. J.) 100 Atl. 189—vi. 817(m); vii. 3724(b).
- Supreme Lodge Knights & Ladies of Honor v. Anderson**, 142 S. W. 1069, 146 Ky. 481—vii. 2711(d).
- v. Baker**, 163 Ala. 518, 50 South. 958—vi. 1979(j), 2041(e), 2048(k), 2061(k), 2064(l), 2207(b).
- v. Benes**, 135 Ill. App. 314—vi. 554(j), 698(f).
- v. Johnson**, 81 Ark. 512, 99 S. W. 834—vi. 434(l), 2386(s).
- v. Payne**, 101 Tex. 449, 108 S. W. 1160, 15 L. R. A. (N. S.) 1277—vi. 1933(b), 2105(f).
- (Tex. Civ. App.) 110 S. W. 523—vi. 1944(i).
- v. Ulanowsky**, 246 Pa. 591, 92 Atl. 711—vii. 3765(r).
- Supreme Lodge of Modern American Fraternal Order v. Miller**, 110 N. E. 556, 60 Ind. App. 269—vi. 2096(a).
- v. Watkins** (Ind. App.) 110 N. E. 1008—vii. 2690(d).
- Supreme Lodge, New England Order of Protection v. Hine**, 82 Conn. 315, 73 Atl. 791—vi. 652(b), 677(a), 812(j); vii. 3748(n), 3765(r).
- v. Sylvester**, 116 Me. 1, 99 Atl. 655, L. R. A. 1917C, 925—vi. 797(a), 813(k).
- Supreme Lodge of Pathfinder v. Johnson**, 47 Tex. Civ. App. 109, 104 S. W. 508—vi. 2371(m).
- (Tex. Civ. App.) 168 S. W. 1010—vi. 2428(c); vii. 3129(a).
- Supreme Lodge, Order of Mut. Protection v. Dewey**, 106 N. W. 140, 142 Mich. 666, 3 L. R. A. (N. S.) 334, 113 Am. St. Rep. 596, 7 Ann. Cas. 681—vi. 809(i); vii. 3748(n).
- Supreme Lodge, United Benevolent Ass'n v. Lawson**, 63 Tex. Civ. App. 273, 133 S. W. 907—vi. 68(m), 496(a), 498(b), 505(e), 507(f).
- Supreme Royal Circle of Friends of the World v. Morrison**, 105 Ark. 140, 150 S. W. 561—vi. 697(e), 702(g).
- Supreme Ruling of Fraternal Mystic Circle v. Blackshear**, 13 Ga. App. 329, 79 S. E. 210—vi. 700(f).
- v. Ericson** (Tex. Civ. App.) 131 S. W. 92—vi. 614(e), 713(m), 714(m), 717(n), 1019(c), 1054(e); vii. 2842(f).
- v. Hansen** (Tex. Civ. App.) 153 S. W. 351—vi. 2000(m), 2400(d).
- (Tex. Civ. App.) 161 S. W. 54—vi. 1984(a), 2096(a), 2400(d).
- v. Hoskins** (Tex. Civ. App.) 171 S. W. 812—vii. 2683(b), 3129(a).
- v. National Surety Co.**, 99 N. Y. Supp. 1033, 114 App. Div. 689—vi. 2451(c); vii. 3338(d).
- v. Turner**, 105 Miss. 468, 62 South. 497—vi. 2199(a).
- Supreme Tent, Knights of Maccabees of the World v. Altmann**, 134 Mo. App. 363, 114 S. W. 1107—vi. 802(d); vii. 3762(r), 3765(r), 3769(s).
- v. Ethridge**, 43 Ind. App. 475, 87 N. E. 1049—vi. 632(c), 1964(a); vii. 3453(i), 3498(e).
- v. Fisher**, 90 N. E. 1044, 45 Ind. App. 419—vi. 2425(a), 2432(e); vii. 3516(c), 3558(b).
- v. King**, 142 Fed. 678, 73 C. C. A. 668—vii. 3255(l), 3264(o).
- Supreme Tribe of Ben Hur v. Cosgrove**, 169 S. W. 999, 160 Ky. 595, 161 Ky. 484—vi. 2061(k), 2400(d), 2430(d).
- v. Gailey**, 117 Ark. 145, 173 S. W. 838—vi. 65(k), 809(h); vii. 3752(n).
- v. Lennert**, 98 N. E. 115, 178 Ind. 122—vi. 2214(f), 2245(g); vii. 2524(d), 2638(i), 2683(b), 2688(b), 2772(b), 2773(c).
- (Ind. App.) 93 N. E. 869—vi. 2045(h), 2214(f); vii. 2524(d), 2638(i), 2683(b), 2688(b), 2690(d), 2693(f), 2773(c), 2831(b).
- (Ind. App.) 94 N. E. 889—vi. 2045(h), 2214(f), 2245(g); vii. 2524(d), 2638(i), 2683(b), 2688(b), 2690(d), 2693(f), 2773(c), 2831(b).
- v. Miller**, 122 Ill. App. 489—vi. 2203(d), 2247(h).
- v. Owens** (Okla.) 151 Pac. 198, L. R. A. 1916A, 979—vii. 2543(o).
- Suravitz v. Prudential Ins. Co. of America**, 91 Atl. 495, 244 Pa. 582, L. R. A. 1915A, 273—vi. 2108(g), 2144(j); vii. 2579(g), 2775(d).
- Surface v. Northwestern Nat. Ins. Co.**, 157 Mo. App. 570, 139 S. W. 262—vi. 576(e); vii. 3057(b).
- Sutherland v. Federal Ins. Co.**, 97 Miss. 345, 52 South. 689—vii. 2490(k), 2617(k).

- Suttles v. Railway Mail Ass'n*, 141 N. Y. Supp. 1024, 156 App. Div. 435—vi. 90(d); vii. 3301(e), 3904(e).
- Sutton v. Wright*, 94 Kan. 499, 147 Pac. 62—vi. 449(d).
- Svea Ins. Co. v. Vicksburg, S. & P. Ry. Co. (C. C.)* 153 Fed. 774—vii. 3893(a).
- Swaine v. Teutonia Fire Ins. Co.*, 109 N. E. 825, 222 Mass. 108—vi. 791(d), 1064(a), 1065(b), 1716(b); vii. 2467(c), 3361(b).
- Swank v. Farmers' Ins. Co.*, 126 Iowa, 547, 102 N. W. 429—vi. 1734(e), 1737(e).
- Sweeney v. Life Ass'n of America*, 152 Ill. App. 173—vi. 2044(g), 2103(d).
- v. National Relief Assur. Ass'n*, 101 N. Y. Supp. 797, 52 Misc. Rep. 144—vii. 3181(b).
- Sweetland v. Bankers' Life Ins. Co. (Sup.)* 105 N. Y. Supp. 627—vii. 2875(h).
- Swett v. Antelope County Farmers' Mut. Ins. Co.*, 91 Neb. 561, 136 N. W. 347—vi. 574(d), 692(b), 737(c); vii. 2725(m).
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- v. Dayton*, 124 App. Div. 58, 108 N. Y. Supp. 155—vi. 564(g), 588(f).
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- v. Sligo Furnace Co.*, 133 Ill. App. 217—vi. 588(f).
- v. Taylor & Crate*, 68 W. Va. 621, 70 S. E. 373—vi. 938(b).
- v. Thomas*, 120 Ill. App. 235—vi. 588(f), 592(h).
- v. Wanamaker*, 139 App. Div. 627, 124 N. Y. Supp. 231—vi. 588(f), 591(h).
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- v. Weston Lumber Co.*, 103 N. W. 816, 140 Mich. 344—vi. 586(d).
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- Switchmen's Union of North America v. Colehouse*, 227 Ill. 561, 81 N. E. 696—vi. 632(c); vii. 3288(b), 3291(b), 3998(l).
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- 101 N. E. 698, 207 N. Y. 632, 47 L. R. A. (N. S.) 196, Ann. Cas. 1914C, 685—vi. 180(d); vii. 2882(c), 2904(d), 3692(c).*
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- Tabor v. Modern Woodmen of America (Tex. Civ. App.)* 163 S. W. 324—vi. 2386(s), 2395(b).
- Tackman v. Brotherhood of American Yeomen*, 106 N. W. 350, 132 Iowa. 64, 8 L. R. A. (N. S.) 974—vii. 3255(l), 3256(l), 3262(n), 3265(o).
- Tacoma Lumber & Shingle Co. v. Fireman's Fund Ins. Co.*, 87 Wash. 79, 151 Pac. 91—vi. 830(a); vii. 2796(f).
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- Tainter v. Central States Life Ins. Co. (Mo. App.)* 185 S. W. 1185—vi. 444(a).
- Talbot v. Atlantic Horse Ins. Co.*, 193 Ill. App. 587—vii. 3347(a), 3514(b).
- v. Union Cent. Life Ins. Co.*, 241 Fed. 669, 154 C. C. A. 427—vi. 845(g).
- Talbott v. Metropolitan Life Ins. Co.*, 142 Fed. 694, 74 C. C. A. 26—vi. 2433(f); vii. 2478(d).
- Talley v. Metropolitan Life Ins. Co.*, 69 S. E. 936, 111 Va. 778—vi. 2101(d), 2108(h), 2121(o).
- Tanenbaum v. Federal Match Co.*, 102 App. Div. 520, 92 N. Y. Supp. 683—vi. 337(c).

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- Tapia v. Baggett, 167 Ala. 381, 52 South. 834—vi. 459(j).
- Tate v. Jasper County Farmers' Mut. Ins. Co., 113 S. W. 659, 133 Mo. App. 584—vi. 688(f), 734(b), 744(f).
- Taussig v. United Security Life Ins. & Trust Co., 231 Pa. 16, 79 Atl. 810—vi. 295(n), 301(d).
- Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393—vi. 545(b), 2454(f); vii. 3329(e), 3334(b).
- Taylor v. American Patriots, 152 Ill. App. 578—vii. 2495(o), 2683(b), 2688(b).
- v. Farmers' Fire Ins. Co., 101 Miss. 480, 58 South. 353—vii. 3965(e).
- v. Grand Lodge A. O. U. W. of Minnesota, 105 N. W. 408, 96 Minn. 441, 3 L. R. A. (N. S.) 114—vi. 2023(a), 2024(b), 2026(d); vii. 2692(e), 2748(g), 2777(e).
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- v. Insurance Co. of North America, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906—vi. 632(c); vii. 2801(h), 2807(k).
- v. Loyal Protective Ins. Co. (Mo. App.) 194 S. W. 1055—vi. 628(a), 641(i); vii. 3298(e).
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- 84 Pac. 867, 42 Wash. 304
7 Ann. Cas. 607—vi. 455(h).
- v. New York Life Ins. Co., 90 N. E. 964, 197 N. Y. 324—vi. 2413(h).
- 102 N. E. 524, 209 N. Y. 29—vi. 2409(g).
- 115 N. Y. Supp. 1146, 131 App. Div. 922—vi. 2413(h).
- 133 N. Y. Supp. 746, 148 App. Div. 815—vi. 2409(g).
- 134 N. Y. Supp. 1148, 149 App. Div. 936—vi. 2409(g).
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- v. Provident Sav. Life Assur. Soc. (C. C.) 134 Fed. 932—vi. 101(c), 2302(a); vii. 2934(b).
- v. Southern States Life Ins. Co., 106 S. C. 356, 91 S. E. 326, L. R. A. 1917C, 910—vii. 3288(b).
- Taylor-Baldwin Co. v. Northwestern Fire & Marine Ins. Co., 18 N. D. 343, 122 N. W. 393, 20 Ann. Cas. 432—vii. 2681(h).
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- Tebbins v. Grand Court of State of New York, Foresters of America (Sup.) 134 N. Y. Supp. 816—vii. 3868(c).
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- Teegarden v. Supreme Tribe of Ben Hur, 190 Ill. App. 474—vi. 1969(f); vii. 2559(b).
- Teeple v. Fraternal Bankers' Reserve Soc. (Iowa) 161 N. W. 102, L. R. A. 1917C, 858—vi. 1939(f).
- Tegley Hardware Co. v. Continental Ins. Co., 154 Pac. 229, 97 Kan. 127—vii. 3008(a).
- Telech v. Orthodox Catholic Mut. Aid Soc., 63 Pa. Super. Ct. 207—vi. 2203(d).
- Ten Brock v. Jansma, 161 Mich. 597, 126 N. W. 710—vi. 998(e).
- Tennant v. Upton (N. H.) 99 Atl. 652—vii. 3731(e), 3734(g), 3797(d).
- Tennent v. Union Cent. Life Ins. Co., 112 S. W. 754, 133 Mo. App. 345—vii. 3237(d).
- Tepper v. New York Life Ins. Co., 89 Misc. Rep. 224, 151 N. Y. Supp. 1049—vi. 1100(b); vii. 3735(g), 3759(r).
- Terminal Ice & Power Co. v. American Fire Ins. Co. (Mo. App.) 187 S. W. 564—vi. 1357(g), 1723(e), 1734(e), 1758(f).
- 196 Mo. App. 241, 194 S. W. 722—vi. 1369(a), 1379(h), 1716(a), 1723(e), 1734(e), 1754(d); vii. 2610(i), 2690(d).
- v. Commercial Fire Ins. Co. (Mo. App.) 187 S. W. 569—vi. 1357(g), 1723(e), 1734(e), 1758(f).
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- v. Home Ins. Co. (Mo. App.) 187 S. W. 568—vi. 1357(g), 1723(e), 1734(e), 1758(f).
- v. Lumbermen's Ins. Co., 187 S. W. 564—vi. 1758(f).
- (Mo. App.) 187 S. W. 568—vi. 1357(g), 1723(e), 1734(e), 1758(f).
- v. Security Ins. Co. (Mo. App.) 187 S. W. 568—vi. 1357(g), 1723(e), 1734(e), 1758(f).
- v. Stuyvesant Ins. Co. (Mo. App.) 187 S. W. 569—vi. 1357(g), 1723(e), 1734(e), 1758(f).
- Terry v. State Mut. Life Ins. Co., 72 S. E. 498, 90 S. C. 1—vi. 2324(n).
- Teter v. Franklin Fire Ins. Co., 74 W. Va. 344, 82 S. E. 40—vi. 1379(b); vii. 3047(a), 3063(b), 3099(a), 3124(c), 3126(d), 3435(b), 3624(q).
- v. Norfolk Fire Ins. Corporation, 74 W. Va. 461, 82 S. E. 201—vi. 1855(q); vii. 2613(i), 3061(a), 3094(g), 3123(c), 3606(e).

- Teutonia Ins. Co. v. Tobias (Tex. Civ. App.) 145 S. W. 251—vi. 1824(e).
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- Texas Moline Plow Co. v. Niagara Fire Ins. Co., 87 S. W. 192, 39 Tex. Civ. App. 168—vii. 3085(e).
- Texas Nat. Fire Ins. Co. v. White, Blakeney & Fuller Dry Goods Co. (Tex. Civ. App.) 165 S. W. 118—vi. 902(c).
- Texas Short Line Ry. Co. v. Waymire (Tex. Civ. App.) 89 S. W. 452—vii. 3334(b), 3960(b).
- Texas & N. O. R. Co. v. Commercial Union Assur. Co. (Tex. Civ. App.) 137 S. W. 401—vii. 3923(m).
- T. F. Walsh & Co. v. Queen Ins. Co., 27 Ohio Cir. Ct. R. 313—vii. 2617(k).
- Thames & Mersey Marine Ins. Co. v. Pacific Creosoting Co., 223 Fed. 561, 139 C. C. A. 101—vi. 643(j), 1257(d); vii. 2898(b), 2975(e).
- Thaxton v. Metropolitan Life Ins. Co., 143 N. C. 33, 55 S. E. 419—vii. 3241(f), 3242(g), 3265(o), 3275(c), 3549(c), 3561(d).
- Thayer v. Thompson, 220 Pa. 241, 69 Atl. 758—vi. 800(c), 805(f).
- Therault v. California Ins. Co., 149 Pac. 719, 27 Idaho, 476, Ann. Cas. 1917D, 818—vi. 1807(h); vii. 3514(b).
- v. Springfield Fire & Marine Ins. Co., 149 Pac. 722, 27 Idaho, 485—vi. 1807(h); vii. 3514(b).
- Thermal Belt Sanatorium Co. v. Hartford Ins. Co., 157 N. C. 551, 73 S. E. 337—vi. 1387(e).
- Thieme v. Niagara Fire Ins. Co., 91 N. Y. Supp. 499, 100 App. Div. 278—vi. 1675(i).
- 78 N. E. 1113, 185 N. Y. 576—vi. 1675(i).
- Thomas v. Continental Ins. Co., 134 S. W. 199, 142 Ky. 265—vii. 3851(e).
- v. Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. (N. S.) 904, 5 Ann. Cas. 456—vi. 697(e), 698(f), 808(h); vii. 3722(b).
- v. Fidelity & Casualty Co., 106 Md. 299, 67 Atl. 259—vii. 3174(g).
- v. Knights of Macabees of the World, 85 Wash. 665, 149 Pac. 7, L. R. A. 1916A, 750, Ann. Cas. 1917B, 804—vi. 714(m), 717(n); vii. 2833(c).
- v. Modern Brotherhood of America, 25 S. D. 632, 127 N. W. 572—vi. 2101(d), 2117(i); vii. 2521(c), 2552(v), 2571(e).
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- 84 N. J. Law, 281, 86 Atl. 375, 46 L. R. A. (N. S.) 779—vi. 292(i).
- Thomas Orr Trucking & Forwarding Co. v. Metropolitan Surety Co., 77 N. J. Law, 749, 73 Atl. 541—vii. 3037(a), 3085(e), 3347(a), 3409(d), 3531(a).
- Thomasson v. Mercantile Town Mut. Ins. Co., 217 Mo. 485, 116 S. W. 1092—vii. 4001(a).
- Thompson v. Bankers' Mut. Casualty Ins. Co., 123 Minn. 474, 151 N. W. 180, Ann. Cas. 1916A, 277—vii. 3205(i).
- v. Columbian Nat. Life Ins. Co., 95 Atl. 229, 114 Me. 1—vii. 3195(f).
- v. Equitable Life Assur. Society, 95 S. C. 16, 78 S. E. 439—vi. 1105(d); vii. 3557(a).
- v. Fidelity Mut. Life Ins. Co., 92 S. W. 1098, 116 Tenn. 557, 6 L. R. A. (N. S.) 1039, 115 Am. St. Rep. 823—vi. 2259(a), 2313(f); vii. 2709(d), 2711(d), 2757(b).
- v. Germania Fire Ins. Co., 45 Wash. 482, 88 Pac. 941—vi. 392(b), 412(b); vii. 3532(b).
- v. Interstate Life & Accident Co., 128 Tenn. 526, 162 S. W. 39—vii. 3890(c), 3959(b).
- v. Iowa State Traveling Men's Ass'n (Iowa) 161 N. W. 655—vii. 2660(b).
- v. Loyal Protective Ass'n, 167 Mich. 31, 132 N. W. 554—vii. 3185(c), 3311(i), 3561(d).
- v. Metropolitan Life Ins. Co., 128 App. Div. 420, 113 N. Y. Supp. 225—vi. 2096(a), 2142(b), 2144(j), 2168(h); vii. 2546(p), 2625(a).
- 92 N. E. 1104, 198 N. Y. 582—vi. 2142(h), 2144(j).
- (Sup.) 99 N. Y. Supp. 1006—vi. 2096(a), 2168(h); vii. 2546(p), 2625(a).
- v. Michigan Mut. Life Ins. Co., 56 Ind. App. 502, 105 N. E. 780—vi. 347(b), 349(c), 449(d).
- v. Modern Brotherhood of America, 189 Mo. App. 15, 176 S. W. 506—vii. 2472(e), 2552(v), 2777(e), 2779(f).
- v. Northwestern Mut. Life Ins. Co., 161 Iowa, 446, 143 N. W. 518—vi. 794(g); vii. 3727(d), 3776(u).
- v. Piedmont Mut. Ins. Co., 58 S. E. 341, 77 S. C. 486—vii. 2777(e), 3285(e).
- v. Postal Life Ins. Co., 178 App. Div. 490, 165 N. Y. Supp. 500—vi. 2296(f); vii. 3964(d).
- v. Prudential Ins. Co., 119 App. Div. 666, 104 N. Y. Supp. 257—vii. 3741(k).
- v. Royal Neighbors of America, 154 Mo. App. 109, 133 S. W. 146—vi. 56(f), 631(b), 1962(k), 1997(j), 2142(h), 2185(d); vii. 3137(c).

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- v. United States Fidelity & Guaranty Co., 44 Wash. 388, 87 Pac. 486—vii. 1657(b).
- Thompson Bros. v. Piedmont Mut. Ins. Co., 57 S. E. 848, 77 S. C. 294—vi. 1511(e).
- Thomson v. American Fidelity Co., 102 N. E. 699, 215 Mass. 460—vii. 3955(a), 3999(l).
- v. McLaughlin, 13 Ga. App. 334, 79 S. E. 182—vi. 1011(d).
- v. United States Fidelity & Guaranty Co., 44 Wash. 388, 87 Pac. 486—vi. 1628(c).
- Thorne v. Casualty Co., 106 Me. 274, 76 Atl. 1106—vii. 2527(e), 2539(l), 2625 (a), 3165(d), 3308(h).
- Thorner v. John Hancock Mut. Life Ins. Co., 149 N. Y. Supp. 345, 164 App. Div. 34—vi. 2100(c).
- Thornton v. Security Ins. Co. (C. C.) 117 Fed. 773—vii. 3076(m).
- Thorp v. Croto, 65 Atl. 562, 79 Vt. 390, 10 L. R. A. (N. S.) 1166, 118 Am. St. Rep. 961, 9 Ann. Cas. 58—vii. 3701(g).
- Tice v. Supreme Lodge, K. P., 204 Mo. 349, 102 S. W. 1013—vi. 36 (j), 61(h); vii. 3237(d), 3239 (d).
- 123 Mo. App. 85, 100 S. W. 519—vi. 36(j), 61(h); vii. 3237 (d), 3239(d).
- Tidd v. McIntyre, 116 App. Div. 602, 101 N. Y. Supp. 867—vii. 3769(s).
- Tierney v. Helvetia-Swiss Fire Ins. Co., 138 App. Div. 469, 122 N. Y. Supp. 869—vii. 4011(h).
- v. Modern Woodmen of America, 145 N. W. 390, 124 Minn. 540—vii. 3758(g), 3769(s).
- v. Perkins, 178 App. Div. 391, 164 N. Y. Supp. 982—vi. 806(f).
- Tigg v. Register Life & Annuity Ins. Co., 133 N. W. 322, 152 Iowa, 720—vi. 2259(a), 2304(b).
- Tighe v. Maryland Casualty Co., 106 N. E. 135, 218 Mass. 463—vii. 3332(a).
- Tillamook Lumbering Co. v. Liverpool & London & Globe Ins. Co. (C. C.) 175 Fed. 508—vi. 1807 (i).
- 178 Fed. 161, 101 C. C. A. 481, 21 Ann. Cas. 844—vi. 1807(i).
- Tilley v. Camden Fire Ins. Ass'n, 72 South. 709, 139 La. 985—vii. 3700(g), 3887(c).
- Tilton v. Farmers' Ins. Co., 143 N. Y. Supp. 107, 82 Misc. Rep. 79—vi. 615 (f), 1835(b); vii. 2498(a), 2617(k), 2621(a), 2658(a), 2734(a).
- Timberlake v. Supreme Commandery, United Order of the Golden Cross, 94 N. E. 685, 208 Mass. 411, 36 L. R. A. (N. S.) 597—vi. 622(e).
- Timlin v. Equitable Life Assur. Soc., 141 Wis. 276, 124 N. W. 253—vi. 124 (d), 662(a).
- Timmerhoff v. Supreme Tent of Knights of Maccabees, 155 Ill. App. 395—vii. 3677(b), 3964(e).
- Tinsman v. Illinois Commercial Men's Ass'n, 85 N. E. 913, 235 Ill. 635—vii. 3213(l), 3215(l).
- Tisch v. Protected Home Circle, 72 Ohio St. 233, 74 N. E. 188—vi. 709(k), 717 (n); vii. 3228(b), 3233(c), 3236(c).
- Title Guaranty & Trust Co. v. Maloney (Sup.) 165 N. Y. Supp. 280—vi. 919(c); vii. 3328(d).
- v. Rudershausen (Sup.) 164 N. Y. Supp. 15—vi. 784(a).
- Title Guaranty & Surety Co. v. Bank of Fulton, 117 S. W. 537, 89 Ark. 471, 33 L. R. A. (N. S.) 676—vi. 437(a), 449(d), 635(d), 2439(c); vii. 3323(b).
- v. Nichols, 100 Pac. 825, 12 Ariz. 405—vi. 2435(a), 2437(b), 2449 (c), 2451(c).
- 32 Sup. Ct. 475, 224 U. S. 340, 56 L. Ed. 795—vi. 2435(a), 2437(b), 2451(c).
- Titlow v. Reliance Life Ins. Co., 246 Pa. 503, 92 Atl. 747—vi. 101(c), 1048 (h), 2259(a).
- T. M. Sinclair & Co. v. National Surety Co., 107 N. W. 184, 132 Iowa, 549—vi. 2441(e), 2448(b), 2450(c); vii. 2764(a), 3320(b), 3531(a), 3580(e).
- Todd v. German American Ins. Co., 2 Ga. App. 789, 59 S. E. 94—vi. 351(e), 398(g), 408(a), 411(b), 458(i), 459(j), 556(k); vii. 2548(s), 2810(m).
- Tolmie v. Fidelity & Casualty Co., 88 N. Y. Supp. 717, 95 App. Div. 352—vii. 3319(a).
- 76 N. E. 1110, 183 N. Y. 581—vii. 3319(a).
- Tolson v. National Provident Union, 130 App. Div. 884, 114 N. Y. Supp. 1149—vi. 812(j), 816 (i); vii. 3770(s).
- 60 Misc. Rep. 460, 113 N. Y. Supp. 534—vi. 812(j), 816(l); vii. 3770(s).
- Tomlinson v. Sovereign Camp Woodmen of the World, 160 Iowa, 472, 141 N. W. 950—vii. 3255(l), 3257(m), 3262 (n), 3264(o), 3265(o).
- Tomson v. Iowa State Traveling Men's Ass'n, 88 Neb. 399, 129 N. W. 529—vi. 56(f); vii. 3462 (d), 3864(b), 4005(d).
- 89 Neb. 791, 132 N. W. 405—vii. 3864(b).
- Tomuschat v. North British & Mercantile Ins. Co., 92 Atl. 329, 77 N. H. 388, Ann. Cas. 1915D, 1155—vii. 3096 (g), 3479(b), 3522(f).
- Tonsor v. Fidelity & Deposit Co., 158 Ill. App. 515—vii. 3320(b).
- Torbert v. Cherokee Ins. Co., 82 S. E. 134, 141 Ga. 773—vi. 686(e).

- Torpedo Top Co. v. Royal Ins. Co.*, 162 Ill. App. 338—vii. 3043(d), 3627(t), 3982(h).
- Torpey v. National Life Ins. Co. (Ky.)* 92 S. W. 982—vi. 413(c), 416(d).
- Tourtellotte v. New York Life Ins. Co.*, 144 N. W. 1117, 155 Wis. 455—vi. 825(b).
- Tower v. Stanley*, 220 Mass. 429, 107 N. E. 1010—vi. 1101(b).
- Towle v. Dirigo Mut. Fire Ins. Co.*, 107 Me. 317, 78 Atl. 374—vi. 1526(d), 1530 (g), 1749(b), 1845(i). 1907(k); vii. 2546 (p), 2692(e), 2695(g).
- Townsend v. Equitable Life Assur. Soc.*, 105 N. E. 324, 263 Ill. 432—vi. 124(d).
- v. Fidelity & Casualty Co.*, 163 Iowa, 713, 144 N. W. 574. L. R. A. 1915A, 109—vii. 3755(q), 3767(s).
- Townsend's Assignee v. Townsend*, 127 Ky. 230, 105 S. W. 937, 32 Ky. Law Rep. 240, 263, 16 L. R. A. (N. S.) 316—vii. 3755(q).
- Tozer v. Ocean Accident & Guarantee Corporation*, 94 Minn. 478, 103 N. W. 509—vii. 2768(d). 99 Minn. 290, 109 N. W. 410—vii. 3323(b).
- Tracy v. Queen City Fire Ins. Co.*, 61 South. 687, 132 La. 610, Ann. Cas. 1914D, 1145—vi. 1663(e); vii. 3982(h).
- Traders' Ins. Co. v. Aachen & M. Fire Ins. Co.*, 150 Cal. 370, 89 Pac. 109, 8 L. R. A. (N. S.) 844—vii. 2809(l).
- v. Dobbins & Ewing*, 86 S. W. 383, 114 Tenn. 227—vi. 1700(g).
- v. Letcher*, 143 Ala. 400, 39 South. 271—vi. 1814(a); vii. 2467(c), 2540(m), 2542(n), 2665(c), 2670 (e), 2772(b), 3405(b).
- Traiser v. Commercial Travelers' Eastern Accident Ass'n*, 88 N. E. 901, 202 Mass. 292—vii. 3173(g), 3175(h), 3448 (e), 3470(b).
- Travelers' Fire Ins. Co. v. Globe Soap Co.*, 107 S. W. 386, 85 Ark. 169, 122 Am. St. Rep. 22—vi. 447 (b), 454(g).
- v. Mercer*, 32 Okl. 503, 122 Pac. 134—vi. 1869(a), 1874(d).
- Travelers' Ins. Co. v. Allen*, 237 Fed. 78, 150 C. C. A. 280—vii. 3197 (g).
- v. Atkinson (Ala.)* 73 South. 903—vi. 2319(l).
- Travelers' Ins. Co. v. Ayers*, 217 Ill. 390, 75 N. E. 506, 2 L. R. A. (N. S.) 168—vi. 632(c); vii. 3197(g).
- 119 Ill. App. 402—vi. 632(c); vii. 3197(g).
- v. Bingham*, 105 S. W. 894, 32 Ky. Law Rep. 233—vii. 3175(h).
- v. Crawford's Admr.*, 106 S. W. 290, 32 Ky. Law Rep. 517—vii. 2625 (a).
- Travelers' Ins. Co. v. Davies*, 153 S. W. 956, 152 Ky. 600—vii. 3174(g), 3200(h).
- v. Great Lakes Engineering Works Co.*, 184 Fed. 426, 107 C. C. A. 20, 36 L. R. A. (N. S.) 60—vii. 3907(f).
- v. Harris (Tex. Civ. App.)* 178 S. W. 816—vii. 3187(d), 3216(m), 3886(a).
- v. Henderson Cotton Mills*, 85 S. W. 1090, 120 Ky. 218, 27 Ky. Law Rep. 653, 117 Am. St. Rep. 585, 9 Ann. Cas. 162—vi. 114 (h); vii. 3319(a), 3331(a), 3966(c).
- v. Leibus*, 28 Ohio Cir. Ct. R. 700—vi. 2092(b).
- v. McInerney (Ky.)* 119 S. W. 171—vii. 3174(g), 3201(h).
- v. Nax*, 142 Fed. 653, 73 C. C. A. 649—vii. 3356(a), 3516(b).
- v. Thorne*, 103 C. C. A. 436, 180 Fed. 82, 38 L. R. A. (N. S.) 626—vii. 2583(h).
- v. Watkins*, 77 N. J. Law, 223, 71 Atl. 325—vi. 576(f).
- Travelers' Protective Ass'n v. Fawcett*, 56 Ind. App. 111, 104 N. E. 991—vii. 3156(a), 3159(a), 3171 (f), 3174(g), 3207(k), 3208(k), 3210(k), 3213(k), 3296(e).
- v. Roth (Tex. Civ. App.)* 108 S. W. 1039—vi. 2338(b), 2368(l), 2400(d); vii. 2748(g), 3174(g).
- v. Smith (Ind.)* 101 N. E. 817—vi. 658(g); vii. 3239(d), 3588 (b).
- 183 Ind. 59, 107 N. E. 283. Ann. Cas. 1917E, 1088—vi. 57(f); vii. 3237(d).
- v. Weil*, 40 Tex. Civ. App. 629, 91 S. W. 886—vii. 3210(k).
- Travis v. Continental Ins. Co. (Mo. App.)* 179 S. W. 766—vii. 2673(f).
- Trenton v. North American Acc. Ins. Co. (Tex. Civ. App.)* 89 S. W. 276—vi. 2144(j), 2150(c).
- Triangle Waist Co. v. General Acc. & Life Assur. Corporation*, 177 App. Div. 904, 163 N. Y. Supp. 687—vii. 3316(a).
- Triple Tie Benefit Ass'n v. Wheatley*, 91 Pac. 59, 76 Kan. 251—vii. 3475(f).
- v. Wood*, 73 Kan. 124, 84 Pac. 565—vi. 436(a), 698(f).
- 78 Kan. 812, 98 Pac. 219—vii. 2706(c).
- Tripp v. Jordan*, 177 Mo. App. 339, 164 S. W. 158—vi. 269(h), 306(g), 1115 (j).
- Trisler v. Mutual Reserve Fund Life Ass'n*, 106 S. W. 1082, 128 Mo. App. 497—vi. 717(n), 1021(c).
- Troendle v. Highleyman (Ky.)* 113 S. W. 812—vii. 3802(g).
- Tromblee v. North American Acc. Ins. Co.*, 158 N. Y. Supp. 1014, 173 App. Div. 174—vii. 3461(c).

- Trost v. Delaware Farmers' Mut. Fire Ins. Co.*, 137 Minn. 208, 163 N. W. 290—vi. 574(d), 620(c), 632(c).
- Trotter v. Grand Lodge of Iowa Legion of Honor*, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533—vi. 68(m), 2375(o); vii. 2460(a), 2462(a), 2706(c), 2719(i).
- Troy v. London*, 39 South. 713, 145 Ala. 280—vi. 317(a).
- Truly v. Mutual Life Ins. Co.*, 108 Miss. 453, 66 So. 970—vi. 906(g); vii. 2872(f).
- Trumbull v. Bombard*, 157 N. Y. Supp. 794, 171 App. Div. 700—vii. 3698(f).
- T. S. Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co.*, 113 S. W. 217, 133 Mo. App. 57—vi. 1394(c), 1829(g); vii. 2569(e).
- T. T. Hay & Bro. v. Union Fire Ins. Co.*, 167 N. C. 82, 83 S. E. 241, Ann. Cas. 1916A, 1129—vii. 2810(m).
- Tubbs v. Mechanics' Ins. Co.*, 108 N. W. 324, 131 Iowa, 217—vi. 732(a), 747(g), 755(j), 762(p).
- Tucker v. Colonial Fire Ins. Co.*, 58 W. Va. 30, 51 S. E. 86—vi. 632(c), 1176(b), 1177(c), 1486(c), 1815(b), 1819(d); vii. 3391(i), 3392(i), 3438(e).
- v. Farmers' Mut. Fire Ass'n*, 71 W. Va. 690, 77 S. E. 279—vi. 831(a).
- v. Knights of Pythias*, 135 Ga. 56, 68 S. E. 796—vi. 809(h); vii. 3731(e).
- v. Supreme Tent, Knights of Macabees of the World*, 123 App. Div. 223, 108 N. Y. Supp. 279—vii. 2670(e).
- Tuite v. Supreme Forest Woodmen Circle*, 187 S. W. 137, 193 Mo. App. 619—vi. 622(e), 799(b), 1038(a); vii. 3755(q), 3756(q).
- Turner v. American Casualty Co.*, 69 Wash. 154, 124 Pac. 486—vi. 2126(b); vii. 2559(b).
- v. Columbia Nat. Life Ins. Co.*, 100 S. C. 121, 84 S. E. 413—vii. 3169(e), 3312(i).
- v. Home Ins. Co.*, 195 Mo. App. 138, 189 S. W. 626—vi. 1376(g), 1382(j), 1903(j); vii. 2558(a).
- v. Modern Woodmen of America*, 186 Ill. App. 404—vi. 1934(c), 2127(c); vii. 2535(j), 2552(v), 2561(b).
- v. Mutual Life Industrial Ass'n*, 65 S. E. 255, 6 Ga. App. 478—vi. 2259(a).
- v. National Surety Co.*, 163 N. Y. Supp. 1, 176 App. Div. 219—vii. 3934(b).
- v. New York Safety Reserve Fund*, 144 N. Y. Supp. 261, 158 App. Div. 835—vi. 2313(f).
- v. Turner (Tex. Civ. App.)* 195 S. W. 326—vii. 3775(t).
- Tusant v. Grand Lodge, A. O. U. W. (Iowa)* 163 N. W. 690—vi. 686(e), 717(n).
- Tutt v. Jackson*, 39 So. 420, 87 Miss. 207—vii. 3735(g).
- Tuttle v. Iowa State Traveling Men's Ass'n*, 104 N. W. 1131, 132 Iowa, 652, 7 L. R. A. (N. S.) 223—vi. 428(i); vii. 2748(g), 3160(a), 3237(d), 3244(h).
- Tweedie Trading Co. v. Western Assur. Co.*, 102 C. C. A. 397, 179 Fed. 103—vi. 200(h), 722(a); vii. 2989(b), 2991(h), 2995(j).
- (D. C.) 168 Fed. 962—vi. 200(h), 722(a); vii. 2898(b), 2991(h), 2995(j).
- Tyblewski v. Svea Fire & Life Assur. Co.*, 220 Ill. 436, 77 N. E. 196—vii. 3652(m), 3673(l).
- 121 Ill. App. 528—vii. 3652(m), 3673(l).
- Tyler v. Treasurer & Receiver General*, 226 Mass. 306, 115 N. E. 300, L. R. A. 1917D, 633—vi. 628(a); vii. 3732(f).
- Tyson v. Equitable Life Assur. Soc.*, 87 S. E. 1055, 144 Ga. 729—vi. 2413(h), 2417(i).

U

- Uhl v. Hartwood Club*, 177 App. Div. 41, 163 N. Y. Supp. 744—vii. 2767(d).
- v. Life & Annuity Ass'n*, 97 Kan. 422, 155 Pac. 926—vi. 711(l), 712(l), 717(n).
- Uhlfelder v. Palatine Ins. Co.*, 111 App. Div. 57, 97 N. Y. Supp. 499—vii. 3707(i).
- 44 Misc. Rep. 153, 89 N. Y. Supp. 792—vii. 3707(i).
- Uhlman v. New York Life Ins. Co.*, 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482—vi. 120(d).
- Ulman v. Equitable Life Assur. Soc.*, 146 N. Y. Supp. 696, 161 App. Div. 708—vi. 868(j).
- v. Supreme Commandery of United Order of Golden Cross*, 220 Mass. 422, 107 N. E. 960—vi. 428(i); vii. 3965(e).
- Ulrici's Estate. In re*, 145 Mo. App. 463, 122 S. W. 761—vii. 3755(q).
- Umbarger v. Supreme Council of the Royal League (Mo. App.)* 118 S. W. 1199—vi. 632(c), 715(n), 717(n); vii. 3236(c), 3758(q).
- Umberger v. Modern Brotherhood of America*, 162 Mo. App. 141, 144 S. W. 898—vi. 57(f), 658(g), 799(b), 803(e).
- Underwood v. Modern Woodmen of America*, 119 N. W. 610, 141 Iowa, 240—vi. 2296(f).
- v. Pennsylvania Fire Ins. Co. (Sup.)* 134 N. Y. Supp. 105—vi. 378(h).
- v. Security Life & Annuity Co. (Tex.)* 194 S. W. 585—vi. 2259(a), 2267(e), 2277(k), 2324(n); vii. 2464(b).

- Union Accident Co. v. Willis, 44 Okl. 578, 145 Pac. 812, L. R. A. 1915D, 358—vii. 3159(a), 3184(b), 3207(k), 3210(k).
- Union Cent. Life Ins. Co. v. Barnes, 175 Ky. 364, 194 S. W. 339—vii. 3967(e).
- v. Bell, 102 N. E. 1134, 87 Ohio St. 475—vi. 120(d).
- v. Burnett, 136 Ill. App. 187—vii. 2658(a), 2699(b).
- v. Robinson, 148 Fed. 358, 78 C. C. A. 268, 8 L. R. A. (N. S.) 883—vi. 538(d).
- v. Spinks, 119 Ky. 261, 83 S. W. 615, 26 Ky. Law Rep. 1205, 69 L. R. A. 264, 7 Ann. Cas. 913—vii. 3286(f).
- 119 Ky. 261, 84 S. W. 1160, 27 Ky. Law Rep. 325, 69 L. R. A. 264, 7 Ann. Cas. 913—vii. 3286(f).
- v. Washburn, 158 Ala. 169, 48 South. 475—vii. 2472(e).
- v. Zihlman, 69 S. E. 855, 68 W. Va. 272—vi. 2259(a), 2267(e).
- Union Cent. Relief Ass'n v. Johnson (Ala.) 73 South. 816—vi. 636(e), 2368(l).
- Union Fraternal League v. Johnston, 53 S. E. 241, 124 Ga. 902—vi. 709(k); vii. 3676(b).
- v. Sweeney, 184 Ind. 378, 111 N. E. 305—vii. 3531(a).
- Union Institution for Savings v. Phoenix Ins. Co., 196 Mass. 230, 81 N. E. 994, 14 L. R. A. (N. S.) 459, 13 Ann. Cas. 433—vi. 1526(d); vii. 3353(c), 3700(g), 3703(h).
- Union Marine Ins. Co. v. Charlie's Transfer Co., 186 Ala. 443, 65 South. 78—vi. 5(b); vii. 3408(c), 3528(h), 3631(b), 3644(j).
- Union Mut. Ins. Co. v. Huntsberry (Okl.) 156 Pac. 327—vi. 691(a); vii. 3347(a), 3478(b), 3487(a).
- Union Mut. Life Ins. Co. v. Adler, 38 Ind. App. 530, 73 N. E. 835—vi. 990(a), 998(e), 2409(g).
- 38 Ind. App. 530, 75 N. E. 1088—vi. 990(a), 998(e), 2409(g).
- United American Fire Ins. Co. v. American Bonding Co., 146 Wis. 573, 131 N. W. 994, 40 L. R. A. (N. S.) 661—vi. 635(d), 2449(c), 2451(c).
- United Assur. Ass'n v. Frederick (Ark.) 195 S. W. 691—vi. 253(f), 632(c), 1030(f); vii. 2521(c), 3886(b).
- United Benev. Ass'n v. Baker (Tex. Civ. App.) 141 S. W. 541—vi. 1990(g), 2183(b), 2455(d).
- v. Cass, 54 Tex. Civ. App. 628, 119 S. W. 123—vi. 708(j), 1019(c).
- United Commercial Travelers v. Boaz, 150 Pac. 822, 27 Colo. App. 423—vii. 3440(a).
- United Commercial Travelers of America v. Sain, 186 Fed. 271, 108 C. C. A. 317—vii. 3456(a), 3561(d).
- United Moderns v. Pistole, 86 S. W. 377, 38 Tex. Civ. App. 422—vi. 2371(m), 2430(d).
- v. Rathbun, 104 Va. 736, 52 S. E. 552—vi. 706(h); vii. 2711(d).
- United Order of Golden Cross v. Hooser, 160 Ala. 334, 49 South. 354—vi. 495(o), 697(e), 2338(b), 2398(c), 2433(f); vii. 2495(o), 2496(o), 2717(h), 2772(b), 2773(c).
- United Sponging Co. v. Preferred Acc. Ins. Co., 161 N. Y. Supp. 309, 97 Misc. Rep. 396—vii. 3033(i).
- United States Annuity & Life Ins. Co. v. Peak, 122 Ark. 58, 182 S. W. 565—vi. 2101(d), 2267(e). (Ark.) 195 S. W. 392—vi. 2017(k), 2096(a).
- United States Bank & Trust Co. v. Switchmen's Union, 256 Pa. 228, 100 Atl. 808, L. R. A. 1917E, 311—vii. 3143(f).
- United States Benev. Soc. v. Watson, 84 N. E. 29, 41 Ind. App. 452—vi. 2238(b), 2371(m), 2432(e); vii. 2715(h).
- United States Cast Iron Pipe & Foundry Co. v. Bragg, 47 South. 66, 156 Ala. 522—vii. 3330(a).
- United States Casualty Co. v. Campbell, 148 Ky. 554, 146 S. W. 1121—vi. 1932(a), 1953(c), 1979(j), 1990(g), 2142(h), 2144(j).
- v. Charleston, S. C. Min. & Mfg. Co. (C. C.) 183 Fed. 238—vi. 615(f), 921(e), 922(e), 934(o).
- v. Griffiths (Ind.) 114 N. E. 83, L. R. A. 1917F, 481—vii. 3200(h).
- v. Newman, 73 S. E. 667, 137 Ga. 447—vii. 4006(e).
- United States Cooperage & Handle Co. v. Firemen's Fund Ins. Co., 174 S. W. 193, 188 Mo. App. 376—vii. 3110(e).
- United States Fidelity & Guaranty Co. v. Bank of Batesville, 87 Ark. 348, 112 S. W. 957—vi. 631(b), 2450(c); vii. 3320(b), 3323(b).
- v. Boley Bank & Trust Co., 43 Okl. 819, 144 Pac. 615—vi. 2449(c); vii. 2764(a).
- v. Citizens' Nat. Bank, 143 S. W. 997, 147 Ky. 285—vi. 846(i), 2439(c), 2447(a).
- 145 S. W. 750, 147 Ky. 810—vi. 846(i), 2439(c), 2447(a).
- v. Des Moines Nat. Bank, 145 Fed. 273, 74 C. C. A. 553—vii. 3323(b).
- v. Downey, 38 Colo. 414, 88 Pac. 451, 10 L. R. A. (N. S.) 323, 120 Am. St. Rep. 128—vi. 2450(c).
- v. Egg Shippers' Strawboard & Filler Co., 148 Fed. 353, 78 C. C. A. 345—vi. 680(b), 683(c), 2439(c); vii. 3320(b).

- United States Fidelity & Guaranty Co. v. First Nat. Bank**, 84 N. E. 670, 233 Ill. 475—vi. 10(g), 631(b), 635(d), 823(a), 1953(c), 1956(f), 2439(c), 2449(c), 2451(c); vii. 3321(b).
137 Ill. App. 382—vi. 10(g), 631(b), 635(d), 823(a), 1953(c), 1956(f), 2439(c), 2449(c), 2451(c); vii. 3321(b).
- v. Foster Deposit Bank**, 147 S. W. 406, 148 Ky. 776—vi. 2439(c), 2447(a), 2449(c).
- v. Foster Deposit Bank's Receiver**, 156 S. W. 371, 153 Ky. 698—vi. 2449(c).
- v. French Mut. Gen. Soc. of Mut. Ins. against Theft**, 212 Fed. 620, 129 C. C. A. 156—vii. 3932(a).
- v. Maryland Casualty Co.**, 182 Ill. App. 438—vii. 3329(e), 3719(o).
- v. Newton**, 115 Pac. 897, 50 Colo. 379—vi. 2435(a), 2439(c); vii. 3321(b), 3961(c).
- v. Overstreet**, 84 S. W. 764, 27 Ky. Law Rep. 248—vii. 3323(b).
- v. Paxton**, 106 S. W. 841, 32 Ky. Law Rep. 707—vii. 3580(e).
- v. Pressler (Tex. Civ. App.)**, 185 S. W. 326—vii. 3331(a), 3458(b).
- v. Shepherds' Home Lodge No. 2**, 163 Ky. 706, 174 S. W. 487—vi. 843(i), 2437(b).
- v. Williams**, 96 Miss. 10, 49 South. 742—vi. 851(d).
- v. W. P. Carmichael Co.**, 190 S. W. 648, 195 Mo. App. 93—vii. 3570(a).
- United States Fire Ins. Co. v. Sam Bynum & Co.**, 137 S. W. 771, 143 Ky. 804—vii. 3085(e), 3411(f).
- United States Health & Acc. Ins. Co. v. Batt**, 49 Ind. App. 277, 97 N. E. 195—vii. 3945(a).
- v. Bennett's Adm'r**, 105 S. W. 433, 32 Ky. Law Rep. 235—vi. 1953(c), 1988(d), 1990(g), 2113(k); vii. 3201(h).
- v. Clark**, 41 Ind. App. 345, 83 N. E. 760—vi. 1048(h), 1961(k); vii. 2504(c), 2559(b), 2693(f), 2775(d), 2777(e), 2831(b), 3531(a), 3945(a).
- v. Goin**, 197 Ala. 584, 73 South. 117—vii. 2521(c), 2683(b).
- v. Harvey**, 129 Ill. App. 104—vii. 3195(f), 3200(h), 3531(a).
- v. Jolly**, 101 S. W. 1179, 31 Ky. Law Rep. 232—vii. 3303(f). (Ky.) 118 S. W. 281—vi. 1953(c).
- v. Krueger**, 135 Ill. App. 432—vii. 2683(b).
- v. Savage (Ala.)**, 64 South. 340—vi. 846(g).
- v. Veitch**, 161 Ala. 630, 50 South. 95—vii. 3129(a).
- United States Indemnity Soc. v. Griggs**, 118 Ill. App. 577—vi. 2400(d); vii. 2694(g), 2715(h).
- United States Life Ins. Co. v. Commonwealth**, 90 S. W. 970, 28 Ky. Law Rep. 948—vi. 1012(d).
- v. Spinks**, 96 S. W. 889, 29 Ky. Law Rep. 960, 13 L. R. A. (N. S.) 1053—vi. 2408(g), 2410(g).
103 S. W. 335, 126 Ky. 405, 31 Ky. Law Rep. 185—vi. 2408(g), 2410(g).
- v. Wood**, 107 S. W. 1193, 32 Ky. Law Rep. 1120—vi. 2413(h), 2417(i).
- United States Tube & Iron Co. v. Maryland Casualty Co.**, 68 Atl. 1026, 220 Pa. 42—vii. 3956(a).
- United Waste Mfg. Co. v. Maryland Casualty Co.**, 148 N. Y. Supp. 852, 85 Misc. Rep. 539—vii. 2768(d), 3319(a), 3332(a).
- United Zinc Cos. v. General Acc. Assur. Corporation**, 102 S. W. 605, 125 Mo. App. 41—vi. 795(h); vii. 3335(c).
128 S. W. 836, 144 Mo. App. 380—vi. 632(c), 906(g); vii. 2479(e), 2537(k), 3576(d).
- Unnewehr Co. v. Standard Life & Accident Ins. Co.**, 176 Fed. 16, 99 C. C. A. 490—vii. 3319(a).
- Unterberg v. Elder**, 149 App. Div. 647, 134 N. Y. Supp. 242—vi. 347(b), 436(a).
72 Misc. Rep. 363, 130 N. Y. Supp. 166—vi. 347(b), 436(a).
211 N. Y. 499, 105 N. E. 834, Ann. Cas. 1915C, 616—vi. 347(b).
- Unterharnscheidt v. Missouri State Life Ins. Co.**, 160 Iowa, 223, 138 N. W. 459, 45 L. R. A. (N. S.) 743—vi. 449(d), 486(k), 495(o), 496(o); vii. 2758(c).
- Untermeyer v. Mutual Life Ins. Co.**, 128 App. Div. 615, 113 N. Y. Supp. 221—vi. 662(a), 665(c).
- Upton Cold Storage Co. v. Pacific Coast Casualty Co.**, 147 N. Y. Supp. 765, 162 App. Div. 842—vii. 3343(g).
- Urbaniak v. Firemen's Ins. Co.**, 227 Mass. 132, 116 N. E. 413—vii. 2740(b).
- Urlick v. Western Travelers' Acc. Ass'n**, 81 Neb. 327, 116 N. W. 48—vi. 827(d); vii. 3761(r), 3767(s).
- Urwan v. Northwestern Nat. Life Ins. Co.**, 125 Wis. 349, 103 N. W. 1102—vi. 662(a), 1012(d), 1039(a), 1050(i).
- Ury v. Modern Woodmen of America**, 149 Iowa, 706, 127 N. W. 665—vi. 708(j), 711(l), 712(l), 2254(b); vii. 3140(e).
- Utah Ass'n of Credit Men v. Home Fire Ins. Co.**, 102 Pac. 631, 36 Utah, 20—vii. 3561(d).
- Utica Canning Co. v. Home Ins. Co.**, 132 App. Div. 420, 116 N. Y. Supp. 934—vi. 771(e).

- Utica Sanitary Milk Co. v. Casualty Co. of America, 136 N. Y. Supp. 353, 152 App. Div. 898—vii. 3571(b).
 104 N. E. 918, 210 N. Y. 399—vii. 3571(b).
 Utz v. Insurance Co. of North America, 122 S. W. 318, 139 Mo. App. 153—vii. 2550(t).
 v. Orient Ins. Co., 123 S. W. 538, 139 Mo. App. 552—vii. 2622(a), 2690(d).

V

- Vail v. North American Union, 191 Ill. App. 297—vi. 2242(f); vii. 3133(b), 3472(d).
 Valentine v. Grand Lodge A. O. U. W., 17 Cal. App. 317, 119 Pac. 671—vi. 2338(b).
 Valentini v. Metropolitan Life Ins. Co., 94 N. Y. Supp. 758, 106 App. Div. 487—vi. 2127(c), 2159(c), 2163(e).
 Valleroy v. Knights of Columbus, 116 S. W. 1130, 135 Mo. App. 574—vi. 652(b), 2096(a), 2183(b), 2185(d).
 Valley Mercantile Co. v. St. Paul Fire & Marine Ins. Co., 49 Mont. 430, 143 Pac. 559, L. R. A. 1915B. 327, Ann. Cas. 1916A, 1126—vii. 3037(a), 3042(c).
 Van Arsdale v. Edwards, 24 Okl. 41, 101 Pac. 1123—vi. 934(o).
 Van Arsdale-Osborne Brokerage Co. v. Cooper, 28 Okl. 598, 115 Pac. 779—vi. 421(f), 428(i), 449(d).
 v. Martin, 106 Pac. 42, 81 Kan. 499—vi. 934(o).
 v. Patterson (Okl.) 154 Pac. 1131—vi. 926(h).
 v. Robertson, 36 Okl. 123, 128 Pac. 107—vi. 442(a), 926(h).
 Van Arsdale & Osborne v. Young, 21 Okl. 151, 95 Pac. 778—vi. 935(o).
 Vanasek v. Western Bohemian Fraternal Ass'n, 122 Minn. 273, 142 N. W. 333, 49 L. R. A. (N. S.) 141, Ann. Cas. 1914D, 1123—vi. 821(o); vii. 3767(s).
 Vancouver Nat. Bank v. Law Union & Crown Ins. Co. (C. C.) 153 Fed. 440—vi. 181(a), 1523(c), 1736(e).
 Vancura v. Zapadni Cesko Bratrská Zednota, 78 Neb. 755, 111 N. W. 845—vi. 2371(m).
 Vanderbeck v. Protected Home Circle, 16; N. Y. Supp. 80, 98 Misc. Rep. 691—vi. 564(g), 820(n).
 Van Dyke v. Baker, 63 Atl. 594, 214 Pa. 168—vi. 979(c).
 Van Etten v. Grand Lodge, A. O. U. W., 60 Atl. 210, 72 N. J. Law, 61—vi. 2428(c), 2432(e).
 Van Nest v. Citizens' Ins. Co., 158 N. W. 725, 134 Minn. 94, L. R. A. 1916F, 693—vii. 3071(h).

- Van Norman v. Modern Brotherhood of America, 134 Iowa, 575, 111 N. W. 992—vii. 3255(l), 3257(m), 3284(e).
 143 Iowa, 536, 121 N. W. 1080—vii. 3248(i), 3265(o), 3268(p).
 Vant v. Grand Lodge, Knights of Pythias, 102 S. C. 413, 86 S. E. 677—vii. 2683(b).
 Van Woert v. Modern Woodmen, 29 N. D. 441, 151 N. W. 224—vi. 1990(g), 2096(a); vii. 2467(c).
 Vaughan v. United States Title Guaranty & Indemnity Co., 122 N. Y. Supp. 393, 137 App. Div. 623—vi. 2446(g).
 Vaughan's Adm'r v. Modern Brotherhood of America, 149 S. W. 937, 149 Ky. 587—vi. 809(h); vii. 3769(s), 3781(u).
 Vaughn v. National Council, Junior Order United American Mechanics, 117 S. W. 115, 136 Mo. App. 362—vii. 3722(b).
 Vawter v. Purdy, 157 Pac. 556, 29 Cal. App. 623—vi. 797(a); vii. 3756(q), 3762(r).
 Veal v. Security Mut. Life Ins. Co., 65 S. E. 714, 6 Ga. App. 721—vi. 2318(k), 2393(a), 2408(g), 2409(g); vii. 2717(h).
 Veenstra v. Farmers' Mut. Fire Ins. Co. (Mich.) 161 N. W. 824—vii. 2735(a).
 Vera v. Mercantile Fire & Marine Ins. Co., 103 N. E. 292, 216 Mass. 154—vii. 3661(b).
 Vernon v. Iowa State Traveling Men's Ass'n, 158 Iowa, 597, 138 N. W. 696—vii. 3172(g), 3181(b), 3184(b), 3198(h).
 Vertrees v. Head & Matthews, 138 Ky. 83, 127 S. W. 523—vi. 360(k).
 Vette & Hoffman v. Evans, 86 S. W. 504, 111 Mo. App. 588—vi. 554(j), 1003(e); vii. 2833(c).
 Vial v. Norwich Union Fire Ins. Soc., 257 Ill. 355, 100 N. E. 929, 44 L. R. A. (N. S.) 317, Ann. Cas. 1914A, 1141—vi. 854(a); vii. 3942(d).
 172 Ill. App. 134—vi. 854(a); vii. 3942(d).
 Vicars v. Aetna Life Ins. Co., 164 S. W. 106, 158 Ky. 1—vii. 3250(i), 3253(k), 3257(m).
 Victoria v. Musical Mut. Protective Ass'n (Sup.) 162 N. Y. Supp. 652—vi. 2428(c).
 Victoria S. S. Co. v. Western Assur. Co., 167 Cal. 348, 139 Pac. 807—vi. 200(h), 518(d), 1190(a), 1242(g); vii. 2944(g).
 Victors v. National Provident Union, 99 N. Y. Supp. 299, 113 App. Div. 715—vii. 2768(a).
 Viles, In re, 155 N. Y. Supp. 401, 170 App. Div. 59—vii. 3776(u).
 149 N. Y. Supp. 121, 86 Misc. Rep. 170—vii. 3731(e), 3776(u).

- Villmont v. Grand Grove, U. A. O. D., 111 Minn. 201, 126 N. W. 730—vii. 2779(f).
- Vinginnerra v. Commercial Casualty Ins. Co. (Sup.) 156 N. Y. Supp. 573—vi. 2041(e); vii. 2706(c).
- Violette v. Insurance Co. of State of Pennsylvania, 159 Pac. 896, 92 Wash. 685—vi. 439(c); vii. 2807(k).
161 Pac. 343, 92 Wash. 685—vi. 439(c); vii. 2807(k).
- Violette v. Queen Ins. Co., 96 Wash. 303, 165 Pac. 65—vi. 735(b).
- Virginia Fire & Marine Ins. Co. v. Hogue, 54 S. E. 8. 105 Va. 355—vii. 3413(b), 3415(d), 3432(m).
- v. J. I. Case Threshing Mach. Co., 107 Va. 588, 59 S. E. 369, 122 Am. St. Rep. 875—vi. 1394(b), 1402(e), 2631(d).
- Vogelstein v. Athletic Mining Co. (Mo. App.) 192 S. W. 760—vi. 193(e); vii. 3714(l).
- Vogt Mach. Co. v. Lingenfelter, 99 S. W. 358, 30 Ky. Law Rep. 654—vii. 3714(l).
- Volunteer State Life Ins. Co. v. Buchanan, 10 Ga. App. 255, 73 S. E. 602—vi. 268(g), 273(o), 327(g), 328(h); vii. 3802(g).
- Von Schuckmann v. Heinrich, 93 App. Div. 278, 87 N. Y. Supp. 673—vi. 1099(a).
182 N. Y. 538, 75 N. E. 1135—vi. 1099(a).
- Voss v. Northwestern Nat. Life Ins. Co., 137 Wis. 492, 118 N. W. 212—vii. 2833(c).
- Vredenburg v. Physicians' Defense Co., 126 Ill. App. 509—vi. 8(e), 89(c).
- W
- Wachs & Co. v. Fidelity & Deposit Co. of Maryland, 248 Pa. 263, 93 Atl. 1007—vii. 3549(c), 3576(d).
- Wachtel v. Harrison, 145 N. Y. Supp. 982, 84 Misc. Rep. 76—vii. 3759(r).
- Wacker v. Globe Fire Ins. Co. of Huron, S. D. (N. D.) 163 N. W. 263—vi. 413(c).
- Wadleigh v. Home Ins. Co., 38 Okl. 316, 132 Pac. 1111—vi. 1823(e).
- W. A. Doody Co. v. Green, 62 S. E. 984, 131 Ga. 568—vi. 290(k); vii. 3790(b).
- Wadsworth v. Walsh, 128 Minn. 241, 150 N. W. 870—vi. 998(e).
- Waggoner v. Burg (Tex. Civ. App.) 147 S. W. 342—vi. 1007(h).
- Wagner v. Supreme Lodge, K. P. (Ind. App.) 116 N. E. 91—vi. 714(m), 2378(p).
- Wait v. Mystic Workers of the World, 140 Iowa, 648, 119 N. W. 72—vi. 317(a), 2375(o).
- Wajceliunas v. St. Peter's Lithuanian Soc., 126 N. Y. Supp. 884, 141 App. Div. 852—vi. 2382(r), 2428(c).
- Wakely v. Sun Ins. Office, 246 Pa. 268, 92 Atl. 136—vii. 3544(a).
- Walden v. Bankers' Life Ass'n, 89 Neb. 546, 131 N. W. 962—vii. 3257(m), 3260(n), 3263(o).
- Walker v. American Order of Foresters, 162 Ill. App. 30—vi. 2404(e); vii. 2495(o), 2625(a).
- v. Knights of Maccabees, 177 Mo. App. 50, 163 S. W. 274—vii. 3516(b), 3532(b).
- v. Lancashire Ins. Co., 75 N. E. 66, 188 Mass. 560—vii. 3379(e), 3487(a), 3511(a).
- v. Peters, 139 Mo. App. 681, 124 S. W. 35—vii. 3783(u).
- v. United Order of the Golden Star, 212 Mass. 289, 98 N. E. 1039, Ann. Cas. 1913D, 345—vi. 2398(c), 2400(d).
- v. Western Underwriters' Ass'n, 105 N. W. 597, 142 Mich. 162—vi. 1165(f); vii. 3043(e), 3126(d), 3417(d).
- Walker Stratman & Co. v. Black, 216 Pa. 395, 65 Atl. 799—vi. 341(g).
- Wall v. Brotherhood of Painters, 165 Ill. App. 59—vi. 2338(b); vii. 2715(h).
- v. Continental Casualty Co., 86 S. W. 491, 111 Mo. App. 504—vii. 3289(b), 3312(i), 3434(a), 3943(d).
- Wallace v. Grand Lodge of United Brothers of Friendship, 107 S. W. 724, 32 Ky. Law Rep. 1013—vi. 130(h).
- v. Metropolitan Life Ins. Co., 73 S. E. 698, 10 Ga. App. 517—vi. 2281(a), 2313(f); vii. 2777(e).
- v. Mutual Ben. Life Ins. Co., 97 Minn. 27, 106 N. W. 84, 3 L. R. A. (N. S.) 478—vii. 3755(q).
- v. Prudential Ins. Co., 174 Mo. App. 110, 157 S. W. 1028—vii. 3742(k).
- Waller v. City of New York Ins. Co., 84 Or. 284, 164 Pac. 959—vi. 1165(f), 1183(h), 1376(g).
- Walrath v. Hanover Fire Ins. Co., 139 App. Div. 407, 124 N. Y. Supp. 54—vi. 450(d); vii. 2792(c), 2808(l).
- Walrod v. Des Moines Fire Ins. Co., 159 Iowa, 121, 140 N. W. 218—vi. 1673(h); vii. 2521(c), 2558(a), 3125(c).
- Walsh v. John Hancock Mut. Life Ins. Co., 162 Ill. App. 436—vi. 1953(c).
- v. Metropolitan Life Ins. Co., 93 N. Y. Supp. 445, 105 App. Div. 186—vi. 410(a); vii. 3999(l).
- v. St. Louis Union Trust Co., 148 Mo. App. 179, 127 S. W. 645—vii. 3769(s), 3815(b).
- Walsh & Co. v. Queen Ins. Co., 27 Ohio Cir. Ct. R. 313—vii. 2617(k).
- Walter v. People's Health & Accident Ins. Co., 173 Mich. 581, 139 N. W. 865—vii. 3220(m), 3303(g).

- Walter Connally & Co. v. Hopkins (Tex. Civ. App.) 195 S. W. 656—vii. 3703(h), 3715(m).
- Walton v. Fraternal Aid Ass'n, 130 S. W. 1124, 149 Mo. App. 493—vi. 2238(b), 2368(l), 2382(r).
- v. Phoenix Ins. Co., 162 Mo. App. 316, 141 S. W. 1138—vi. 632(c), 637(f), 1511(e), 1667(f), 1685(o), 1722(d); vii. 3710(j).
- Waltz v. Workmen's Sick and Death Benefit Fund, 139 N. Y. Supp. 1016, 78 Misc. Rep. 499—vi. 1048(h), 2023(a), 2026(d); vii. 2831(b).
- (Sup.) 141 N. Y. Supp. 578—vi. 1048(h), 2023(a), 2026(d); vii. 2831(b).
- Wandell v. Mystic Toilers, 105 N. W. 448, 130 Iowa, 639—vii. 3756(q), 3769(s), 3774(s).
- Wanerka v. Supreme Council of Royal Arcanum (Sup.) 159 N. Y. Supp. 697—vi. 1969(f).
- Wanner v. Manufacturers' & Merchants' Mut. Fire Ins. Co., 91 Atl. 498, 245 Pa. 90—vii. 3587(b).
- Ward v. Aetna Life Ins. Co., 82 Neb. 499, 118 N. W. 70—vii. 3175(h), 3199(h), 3200(h).
- 85 Neb. 471, 123 N. W. 456—vii. 3176(a).
- v. Bankers' Life Co., 157 N. W. 1017, 99 Neb. 812—vii. 3892(d).
- v. North American Acc. Ins. Co., 182 Ill. App. 317—vii. 2645(n), 3162(c).
- v. Queen City Fire Ins. Co., 69 Or. 347, 138 Pac. 1067—vii. 2680(h), 3416(d), 3432(m).
- v. Ward, 154 Ky. 355, 157 S. W. 700—vi. 1110(g).
- Ward's Adm'r v. Preferred Acc. Ins. Co., 67 Atl. 821, 80 Vt. 321—vi. 689(g); vii. 2521(c), 3181(b), 3189(d).
- Warfield-Pratt-Howell Co. v. Williamson, 233 Ill. 487, 84 N. E. 706—vii. 2825(e), 3073(j).
- Waring v. Wilcox, 8 Cal. App. 317, 96 Pac. 910—vii. 3755(q), 3775(t).
- Warner v. Modern Woodmen of America, 96 S. W. 222, 119 Mo. App. 222—vi. 2398(c), 2400(d).
- v. Narragansett Mut. Fire Ins. Co., 90 Atl. 706, 111 Me. 590—vi. 1410(g); vii. 3415(d), 3431(m), 3715(m), 3718(n).
- Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924—vi. 271(j).
- Warren v. Farmers' Mut. Fire Ins. Co., 109 S. W. 88, 130 Mo. App. 226—vii. 3042(c).
- v. Franklin Fire Ins. Co., 161 Iowa, 440, 143 N. W. 554—vi. 449(d); vii. 2807(k).
- v. New York Life Ins. Co. (Mo. App.) 182 S. W. 96—vi. 1979(j), 2126(b).
- Warren v. Postal Life Ins. Co., 148 N. Y. Supp. 1024, 163 App. Div. 638—vi. 691(a), 2413(h).
- Warsaw-Wilkinson Co. v. Exchange Mut. Fire Ins. Co. (C. C.) 192 Fed. 666—vi. 822(a).
- Wasem v. Gray, 43 Colo. 140, 95 Pac. 557—vii. 3715(m).
- Washburn v. Union Cent. Life Ins. Co., 38 South. 1011, 143 Ala. 485—vi. 2245(g); vii. 2462(b), 2470(d), 2659(a), 2700(b), 2726(n).
- v. United States Casualty Co., 106 Me. 411, 76 Atl. 902—vi. 628(a), 2322(m).
- 108 Me. 429, 81 Atl. 575—vi. 482(i); vii. 2591(k).
- Washburn-Crosby Co. v. Home Ins. Co., 199 Mass. 463, 85 N. E. 592—vi. 768(d), 774(g); vii. 3692(c).
- Washington v. Union Casualty & Surety Co., 91 S. W. 988, 115 Mo. App. 627—vii. 3208(k).
- Washington Fire Ins. Co. v. Cobb (Tex. Civ. App.) 163 S. W. 608—vi. 1433(f), 1663(e); vii. 3919(j).
- Washington Life Ins. Co. v. Lovejoy (Tex. Civ. App.) 149 S. W. 398—vi. 653(c), 900(a); vii. 2841(f).
- Wasson v. American Patriots, 148 Iowa, 142, 126 N. W. 778—vi. 715(n); vii. 3281(e).
- Waterloo Lumber Co. v. Des Moines Ins. Co., 150 Iowa, 607, 130 N. W. 147—vii. 2809(l).
- 158 Iowa, 563, 138 N. W. 504, 51 L. R. A. (N. S.) 539—vi. 109(e), 458(i), 459(j); vii. 2794(d), 2796(f), 2809(l).
- Waters v. Kopp, 34 App. D. C. 575—vii. 3731(e), 3793(c).
- v. Security Life & Annuity Co., 144 N. C. 663, 57 S. E. 437, 13 L. R. A. (N. S.) 805—vi. 421(f), 456(h), 557(l), 689(g), 843(g); vii. 2849(j).
- Waterstrow v. National Americans, 183 Ill. App. 82—vii. 3476(g).
- Watkins v. Brotherhood of American Yeomen, 188 Mo. App. 626, 176 S. W. 516—vi. 2365(j), 2428(c); vii. 2706(c), 2781(f), 3272(b).
- Watrous v. Des Moines Ins. Co., 144 Iowa, 551, 123 N. W. 171—vi. 347(b), 421(e).
- Watson v. Mutual Life Ins. Co., 139 La. 737, 72 South. 189—vii. 3968(f).
- v. National Life & Trust Co., 189 Fed. 872, 111 C. C. A. 134—vii. 2833(c).
- v. North Carolina Home Ins. Co., 159 N. C. 638, 75 S. E. 1105—vi. 1738(f).
- Watts v. Phenix Ins. Co., 134 Ga. 717, 68 S. E. 479—vi. 1733(d).
- v. Equitable Life Assur. Soc., 105 N. Y. Supp. 363, 55 Misc. Rep. 454—vi. 124(d).

- Waukau Milling Co. v. Citizens' Mut. Fire Ins. Co., 130 Wis. 47, 109 N. W. 937, 118 Am. St. Rep. 998, 10 Ann. Cas. 795—vi. 678(a), 682(c), 1475 (g), 1796(a), 1804(g); vii. 2642(k).
- Waverley Sales Co. v. Ford (Mo. App.) 194 S. W. 1085—vii. 3702(g).
- Way v. Pacific Lumber & Timber Co., 133 Pac. 595, 74 Wash. 332, 49 L. R. A. (N. S.) 147—vi. 934(o).
- Wayland v. Western Life Indemnity Co., 166 Mo. App. 221, 148 S. W. 626—vi. 90(d), 845(g), 1015(b), 2348(d), 2378(p); vii. 2834(d), 3286(f).
- Weaver v. New Jersey Fidelity & Plate Glass Ins. Co., 56 Colo. 112, 136 Pac. 1180, 51 L. R. A. (N. S.) 414—vii. 3032 (i), 3913(i).
- Webb v. Concordia Fire Ins. Co., 132 N. W. 523, 167 Mich. 144, 36 L. R. A. (N. S.) 350—vii. 3102(b).
- v. Granite State Fire Ins. Co., 164 Mich. 139, 129 N. W. 19—vii. 2805(j).
- v. Missouri State Life Ins. Co., 115 S. W. 481, 134 Mo. App. 576—vii. 3287(f).
- Weber v. Head Camp, Pacific Jurisdiction, Woodmen of the World, 60 Colo. 529, 154 Pac. 728—vii. 3239(d), 3871 (d).
- Webster v. Columbia Nat. Life Ins. Co., 131 App. Div. 837, 116 N. Y. Supp. 404—vi. 470(e).
- 196 N. Y. 523, 89 N. E. 1114—vi. 470(e).
- v. Ferguson, 102 N. W. 213, 94 Minn. 86—vi. 341(g), 360(k).
- v. Iowa State Traveling Men's Ass'n (C. C.) 165 Fed. 367—vii. 4007(f).
- v. State Mut. Fire Ins. Co., 69 Atl. 319, 81 Vt. 75—vii. 2772(b), 3481(c), 3559(c).
- Weddington v. Piedmont Fire Ins. Co., 141 N. C. 234, 54 S. E. 271, 8 Ann. Cas. 497—vi. 1765(a); vii. 2664(b), 2692(e).
- Wehring v. Modern Woodmen of America, 119 N. W. 245, 107 Minn. 25—vii. 3864(b).
- Weidenaar v. New York Life Ins. Co., 94 Pac. 1, 36 Mont. 592—vi. 1039(a).
- Weidner v. Standard Life & Acc. Ins. Co., 130 Wis. 10, 110 N. W. 246—vii. 3212(k).
- Weil v. Federal Life Ins. Co., 264 Ill. 425, 106 N. E. 246, Ann. Cas. 1915D, 974—vii. 2755(b), 3943 (d).
- 182 Ill. App. 322—vi. 1963(m); vii. 2755(b), 3943(d).
- v. Globe Indemnity Co., 179 App. Div. 166, 166 N. Y. Supp. 225—vi. 638(g); vii. 3304(g).
- v. Marquis, 256 Pa. 608, 101 Atl. 70—vii. 3755(q), 3797(d).
- Weiler v. Lancaster County Mut. Ins. Co., 50 Pa. Super. Ct. 249—vi. 1835 (b); vii. 2520(b).
- Weiman v. National Ben Franklin Fire Ins. Co. (Supp.) 159 N. Y. Supp. 698—vii. 3390(h).
- Weinberg v. Woodward, 124 N. Y. Supp. 480, 67 Misc. Rep. 283—vi. 27(b), 2338 (b).
- Weinberger v. Agricultural Ins. Co., 80 N. J. Law, 202, 76 Atl. 343—vi. 209(j), 1065(b).
- v. Insurance Co. of North America, 156 S. W. 79, 170 Mo. App. 266—vii. 2644(m), 2775(d).
- Weinstein v. Weinstein, 104 N. Y. Supp. 1113, 120 App. Div. 496—vii. 3748(n).
- Weisberger v. Western Reserve Ins. Co., 95 Atl. 402, 250 Pa. 155—vi. 1720 (b); vii. 3390(h).
- Weisguth v. Supreme Tribe of Ben Hur, 272 Ill. 541, 112 N. E. 350—vi. 636(e), 677(a), 1939(f), 2103(d); vii. 2528(f), 2535(j), 2567(d).
- 194 Ill. App. 17—vi. 636(e), 677 (a), 1939(f), 2103(d); vii. 2528 (f), 2535(j), 2567(g).
- Weisman v. Firemen's Ins. Co., 95 N. E. 411, 208 Mass. 577—vii. 3631(b).
- Weissman v. County Fire Ins. Co., 76 Atl. 1105, 83 Conn. 716—vii. 3126(d).
- Welch v. British-American Assur. Co., 148 Cal. 223, 82 Pac. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396—vi. 633(c), 1523(c).
- Welles v. Colorado Nat. Life Assur. Co., 49 Colo. 508, 113 Pac. 524—vi. 1006 (h).
- Wells v. Glens Falls Ins. Co., 101 N. Y. Supp. 1059, 117 App. Div. 346—vi. 1437(h).
- v. Great Eastern Casualty Co. (R. I.) 100 Atl. 395—vi. 2082(i), 2084(b); vii. 2830(b).
- (R. I.) 101 Atl. 6—vi. 615(f).
- v. Union Cent. Life Ins. Co., 98 S. W. 697, 81 Ark. 145—vi. 2259 (a); vii. 3966(c).
- Wells & McComas Council, No. 14, Junior Order United American Mechanics v. Littleton, 60 Atl. 22, 100 Md. 416—vii. 3685(d).
- Welsh v. Metropolitan Life Ins. Co., 165 Mo. App. 233, 147 S. W. 147—vi. 1962 (k), 1991(g).
- Wensel v. Property Mut. Ins. Ass'n, 105 N. W. 522, 129 Iowa, 295—vii. 2622(a), 3097(g), 3839(b).
- Wermuth v. Minden Lumber Co., 129 La. 912, 57 South. 170—vi. 124(e).
- Werner v. Fraternal Bankers' Reserve Soc., 172 Iowa, 504, 154 N. W. 773, Ann. Cas. 1918A, 1005—vii. 3131(a), 3531(a), 3959(b).
- West v. National Casualty Co., 61 Ind. App. 479, 112 N. E. 115—vi. 2308(d), 2433(f); vii. 2479(e), 2506(d), 2658 (a), 2715(h).
- Westchester Fire Ins. Co. v. Gurian, 101 N. Y. Supp. 50, 115 App. Div. 610—vi. 913(a); vii. 2818 (b).

- Westchester Fire Ins. Co. v. McMinn (Tex. Civ. App.) 188 S. W. 25—vi. 1829(g), 1893(i); vii. 2315(a), 2820(c).
- v. Ocean View Pleasure Pier Co., 56 S. E. 584, 106 Va. 633—vi. 1697(e), 1710(l); vii. 2630(d).
- v. Redditt (Tex. Civ. App.) 196 S. W. 334—vi. 1673(h).
- v. Robinson (Tex. Civ. App.) 192 S. W. 793—vi. 363(a), 398(f).
- v. Smith, 128 Ark. 92, 193 S. W. 275—vii. 2464(b), 2521(c).
- West End Trust Co. v. Fidelity Mut. Life Ins. Co., 98 Atl. 768, 253 Pa. 619—vi. 1048(h).
- Westerman v. Supreme Lodge, K. P., 196 Mo. 670, 94 S. W. 470, 5 L. R. A. (N. S.) 1114—vi. 36(j), 2407(g).
- Western Assur. Co. v. Chesapeake Lighterage & Towing Co., 105 Md. 232, 65 Atl. 637, 11 Ann. Cas. 956—vi. 197(f), 1249(k), 1273(r); vii. 2882(c), 2904(d).
- v. Ferrel (Miss.) 40 South. 8—vi. 1506(a), 1837(b), 1858(r).
- v. Hall Bros., 38 South. 853, 143 Ala. 163—vii. 3638(f), 3641(i), 3660(b).
- v. Hillyer-Deutsch-Jarratt Co. (Tex. Civ. App.) 167 S. W. 816—vi. 171(c), 636(e), 1628(c), 1738(f); vii. 2620(a), 2622(a).
- Western Coal & Dock Co. v. Traders' Ins. Co., 122 Ill. App. 138—vii. 3975(g), 3982(h).
- Western Commercial Travelers' Ass'n v. Tennent, 128 Mo. App. 541, 106 S. W. 1073—vi. 56(f), 809(i); vii. 3748(n).
- Western Indemnity Co. v. MacKechnie (Tex. Civ. App.) 185 S. W. 615—vii. 3198(h), 3959(b).
- Western Ins. Co. v. Ashby, 53 Ind. App. 518, 102 N. E. 45—vi. 1541(f); vii. 2532(i), 2733(a), 2777(e).
- Western Life Indemnity Co. v. Rupp, 144 S. W. 743, 147 Ky. 489—vi. 253(f), 1079(a).
- Western Life & Acc. Co. v. State Insurance Board (Neb.) 162 N. W. 530—vi. 54(e).
- Western Nat. Ins. Co. v. Marsh, 34 Okl. 414, 125 Pac. 1094, 42 L. R. A. (N. S.) 991—vii. 2481(f), 2622(a), 2653(t), 3121(c).
- Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co., 37 Okl. 213, 131 Pac. 691—vi. 1829(g).
- Western Reciprocal Underwriters' Exchange v. Coon, 38 Okl. 453, 134 Pac. 22—vii. 2487(i), 2742(c).
- Western Transit Co. v. Brown, 161 Fed. 869, 88 C. C. A. 617—vii. 2893(h).
- (D. C.) 152 Fed. 476—vii. 2893(h).
- Western Travelers' Acc. Ass'n v. Tomson, 72 Neb. 661, 101 N. W. 341, 103 N. W. 695—vii. 3350(a), 3440(a), 3534(b).
- 72 Neb. 661, 105 N. W. 293—vii. 3347(a).
- Western Underwriters' Ass'n v. Hankins, 221 Ill. 304, 77 N. E. 447—vii. 3477(a), 3523(f), 3528(h), 3559(c), 3628(t), 3641(i), 3658(a), 3660(b).
- 122 Ill. App. 600—vii. 3477(a), 3523(f), 3528(h), 3559(c), 3628(t), 3641(i), 3658(a), 3660(b).
- Western Woolen Mill Co. v. Northern Assur. Co., 139 Fed. 637, 72 C. C. A. 1—vii. 3013(b).
- Western & Reciprocal Underwriters' Exchange v. Coon, 38 Okl. 453, 134 Pac. 22—vii. 2487(i), 3955(a).
- Western & Southern Life Ins. Co. v. Davis, 141 Ky. 358, 132 S. W. 410—vi. 453(f), 686(e), 689(g).
- v. Giltane, 163 S. W. 192, 157 Ky. 275—vi. 2330(g).
- v. Grimes' Adm'r, 133 Ky. 338, 128 S. W. 65—vi. 247(b), 251(e), 299(b).
- v. Oppenheimer, 104 S. W. 721, 31 Ky. Law Rep. 1049—vii. 2683(b).
- v. Quinn, 130 Ky. 397, 113 S. W. 456—vi. 1953(c), 1956(f); vii. 3586(a), 3655(p), 3657(p).
- v. Webster, 189 S. W. 429, 172 Ky. 444, L. R. A. 1917B, 375 Ann. Cas. 1917C, 271—vi. 258(g), 280(b), 286(g), 312(b).
- Westinghouse-Church-Kerr Co. v. Long Island R. Co., 141 N. Y. Supp. 644, 80 Misc. Rep. 127—vi. 545(b).
- Weston v. American Ins. Co., 177 S. W. 792, 191 Mo. App. 282—vi. 737(c); vii. 3095(g), 3887(c).
- v. State Mut. Life Assur. Co., 234 Ill. 492, 84 N. E. 1073—vi. 2259(a), 2293(d), 2308(d), 2432(e); vii. 2478(d), 2681(h), 2839(d).
- 137 Ill. App. 319—vi. 2259(a), 2293(d), 2308(d), 2432(e); vii. 2478(d), 2681(h), 2839(d).
- Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734, 151 Pac. 159—vi. 2120(n); vii. 2528(f).
- West Riverside Coal Co. v. Maryland Casualty Co., 135 N. W. 414, 155 Iowa, 161, 48 L. R. A. (N. S.) 195—vii. 3334(b).
- Wetherill v. Williamsburgh City Fire Ins. Co., 60 Pa. Super. Ct. 37—vii. 3033(i).
- Wetmore v. McElroy, 80 S. E. 266, 96 S. C. 182, Ann. Cas. 1916B, 79—vi. 938(c).
- Wettengel v. United States Lloyds, 147 N. W. 360, 157 Wis. 433, Ann. Cas. 1915A, 626—vii. 3033(i).
- Wever v. Pioneer Fire Ins. Co., 49 Okl. 546, 153 Pac. 1146—vii. 3975(g).
- Wexner v. Gruenapple, 111 N. Y. Supp. 280, 127 App. Div. 179—vii. 3301(e).

- Whalen v. Peerless Casualty Co., 75 N. H. 297, 73 Atl. 642, 139 Am. St. Rep. 695—vii. 3216(m), 3219(m), 3223(m).
- v. Western Assur. Co., 185 Fed. 490, 107 C. C. A. 590—vii. 3563(a).
- Whaley v. Bankers' Union, 39 Tex. Civ. App. 385, 88 S. W. 259—vi. 619(b).
- Wharton v. Drewry, 135 Ga. 587, 69 S. E. 1117—vii. 3776(u).
- Wheaton Packing Co. v. Aetna Ins. Co., 185 Fed. 108, 107 C. C. A. 113, 34 L. R. A. (N. S.) 563—vi. 1810(k).
- Wheatley's Adm'r v. Knights of Columbus, 161 Ky. 331, 170 S. W. 937—vii. 2715(h).
- Wheaton v. Liverpool & London & Globe Ins. Co., 20 S. D. 62, 104 N. W. 850—vi. 442(a), 450(d), 525(i), 610(c); vii. 3069(g).
- Wheeler v. Equitable Trust Co., 221 Pa. 276, 70 Atl. 750—vi. 631(b); vii. 3327(d).
- v. Farmers' Fire Ins. Co., 161 Ill. App. 585—vi. 1679(k).
- v. Fidelity & Casualty Co., 129 Ga. 237, 58 S. E. 709—vii. 3163(c).
- v. Phenix Ins. Co., 136 App. Div. 909, 120 N. Y. Supp. 1151—vii. 3027(g), 3043(e).
- 203 N. Y. 283, 96 N. E. 452, 38 L. R. A. (N. S.) 474, Ann. Cas. 1913A, 1297—vii. 3027(g), 3043(e).
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- v. Home Life Ins. Co., 115 Minn. 177, 131 N. W. 1081—vi. 552(h), 686(e), 1988(d); vii. 3475(f).
- Whelen v. Goldman, 62 Misc. Rep. 108, 115 N. Y. Supp. 1006—vi. 183(d), 1351(c); vii. 3642(i).
- Wherry v. Latimer, 103 Miss. 524, 60 So. 563, 642—vii. 3762(r), 3775(t).
- Whigham v. Supreme Court I. O. F., 51 Or. 489, 94 Pac. 968—vii. 2528(f), 2777(e).
- Whinfield v. Massachusetts Bonding & Ins. Co., 162 Wis. 1, 154 N. W. 632—vi. 635(d), 2435(a), 2439(c).
- White v. Brotherhood of Locomotive Firemen, 162 N. W. 441, 165 Wis. 418—vii. 3452(h), 3544(a).
- v. Empire State Degree of Honor, 47 Pa. Super. Ct. 52—vi. 458(i), 563(f), 641(i); vii. 3226(a), 3532(b).
- v. Maryland Casualty Co., 139 App. Div. 179, 123 N. Y. Supp. 840—vi. 83(e), 1066(c), 1105(d); vii. 3719(o), 3990(k).
- v. New York Life Ins. Co., 86 N. E. 928, 200 Mass. 510—vi. 2271(g).
- v. Post & Bowles, 91 Miss. 685, 45 So. 366—vi. 926(h).
- v. Prudential Ins. Co., 105 N. Y. Supp. 87, 120 App. Div. 260—vii. 3255(l).
- White v. Ratcliff, 99 Miss. 93, 54 South. 658—vi. 1101(b).
- v. Standard Life & Acc. Ins. Co., 103 N. W. 735, 884, 95 Minn. 77, 5 Ann. Cas. 83—vii. 3201(h).
- v. White, 111 Miss. 219, 71 So. 322—vii. 3774(s), 3775(c).
- Whitehurst v. Mason, 140 Ga. 148, 78 S. E. 938—vii. 3854(f).
- Whiteside v. North American Acc. Ins. Co., 119 App. Div. 915, 104 N. Y. Supp. 1150—vi. 527(i); vii. 3462(d).
- 200 N. Y. 320, 93 N. E. 948, 35 L. R. A. (N. S.) 696—vi. 527(i); vii. 3462(d).
- Whitfield v. Aetna Life Ins. Co., 144 Fed. 356, 75 C. C. A. 358—vii. 3237(d), 3275(c), 3304(g).
- 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895—vii. 3237(d), 3275(c), 3304(g).
- Whiting v. Fidelity Mut. Life Ins. Ass'n, 137 App. Div. 758, 122 N. Y. Supp. 1014—vi. 993(b), 1025(d).
- Whiting v. Fidelity Mut. Life Ass'n, Philadelphia, 203 N. Y. 597, 96 N. E. 1134—vi. 993(b), 1025(d).
- Whitlock v. Greenberg (Sup.) 159 N. Y. Supp. 184—vi. 925(g).
- Whitman v. Milwaukee Fire Ins. Co., 107 N. W. 291, 128 Wis. 124, 5 L. R. A. (N. S.) 407, 116 Am. St. Rep. 25—vi. 397(d).
- Whitney Estate Co. v. Northern Assur. Co., 101 Pac. 911, 155 Cal. 521, 23 L. R. A. (N. S.) 123, 18 Ann. Cas. 512—vi. 85(a), 87(a), 545(b); vii. 3085(e), 3098(g).
- Whittaker v. Mutual Life Ins. Co., 133 Mo. App. 664, 114 S. W. 53—vi. 658(g), 2411(g).
- Whitton v. American Nat. Ins. Co., 17 Ga. App. 525, 87 S. E. 827—vii. 3289(b).
- Wicecarver v. Mercantile Town Mut. Ins. Co., 137 Mo. App. 247, 117 S. W. 698—vii. 2769(a), 3364(e), 3952(d), 3961(c), 4001(a).
- Wichita Southern Life Ins. Co. v. Roberts (Tex. Civ. App.) 186 S. W. 411—vi. 2395(b), 2432(e); vii. 2610(i).
- Wichman v. Metropolitan Life Ins. Co., 96 S. W. 695, 120 Mo. App. 51—vi. 2398(c).
- Wicks v. London & Lancashire Fire Ins. Co. (Sup.) 111 N. Y. Supp. 63—vi. 747(g).
- Widincamp v. Phoenix Ins. Co., 62 S. E. 478, 4 Ga. App. 759—vi. 1736(e).
- Wiedynska v. Pulaski Polish Benev. Soc., 97 N. Y. Supp. 413, 110 App. Div. 732—vi. 717(n).
- Wiest v. United States Health & Acc. Ins. Co., 186 Mo. App. 22, 171 S. W. 570—vii. 3301(f).
- Wightman v. Grand Lodge A. O. U. W., 98 S. W. 829, 121 Mo. App. 252—vi. 127(f); vii. 2337(d).

- Wiig v. Girard Fire & Marine Ins. Co.**, 100 Neb. 271, 159 N. W. 416, L. R. A. 1917E, 1061—vii. 3030(h).
Wilber v. Supreme Lodge of New England Order of Protection, 192 Mass. 477, 78 N. E. 445—vi. 813(k).
Wilbisky v. German Alliance Ins. Co., 90 Misc. Rep. 335, 152 N. Y. Supp. 1048—vii. 3654(p).
Wilcock v. Massachusetts Bonding & Ins. Co., 112 N. E. 51, 223 Mass. 482—vi. 607(a).
Wilcox v. Central Acc. Ins. Co., 234 Pa. 58, 82 Atl. 1093—vii. 3187(d), 3220(m).
 v. **Court of Honor**, 134 Mo. App. 547, 114 S. W. 1155—vi. 714(m), 717(n); vii. 3268(p).
 v. **Supreme Council of Royal Arcanum**, 151 App. Div. 297, 136 N. Y. Supp. 377—vi. 128(g), 2203(d), 2251(j).
 66 Misc. Rep. 253, 123 N. Y. Supp. 83—vi. 128(g), 2203(d), 2251(j).
Wild Rice Lumber Co. v. Royal Ins. Co., 99 Minn. 190, 108 N. W. 871—vi. 529(j), 732(b).
Wilde v. Wilde, 209 Mass. 205, 95 N. E. 295—vi. 649(a), 658(g), 1079(a), 1090(f), 1094(g); vii. 2875(b).
Wilder v. Continental Casualty Co., 150 Fed. 92, 80 C. C. A. 46—vi. 2041(e), 2049(i).
 v. **Watts (D. C.)**, 138 Fed. 426—vii. 3712(k).
Wiley v. London & Lancashire Fire Ins. Co., 89 Conn. 35, 92 Atl. 678—vi. 636(e), 1716(b), 1720(b).
 v. **Rome Ins. Co.**, 12 Ga. App. 186, 76 S. E. 1067—vii. 2467(c), 2517(a), 2521(c).
Wilhelm v. Order of Columbian Knights, 136 N. W. 160, 149 Wis. 585—vii. 2574(e).
Wilken v. Capital Fire Ins. Co., 99 Neb. 828, 157 N. W. 1021—vi. 427(h).
Wilkes v. Hicks, 124 Ark. 192, 186 S. W. 830—vii. 3762(r), 3767(s).
Wilkie v. National Council J. O. U. A. M., 147 N. C. 637, 61 S. E. 580—vi. 2344(d), 2428(c).
 151 N. C. 527, 66 S. E. 579—vi. 2344(d); vii. 2699(b).
 v. **New York Life Ins. Co.**, 146 N. C. 513, 60 S. E. 427—vi. 2409(g).
Wilkins v. Price (Sup.), 142 N. Y. Supp. 574—vii. 3271(a).
Wilkinson v. Aetna Life Ins. Co., 240 Ill. 205, 88 N. E. 550, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269—vi. 632(c); vii. 3172(g), 3174(g), 3213(k), 3256(l), 3262(n), 3306(g), 3312(i).
 144 Ill. App. 38—vi. 632(c); vii. 3172(g), 3174(g), 3213(k), 3256(l), 3262(n), 3306(g), 3312(i).
Wilkinson v. John Hancock Mut. Life Ins. Co., 61 Atl. 43, 27 R. I. 146, 8 Ann. Cas. 1063—vii. 3972(g).
Will & Baumer Co. v. Rochester German Ins. Co., 125 N. Y. Supp. 606, 140 App. Div. 691—vii. 3356(a), 3361(c), 3380(a), 3407(c), 3410(e).
Willert v. Minnesota Farmers' Mut. Ins. Co., 123 N. W. 1083, 109 Minn. 527—vi. 586(d).
Williams v. Aetna Fire Ass'n, 30 Ohio Cir. Ct. R. 197—vi. 616(f).
 v. **American Ins. Co.**, 196 Ill. App. 370—vii. 3035(j), 3481(c), 3511(a), 3612(k).
 v. **Bankers' Union of Chicago**, 166 Ill. App. 495—vii. 3989(k).
 v. **Empire Life Ins. Co.**, 146 Ga. 246, 91 S. E. 44—vi. 470(e).
 v. **Empire Mut. Annuity & Life Ins. Co.**, 8 Ga. App. 303, 68 S. E. 1082—vi. 445(b), 486(k), 507(f), 509(g), 995(c), 2267(e); vii. 2464(b), 2724(e), 2726(n).
 v. **Fire Ass'n**, 104 N. Y. Supp. 100, 119 App. Div. 573—vi. 1174(a); vii. 2768(a), 3403(a), 3965(e), 3968(f).
 v. **Hixson**, 164 Ill. App. 381—vi. 913(a).
 v. **Metropolitan Life Ins. Co.**, 109 App. Div. 843, 96 N. Y. Supp. 823—vii. 2559(b), 2572(e), 2580(h).
 v. **Mutual Reserve Fund Life Ass'n**, 58 S. E. 802, 145 N. C. 128, 13 Ann. Cas. 51—vi. 566(j); vii. 4007(f).
 v. **New York Life Ins. Co.**, 89 Atl. 97, 122 Md. 141—vi. 437(a), 642(i), 660(i).
 v. **Philadelphia Life Ins. Co.**, 105 S. C. 305, 89 S. E. 675—vi. 447(b).
 v. **St. Louis Life Ins. Co.**, 189 Mo. 70, 87 S. W. 499—vi. 552(h), 1997(j); vii. 2755(b).
 97 Mo. App. 449, 71 S. W. 376—vi. 552(h), 1997(j); vii. 2755(b).
 v. **Supreme Conclave Improved Order of Heptasophs**, 172 N. C. 787, 90 S. E. 888—vi. 27(b), 564(g), 711(l).
 v. **Supreme Council of Catholic Mut. Ben. Ass'n**, 152 Mich. 1, 115 N. W. 1060—vi. 709(k), 717(n).
 v. **United States Casualty Co.**, 64 S. E. 510, 150 N. C. 597—vii. 3362(d).
 v. **United States Fidelity & Guaranty Co.**, 66 Atl. 495, 105 Md. 490—vii. 3323(b).
 v. **Virginia State Ins. Co.**, 55 S. E. 680, 106 Va. 259—vi. 1895(a).
 v. **Western Travelers' Acc. Ass'n**, 97 Neb. 352, 149 N. W. 822—vii. 3312(i), 3955(a), 3964(e).
Williams Mfg. Co. v. Insurance Co. of North America, 85 Vt. 282, 81 Atl. 916—vi. 148(c), 150(e), 184(a).

- Williams & Co. v. Auto Express Co., 78 N. J. Eq. 165, 78 Atl. 670—vii. 3692(c).
 Williamsburg City Fire Ins. Co. v. Weeks Drug Co., 103 Tex. 608, 132 S. W. 121, 31 L. R. A. (N. S.) 603—vi. 1783(a).
 (Tex. Civ. App.) 133 S. W. 1097—vi. 1783(a); vii. 3067(e).
 v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103—vi. 638(g); vii. 3025(f).
 Williamson v. Warfield, Pratt, Howell Co., 136 Ill. App. 168—vi. 53(d), 633(c); vii. 2801(h), 2825(e), 3073(j).
 Willis v. Horticultural Fire Relief, 69 Or. 293, 137 Pac. 761, Ann. Cas. 1916A, 449—vii. 3416(d).
 77 Or. 621, 152 Pac. 259—vii. 3415(d), 3431(m).
 Willis Cab & Auto Co. v. General Accident, Fire & Life Assur. Corporation, 136 N. Y. Supp. 100—vi. 918(c).
 Willoughby v. Fidelity & Deposit Co., 85 Pac. 713, 16 Okl. 546, 7 L. R. A. (N. S.) 548, 8 Ann. Cas. 603—vi. 2435(a).
 Willson v. German American Ins. Co., 95 Neb. 774, 146 N. W. 945—vi. 347(b), 403(j), 833(a).
 Wilmarth v. Pacific Mut. Life Ins. Co., 168 Cal. 536, 143 Pac. 780, Ann. Cas. 1915B, 1120—vii. 3304(g).
 Wilms v. New Hampshire Fire Ins. Co., 194 Mich. 656, 161 N. W. 940—vi. 1064(a); vii. 2487(i), 2741(b), 3590(e).
 Wilson v. Anchor Fire Ins. Co., 143 Iowa, 458, 122 N. W. 157—vi. 864(g), 1835(b), 1853(o); vii. 2524(d), 2622(a).
 v. Central Ins. Co., 119 N. Y. Supp. 955, 135 App. Div. 649—vi. 652(c); vii. 3606(e), 3659(a).
 v. Commercial Union Assur. Co., 90 Vt. 105, 96 Atl. 540—vi. 1142(g), 1337(f), 1466(b); vii. 2527(e).
 v. Farmers' Mut. Fire Ins. Co., 121 N. W. 284, 156 Mich. 545—vi. 732(b), 736(b); vii. 3009(a).
 v. Frankfort Marine, Acc. & Plate Glass Ins. Co., 91 Atl. 913, 77 N. H. 344—vii. 2606(f), 3576(d).
 v. General Assembly of American Benev. Ass'n, 125 Mo. App. 597, 103 S. W. 109—vi. 1997(j).
 v. German-American Ins. Co., 133 Pac. 715, 90 Kan. 355—vi. 351(d), 351(e); vii. 3350(a), 3405(b).
 v. Germania Fire Ins. Co., 140 Ky. 642, 131 S. W. 785—vi. 1336(f), 1345(a), 1348(c); vii. 2521(c), 2549(t), 2621(a), 2622(a).
 v. Interstate Business Men's Acc. Ass'n, 160 Iowa, 184, 140 N. W. 860—vi. 444(a), 2096(a); vii. 3168(e).
 v. Life Ins. Co., 155 N. C. 173, 71 S. E. 79—vi. 555(j), 854(a).
 Wilson v. Royal Neighbors of America, 102 N. W. 957, 139 Mich. 423—vi. 2146(k).
 v. Royal Union Mut. Life Ins. Co., 114 N. W. 1051, 137 Iowa, 184—vi. 2271(g); vii. 2712(e), 2831(b).
 v. Washington Life Ins. Co., 103 S. W. 339, 31 Ky. Law Rep. 717—vi. 2417(i).
 Winchester v. North British & Mercantile Ins. Co., 160 Cal. 1, 116 Pac. 63, 35 L. R. A. (N. S.) 404—vii. 3076(m), 3623(p).
 Windle v. Empire State Surety Co., 151 Ill. App. 273—vii. 3295(d), 3350(a).
 Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., 196 Fed. 340, 116 C. C. A. 160—vii. 3319(a).
 Wing Chung Long Co. v. Prussian Nat. Ins. Co., 33 Cal. App. 715, 166 Pac. 358—vii. 2793(d).
 Wingersky v. United States Grand Lodge, I. O. F. S. I., 126 N. Y. Supp. 74—vi. 698(f).
 Winkler Brokerage Co. v. Fidelity & Deposit Co., 119 La. 735, 44 South. 449—vi. 2435(a), 2439(c).
 Winn v. Modern Woodmen of America, 138 Mo. App. 701, 119 S. W. 536—vi. 2142(h), 2143(i); vii. 3685(d).
 146 Mo. App. 69, 123 S. W. 59—vi. 2142(h), 2143(i); vii. 3685(d).
 157 Mo. App. 1, 137 S. W. 292—vi. 2169(j).
 Winsor & Son v. Mutual Fire & Tornado Ass'n, 170 Iowa, 521, 153 N. W. 97—vi. 739(d), 1621(l); vii. 2464(b), 2683(b).
 Winston v. Arlington Fire Ins. Co., 32 App. D. C. 61, 20 L. R. A. (N. S.) 960, 16 Ann. Cas. 104—vii. 3986(j).
 Winterberg v. Brotherhood of Locomotive Firemen & Enginemen, 148 Ky. 501, 146 S. W. 1105—vi. 697(e).
 Wintergerst v. Court of Honor, 185 Mo. App. 373, 170 S. W. 346—vi. 631(b); vii. 2659(a), 3770(s).
 Wisconsin Zinc Co. v. Fidelity & Deposit Co., 162 Wis. 39, 155 N. W. 1081—vi. 638(g); vii. 3330(a), 3334(b).
 Wisecup v. American Ins. Co., 186 Mo. App. 310, 172 S. W. 73—vi. 163(h); vii. 2463(b).
 Wisenstine v. Interstate Business Men's Acc. Ass'n, 98 Neb. 365, 152 N. W. 742—vii. 2559(b), 2562(b), 3872(d).
 Wising v. Brotherhood of American Yeomen, 156 N. W. 247, 132 Minn. 303—vi. 2232(b).
 Wisotzkey v. Hartford Fire Ins. Co., 112 App. Div. 596, 98 N. Y. Supp. 763—vii. 2530(h).
 189 N. Y. 532, 82 N. E. 1134—vii. 2530(h).

- Wisotzkey v. Niagara Fire Ins. Co., 112 App. Div. 599, 98 N. Y. Supp. 760—vii. 2508(d), 2622(a), 2650(r), 2651(s).
189 N. Y. 532, 82 N. E. 1134—vii. 2508(d), 2622(a), 2650(r), 2651(s).
- Witherow v. Mystic Toolers (Utah) 161 Pac. 1126—vi. 2153(d).
- Witt v. Old Line Bankers' Life Ins. Co., 144 N. W. 801, 94 Neb. 748—vi. 1037(a).
- W. N. Kratzer & Co. v. Pennsylvania Casualty Co., 86 Atl. 303, 238 Pa. 515—vii. 3146(f).
- Wojanski v. Wojanski, 136 Ill. App. 614—vi. 814(k).
- Wolarsky v. New York Life Ins. Co., 104 N. Y. Supp. 1047, 120 App. Div. 99—vi. 2432(e).
- Wolcott v. State Farmers' Mut. Ins. Co., 77 Neb. 742, 110 N. W. 628—vi. 945(f), 950(g), 961(p), 965(r).
77 Neb. 746, 112 N. W. 371—vi. 945(f), 950(g), 961(p), 965(r).
- Wold v. Minnesota Commercial Men's Ass'n. 136 Minn. 380, 162 N. W. 461—vii. 4007(f).
- Wolf & Sons v. Royal Ins. Co., 194 Fed. 853, 114 C. C. A. 641—3886(a).
- Wolfe v. Washington Life Ins. Co., 118 N. Y. Supp. 599, 63 Misc. Rep. 571—vii. 2832(c), 2842(f).
- Wolff v. German-American Farmers' Mut. Ins. Co. (Okla.) 159 Pac. 480—vi. 1871(b); vii. 2768(a).
- Wolff Packing Co. v. Travelers' Ins. Co., 94 Kan. 630, 146 Pac. 1175—vii. 3316(a).
- Wolfram v. Modern Woodmen of America, 167 Mo. App. 220, 149 S. W. 1167—vi. 2254(b); vii. 3138(d), 3181(b).
- Wolffstern v. Pennsylvania Railroad Voluntary Relief Department, 76 N. J. Eq. 78, 74 Atl. 533—vi. 65(k), 586(d).
- Wollman v. National Fire Ins. Co., 131 N. Y. Supp. 335, 72 Misc. Rep. 477—vii. 3886(a).
- Wolowitch v. National Surety Co., 136 N. Y. Supp. 793, 152 App. Div. 14—vi. 1829(g); vii. 2583(h).
- Wolverine Brass Works v. Pacific Coast Casualty Co., 146 Pac. 184, 26 Cal. App. 183—vi. 2439(c).
- Wolverine Lumber Co. v. Liverpool & London & Globe Ins. Co., 139 Mich. 435, 102 N. W. 992—vi. 735(b).
v. Palatine Ins. Co., 139 Mich. 432, 102 N. W. 991—vi. 735(b).
v. Phenix Ins. Co., 145 Mich. 558, 108 N. W. 1088—vi. 736(b).
- Women's Catholic Order of Foresters v. Hill, 191 Ill. App. 629—vii. 3758(q).
- Wondra v. National Life Ins. Co., 147 N. W. 961, 126 Minn. 136—vii. 3959(b).
- Wood v. Brotherhood of American Yeomen (Iowa) 113 N. W. 825—vi. 456(h), 458(i), 459(j), 460(j); vii. 2830(b).
140 Iowa, 98, 117 N. W. 1123—vi. 458(i), 459(j).
148 Iowa, 400, 126 N. W. 949—vii. 3229(b), 3284(e), 3769(s).
- v. General Acc. Ins. Co. (C. C.) 156 Fed. 982—vii. 3162(c).
160 Fed. 926, 88 C. C. A. 108—vii. 3162(c).
- v. Iowa Legion of Honor, 133 Iowa, 33, 110 N. W. 164—vi. 2368(l).
- v. Sovereign Camp of Woodmen of the World, 166 Iowa, 391, 147 N. W. 888—vii. 3241(f), 3242(g), 3257(m), 3265(o), 3268(p).
- v. Spring Garden Ins. Co., 215 Fed. 355, 131 C. C. A. 497—vi. 352(f).
- Woodall v. Fidelity & Casualty Co., 62 S. E. 808, 131 Ga. 517—vii. 3356(a).
- Woodard v. German American Ins. Co., 128 Wis. 1, 106 N. W. 681, 116 Am. St. Rep. 17—vi. 1521(c); vii. 2695(h), 2734(a).
- Wooden v. Wooden (Tex. Civ. App.) 116 S. W. 627—vii. 3767(s).
- Woodmen of the World v. Dodd (Tex. Civ. App.) 134 S. W. 254—vi. 2199(a); vii. 3146(f).
- v. Hall, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517—vi. 697(e), 698(f), 2430(d); vii. 2494(o), 2496(o).
- v. Hipp (Tex. Civ. App.) 147 S. W. 316—vii. 3143(f), 3149(f).
- v. Jackson, 97 S. W. 673, 80 Ark. 419—vi. 2428(c), 2432(e); vii. 2719(j).
- v. McCoslin, 59 Tex. Civ. App. 574, 126 S. W. 894—vii. 3149(f).
- v. McHenry, 73 South. 97, 197 Ala. 541—vi. 2096(a).
- v. Torrence (Tex. Civ. App.) 103 S. W. 652—vii. 3733(g).
- v. Walters, 124 Ky. 663, 99 S. W. 930, 30 Ky. Law Rep. 916—vii. 3149(f).
- v. Wright, 7 Ala. App. 255, 60 South. 1006—vii. 3146(f), 3150(f), 3241(f), 3262(n), 3265(o), 3281(e).
- Woods v. Insurance Co. of State of Pennsylvania, 82 Wash. 563, 144 Pac. 650—vi. 1779(j); vii. 2546(p), 3690(b).
- v. Woods' Adm'r, 130 Ky. 162, 113 S. W. 79, 19 L. R. A. (N. S.) 233—vi. 287(h), 308(h), 1118(k).
- Woodson v. Colored Grand Lodge of Knights of Honor of America, 97 Miss. 210, 52 So. 457—vii. 3734(g).
- Woodward v. Pittsburg Underwriters, 40 Pa. Super. Ct. 143—vii. 3434(a).

- Woodworth v. *Ætna Life Ins. Co.*, 154 Ala. 392, 45 So. 417—vii. 3779(u).
- Woody's Adm'r v. Schaff, 56 S. E. 807, 106 Va. 799—vi. 328(g).
- Woolford v. *Phenix Ins. Co.*, 76 N. E. 722, 190 Mass. 233—vi. 1856(q); vii. 2657(v).
- Woolverton v. *Fidelity & Casualty Co.*, 96 App. Div. 275, 89 N. Y. Supp. 292—vii. 3574(c).
- 190 N. Y. 41, 82 N. E. 745, 16 L. R. A. (N. S.) 400—vii. 3574(c).
- 100 N. Y. Supp. 1151—vii. 3574(c).
- Woolwine v. Mason, 128 Tenn. 35, 157 S. W. 682—vi. 588(f).
- Workingmen's Mut. Protective Ass'n v. Leverton, 178 Ind. 151, 98 N. E. 871—vii. 2715(h), 2719(i).
- v. Roos (Ind. App.) 113 N. E. 760—vii. 3288(b).
- Workman v. *Royal Exch. Assurance*, 165 Pac. 488, 96 Wash. 559—vi. 1448(j); vii. 2464(b), 2521(c).
- Worley v. *Supreme Lodge Royal Achatas*, 88 Neb. 440, 129 N. W. 984—vii. 2706(c).
- Wortham v. *Illinois Life Ins. Co.*, 107 S. W. 276, 32 Ky. Law Rep. 827—vi. 67(l), 2409(g), 2432(e); vii. 3531(a).
- W. P. Harper & Co. v. *Ginners' Mut. Ins. Co.*, 64 S. E. 567, 6 Ga. App. 139—vi. 432(k).
- W. P. Parker & Co. v. *Continental Ins. Co.*, 55 S. E. 717, 143 N. C. 339—vi. 1820(d); vii. 3532(b).
- Wright v. *Fraternities Health & Accident Ass'n*, 107 Me. 418, 78 Atl. 475, 32 L. R. A. (N. S.) 461—vi. 1940(f), 2072(b).
- v. *Grand Lodge K. P. Colored (Tex. Civ. App.)* 173 S. W. 270—vi. 809(h), 812(j).
- v. *Hartford Fire Ins. Co.*, 54 Tex. Civ. App. 6, 118 S. W. 191—vi. 1376(g), 1378(h), 1424(d).
- v. *Knights of Maccabees*, 122 App. Div. 904, 106 N. Y. Supp. 1150—vi. 713(m), 715(n).
- 128 App. Div. 883, 112 N. Y. Supp. 1150—vi. 717(n).
- 196 N. Y. 391, 89 N. E. 1078, 31 L. R. A. (N. S.) 423, 134 Am. St. Rep. 838—vi. 717(n).
- 197 N. Y. 613, 91 N. E. 1122—vi. 717(n).
- 48 Misc. Rep. 558, 95 N. Y. Supp. 996—vi. 717(n).
- v. *Order of United Commercial Travelers*, 188 Mo. App. 457, 174 S. W. 833—vii. 3156(a), 3172(g), 3200(h).
- Wyandotte Brewing Co. v. *Hartford Fire Ins. Co.*, 144 Mich. 440, 108 N. W. 393, 6 L. R. A. (N. S.) 852, 115 Am. St. Rep. 458—vi. 1337(f), 1361(j).
- Wygol v. *Georgia Home Ins. Co.*, 148 Ky. 674, 147 S. W. 394—vii. 2807(k), 2809(l).
- Wylie v. *Jefferson Standard Life Ins. Co.*, 78 S. E. 745, 95 S. C. 163—vi. 2263(b), 2308(d).
- v. *United States Health & Accident Ins. Co.*, 82 S. E. 402, 98 S. C. 273—vi. 2432(e).
- Wynn v. *Caledonian Ins. Co.*, 100 S. C. 47, 84 S. E. 306—vi. 1835(b).
- v. *Provident Life & Trust Co. of Philadelphia*, 95 App. Div. 142, 88 N. Y. Supp. 821—vi. 2033(h).
- 99 App. Div. 103, 91 N. Y. Supp. 167—vi. 2033(h).
- Wynnewood Lumber Co. v. *Travelers' Ins. Co.*, 91 S. E. 946, 173 N. C. 263—vii. 3330(a).
- Wyss-Thalman v. *Maryland Casualty Co. (C. C.)* 193 Fed. 55—vi. 458(j), 2083(a); vii. 2498(a).
- 193 Fed. 53, 113 C. C. A. 383—vi. 458(j), 2083(a); vii. 2498(a).

Y

- Yanko v. *Standard Fire Ins. Co.*, 31 Pa. Super. Ct. 1—vii. 3107(d).
- Yates v. *Thomason*, 83 Ark. 126, 102 S. W. 1112—vi. 1819(c), 1828(f), 1829(g); vii. 3531(a).
- Yeomen of America v. *Rott*, 145 Ky. 604, 140 S. W. 1018—vi. 683(c), 1955(e), 2144(j).
- Yonda v. *Royal Neighbors of America*, 148 N. W. 926, 96 Neb. 730—vi. 2096(a), 2142(h), 2163(e).
- York v. *Flaherty*, 96 N. E. 53, 210 Mass. 35—vii. 3767(s).
- v. *Sun Ins. Office (Ind. App.)* 113 N. E. 1021—vi. 507(f); vii. 2665(c), 2823(d).
- Yost v. *Anchor Fire Ins. Co.*, 38 Pa. Super. Ct. 594—vi. 636(e), 1663(e), 1686(p); vii. 2548(s), 3085(e).
- v. *Empire State Surety Co.*, 125 Pac. 167, 69 Wash. 397—vii. 3590(e).
- Young v. *Æolian Council No. 17*, 59 Pa. Super. Ct. 174—vi. 2382(r), 2395(b).
- v. *Ætna Ins. Co.*, 64 Atl. 584, 101 Me. 294—vii. 3641(i), 3642(i).
- v. *New York Horse Ins. Co. (Sup.)* 115 N. Y. Supp. 1075—vii. 3054(b).
- v. *Pennsylvania Fire Ins. Co.*, 269 Mo. 1, 187 S. W. 856—vii. 3517(c), 3610(j), 3631(b), 3955(a), 3960(b).
- v. *Railway Mail Ass'n*, 126 Mo. App. 325, 103 S. W. 557—vi. 56(f), 61(h), 713(m), 715(n), 717(n); vii. 3173(g), 3174(g), 3459(b), 3545(a).
- Younghoe v. *Grain Shippers' Mut. Fire Ins. Ass'n*, 126 Iowa, 374, 102 N. W. 137—vi. 692(b), 1871(b).

Young Men's Lyceum v. National Ben Franklin Fire Ins. Co., 177 App. Div. 351, 163 N. Y. Supp. 226—vi. 1228(b).

Yount v. Prudential Life Ins. Co. (Mo. App.) 179 S. W. 749—vi. 444(a), 451 (f).

Yousey v. Queen Ins. Co. (Sup.) 148 N. Y. Supp. 125—vii. 3514(b).

Z

Zahn v. Royal Fraternal Union of St. Louis, 154 Mo. App. 70, 133 S. W. 374—vi. 2391(u), 2425(a); vii. 2462 (a), 2659(a), 2706(c), 2708(c).

Zearfoss v. Switchmen's Union of North America, 102 Minn. 56, 112 N. W. 1044—vii. 3241(f), 3265(o).

Zeigler Co. v. Commercial Union Assur. Co., 38 Pa. Super. Ct. 532—vii. 3860(h).

Zeitler v. Concordia Fire Ins. Co., 169 Mich. 555, 135 N. W. 332—vi. 1717(b), 1736(e), 1750(b).

v. National Casualty Co., 145 N. W. 395, 124 Minn. 478—vi. 632(c), 3174(g), 3959(b).

Zeman v. North American Union, 263 Ill. 304, 105 N. E. 22—vi. 706 (h), 2205(a); vii. 2552(v), 2658(a), 2688(b), 2775(d), 181 Ill. App. 551—vi. 706(h), 2205(a); vii. 2552(v), 2658 (a), 2688(b), 2775(d).

Zender v. Detroit Lodge No. 1 of Knights of Royal Ark, 190 Mich. 624, 157 N. W. 361—vi. 1080(f), 2356(h), 2365(j).

Zenor v. Hayes, 81 N. E. 1144, 228 Ill. 626, 13 L. R. A. (N. S.) 909—vi. 191 (d); vii. 3698(f).

Zerulla v. Supreme Lodge, Order of Mut. Protection, 223 Ill. 518, 79 N. E. 160—vii. 3248(i), 118 Ill. App. 191—vii. 3248(i).

Ziebell v. Fraternal Reserve Ass'n, 158 Wis. 612, 149 N. W. 475—vii. 3172(g), 3265(o).

Zimmerman v. Ohio German Fire Ins. Co., 39 Pa. Super. Ct. 521—vi. 351(e).

v. Supreme Tent Knights of Macca-bees of the World, 122 Mo. App. 591, 99 S. W. 817—vi. 715(n), 717(n), 3236(c).

Zitron, In re (D. C.) 203 Fed. 79—vii. 3703(h).

INDEX

[The Roman numerals refer to the number of the volume; and the Arabic figures immediately following refer to the original paging at the top of the page]

A

ACCIDENT INSURANCE,

Double indemnity for injuries received in burning building, vii. 3306.

AUTOMOBILE INSURANCE,

Against theft, risk and cause of loss, vii. 3033.

Authority to write, vi. 568.

Cancellation of policy, what law governs, vi. 560.

Change of title or possession, vi. 1715.

Condition against leasing as promissory warranty, vi. 1791.

Description of car, materiality, vi. 1283.

Effect of overvaluation, vi. 1314.

Estoppel and waiver, vii. 2516.

Extent of liability, vii. 3343.

For damage in collision, vii. 3063.

Failure to safeguard property, vi. 1796.

Forfeiture of policy, vi. 2454.

Insurable interest, vi. 142.

Knowledge or notice as essential to estoppel or waiver, vii. 2516.

Liability for injuries as subject of insurance, vi. 114.

Reformation of policy, vi. 876, 878.

Risk and cause of loss, vii. 3023, 3329.

Risks specially excepted, vii. 3023.

Subrogation, vii. 3894, 3911,

Validity of policies, vi. 545.

AVOIDANCE OF CONTRACT,

In employers' liability insurance, vi. 2447.

B

BURGLARY INSURANCE,

Authority to write, vi. 568.

Change in condition of risk, vi. 1600.

Breach of warranty as question for jury, vi. 1285.

Change of occupants, vi. 1628.

Condition as to keeping books and accounts, vi. 1822.

Delivery of policy, vi. 445.

Effect of misrepresentations made in good faith, vi. 1199.

Effect of misrepresentation, vi. 1288.

Estoppel and waiver, vii. 2622.

By fraud, mistake, or negligence of agent, vii. 2555, 2558.

To assert breach of conditions by conduct after loss, vii. 2747.

Evidence as to cause of loss, vii. 3040, 3042.

BURGLARY INSURANCE—Continued,

- Limitation of action, vii. 3955.
- Notice of cancellation, vii. 2793.
- Notice of surrender of policy, vii. 2823.
- Partial loss, vii. 3064.
- Pleading in action on, sufficiency of complaint, vi. 1508.
- Pleading cause of loss, vii. 3037.
- Property covered, vi. 730.
- Location of property, vi. 736.
- Provision as to employment of watchman, vi. 1807.
- Risk and cause of loss, vii. 3033.
- Statement as to occupation of insured, vi. 1427.
- Statements as to other insurance, vi. 1448.
- Statements as to prior losses, vi. 1437.
- Subrogation, vii. 3911.
- Vacancy of premises, vi. 1657.
- Waiver of breach of conditions by delivery of policy, vii. 2622.

BURNING BUILDING,

- Double indemnity for injuries received in, vii. 3306.

C**CANCELLATION,**

- In burglary insurance, vii. 2823.
- Notice of, vii. 2793.
- In title insurance, vi. 1047.

CHANGE OF TITLE,

- Of automobile, vi. 1715.

COMMERCIAL INSURANCE,

- Defined, vi. 8.

CONSTRUCTION,

- Credit insurance, vi. 634.
- Effect of prior decisions as applied to standard policies, vi. 644.

CONTRACT INSURANCE,

- Construction of policy, vi. 636.
- Extent of liability, vii. 3343.
- Risk and cause of loss, vii. 3329.

CREDIT INSURANCE,

- Construction of policies, vi. 634, 662, 688.

D**DENTISTS' INDEMNITY INSURANCE,**

- Risk and cause of loss, vii. 3329.

E**EARTHQUAKES,**

- As an excepted risk, vii. 3023, 3028.

EMPLOYERS' LIABILITY INSURANCE,

- As a personal contract, vi. 83.
- Avoidance of contract, vi. 2447.
- Effect of violations of labor laws, vi. 542.

EMPLOYMENT,

Insurance against loss of, vii. 3033.

ESTOPPEL AND WAIVER,

In automobile insurance, vii. 2516.

In burglary insurance, vii. 2622, 2747.

In health insurance, vii. 2572, 2657, 2695.

In strike insurance, vii. 2621, 2690.

F**FIDELITY INSURANCE,**

Subjects of insurance, vi. 783.

FIRE INSURANCE,

On automobile, vi. 5.

FORFEITURE,

In automobile liability insurance, vi. 2454.

In title insurance, vi. 2454.

G**GUARANTY INSURANCE,**

Notice and proofs of loss, vii. 3582.

H**HEALTH INSURANCE,**

Estoppel to assert breach of conditions by acceptance or retention or premium, vii. 2695.

By conduct prior to delivery, vii. 2657.

False statements by agent, good faith of insured, vii. 2572.

Extent of disability, vii. 3289.

Confined to house, vii. 3294.

Extent of liability, vii. 3299.

Liability dependent on nature of disease, vii. 3303.

Liability for particular diseases, vii. 3303.

Limitation as to time of disability, vii. 3169.

Questions of practice, vii. 3311.

Limitation of action, vii. 3975.

Necessity of furnishing notice of loss, vii. 3442.

Risk and cause of loss, vii. 3135, 3169, 3184.

Excepted risks, vii. 3135.

Burden of proof, vii. 3184.

Time of furnishing notice of loss, vii. 3444, 3464.

I**INDEMNITY INSURANCE,**

Contract to indemnify owner of automobile for injuries to third person, see Automobile Insurance.

Contract of indemnify physician charged with malpractice, vi. 8.

Dentists' indemnity policy, construction, vi. 690.

INSURABLE INTEREST,

Homestead entry, vi. 152.

Of owner of party wall, vi. 159.

Of parent in property of child, vi. 158.

INSURABLE INTEREST—Continued,
Of receiver in bankruptcy, vi. 160.
Termination, of interest in rents, vi. 202.

INSURANCE,
Commercial insurance, vi. 8.
Contract to furnish funeral, vi. 5.
Contract to furnish medical services, vi. 5.
Contract to indemnify physician charged with malpractice, vi. 8.

IRON SAFE CLAUSE,
In burglary insurance, vi. 1822.

L

LESSEE,
Construction of policy on leasehold interest, vi. 630.

LIABILITY OF INSURER,
Double indemnity for injuries received in burning building, vii. 3306.
In automobile insurance, vii. 3063.
In health insurance, vii. 3289, 3299.

LIFE INSURANCE,
Standard forms of policy, vi. 531.

O

OCCUPATION,
Of owner of premises in burglary insurance, vi. 1427.

OTHER INSURANCE,
In burglary insurance, vi. 1448.

P

PARTIES TO THE CONTRACT,
Who may take out insurance, school trustees, vi. 71.

PHYSICIANS' INDEMNITY INSURANCE,
Risk and cause of loss, vii. 3329.

PREMIUMS,
Recovery of, by insured, in title insurance, vi. 1047.

PROHIBITED ARTICLES,
Gasoline in tank of automobile, vi. 1693.

R

RENT INSURANCE,
Validity of policy, vi. 545.

REPRESENTATIONS,
Description of automobile, vi. 1283.
In burglary insurance, vii. 1199, 1288.

RIDER,
Validity of war rider, vi. 529.

RISK AND CAUSE OF LOSS,
Burglary insurance, vii. 3033.
Partial loss, vii. 3061.

RISK AND CAUSE OF LOSS—Continued,

- Fire insurance, excepted risks, earthquake, vii. 3023, 3028.
- Health insurance, vii. 3135, 3169, 3184.
- Insurance against loss of employment, vii. 3033.
- Insurance against theft, vii. 3033.
- Insurance of automobile against fire, vii. 3023.

S

STANDARD POLICIES,

- Life policies, vi. 831.

STATUTES CONSTRUED,

Alabama,

- Code 1896, § 28, vii. 3726.
- Code 1896, § 1116 et seq., vi. 577.
- Code 1907, § 4572, vi. 1988, 2100, 2156.
- Code 1907, § 4579, vi. 1011, 1937.

Arkansas,

- Kirby's Dig. § 937 et seq., vi. 581.
- Kirby's Dig. § 4375a, vi. 1502, 1818, 1820.

California,

- Civ. Code, §§ 1442, 1654, 2541, vi. 1523.
- Civ. Code, § 2546, vi. 190.
- Civ. Code, §§ 2594, 2595, vi. 518.
- Civ. Code, § 2596, vii. 3098.
- Civ. Code, §§ 2607, 2612, vi. 1984.
- Civ. Code, §§ 2608, 2610, 2611, vi. 1190.

Colorado,

- Acts 1903, c. 119, vii. 3239.

District of Columbia,

- Code 1901, § 657, vi. 678, 684.

Florida,

- Laws 1872, c. 1864, as amended by Laws 1897, c. 4555, vii. 3726.

Georgia,

- Civ. Code 1910, § 2471, vi. 686.
- Civ. Code 1910, § 2500, vi. 543, vii. 3239.
- Civ. Code 1910, § 3599, vii. 2591.
- Acts 1912, p. 129, § 20, vi. 1011.

Idaho,

- Laws 1911, c. 228, § 42, as amended by Laws 1913, c. 97, § 22, vii. 2755.

Illinois,

- Hurd's Rev. St. 1899, p. 1030, c. 73, vi. 2026.
- Hurd's Rev. St. 1905, c. 73, § 258, vi. 806.
- Hurd's Rev. St. 1909, c. 73, §§ 27-30, vi. 1009.
- Act June 19, 1891, vi. 1010, 1011.

Indiana,

- Laws 1867, c. 71, vi. 577.
- Laws 1897, c. 195, vi. 577.

Iowa,

- Code, §§ 1727, 1741, vi. 1874.
- Code, § 1741, vi. 1158, 2439.
- Code, § 1742, vii. 3097.

STATUTES CONSTRUED—Continued,

- Code, § 1743, vi. 1457, 1893.
- Code, § 1784, vi. 577.
- Code, § 1789, vi. 579, 805.
- Code, § 1811, vii. 2552.
- Code, § 1812, vii. 2758.
- Code, § 1813, vi. 2025.
- Code, § 3313, vii. 2726.
- McClain's Code, § 1695, vi. 568.
- Code Supp. 1907, § 1709, subd. 5, vi. 545.

Kansas,

- Gen. St. 1909, § 4200, vi. 2185.
- Gen. Laws 1909, § 4216, vi. 946.
- Laws 1913, c. 212, vi. 2286, vii. 2331.

Kentucky,

- St. § 639, vi. 1190, 1192, 1901, 2439, 2447.
- St. 1903, § 79, vi. 532.
- St. 1903, § 653, vi. 118.
- St. 1903, § 656, vi. 1011.
- St. 1903, § 659, vii. 2872.
- St. 1903, § 679, vi. 694.
- St. § 679, as amended by Acts 1906, c. 141, vi. 56.
- St. 1903, § 711, vi. 970.
- St. 1903, § 712, vi. 973.

Louisiana,

- Acts 1898, No. 105, vi. 529.
- Acts 1900, No. 135, § 2, vii. 3063.
- Acts 1906, No. 52, vi. 2121.

Maine,

- Rev. St. 1883, c. 49, vi. 1634.
- Rev. St. c. 49, § 30, vi. 693.
- Rev. St. 1903, c. 49, § 4, vi. 529, 531.
- Rev. St. 1903, c. 49, § 93, vii. 2539, 2591.
- Laws 1895, p. 14, c. 18, vi. 1681.

Massachusetts,

- St. 1882, c. 195, § 2, vi. 812.
- Rev. Laws, c. 118, § 21, vi. 1626.
- Rev. Laws, c. 118, § 73, vi. 553, 684.
- St. 1907, c. 576, § 21, vi. 1190, 1984.
- St. 1907, c. 576, vi. 576.
- St. 1907, c. 576, § 75, vi. 531, 678.

Michigan,

- Comp. Laws, § 7256, vi. 572.
- Comp. Laws 1897, § 5180, vi. 1545, 1893.
- Pub. Acts 1869, No. 136, as amended by Pub. Acts 1911, No. 15, § 1, vi. 568.
- Pub. Acts 1905, No. 277, as amended by Pub. Acts 1907, No. 307, Pub. Acts 1911, No. 246, vii. 2609.

Minnesota,

- Gen. Laws 1895, c. 175, vi. 487.
- Gen. Laws 1895, c. 175, § 71, vi. 678.
- Gen. Laws 1895, c. 175, § 88, vi. 476.
- Gen. Laws 1895, c. 175, as amended by Gen. Laws 1897, c. 254, vi. 529.
- Rev. Laws 1905, § 1594, vi. 580.

STATUTES CONSTRUED—Continued,

- Rev. Laws 1905, § 1623, vi. 1991.
- Gen. St. 1913, §§ 3307, 3414, vi. 965.
- Laws 1907, c. 220, vi. 1988.
- Gen. Laws 1915, c. 107, vi. 574.

Mississippi,

- Code 1906, § 2559, vi. 60.
- Code 1906, § 2596, vi. 1228.
- Code 1906, § 2600, vi. 1011, 1012.
- Code 1906, § 2676, vi. 2025.

Missouri,

- Rev. St. 1889, § 2823, vi. 798.
- Rev. St. 1889, § 5855, vii. 3237, 3275.
- Rev. St. 1899, § 1408, vi. 577.
- Rev. St. 1899, §§ 5856-5859, 7897-7900, vi. 2263.
- Rev. St. 1899, § 7890, vi. 1989, 2025, 2185.
- Rev. St. 1899, § 7897, vi. 2407, 2411, vii. 2759.
- Rev. St. 1899, § 7903, vi. 577, 1710.
- Rev. St. 1899, §§ 7973-7975, vi. 1192.
- Rev. St. 1899, § 7979, vii. 3095.
- Rev. St. 1909, § 6937, vi. 1984, 2025, 2098, 2185.
- Rev. St. 1909, §§ 6937, 7024, 7026, vi. 2435.
- Rev. St. 1909, § 6938, vii. 2591.
- Rev. St. 1909, § 6944, vii. 3759.
- Rev. St. 1909, §§ 7020, 7021, vii. 3095.
- Rev. St. 1909, §§ 7023, 7030, vi. 576.
- Rev. St. 1909, § 7025, vi. 1190.
- Rev. St. 1909, § 7030, vi. 1318, vii. 3057, 3059.
- Laws 1895, p. 200, vi. 572.

Montana,

- Rev. Code, § 5057, vi. 545.

Nebraska,

- Laws 1891, c. 33, § 12, vi. 945.
- Laws 1897, c. 45, vi. 572.
- Laws 1913, c. 154, § 100, vi. 528.
- Rev. St. 1913, § 3187, vi. 1190, 1502.

New Hampshire,

- Laws 1895, c. 86, § 10, vi. 296.

New Jersey,

- P. L. 1902, p. 407, as amended by P. L. 1907, p. 127, vi. 576.

New York,

- Consol. Laws 1909, c. 28, § 89, vi. 1012.
- Consol. Laws 1909, c. 28, § 121, vi. 529.
- Insurance Law, § 58, vi. 678, 694.
- Insurance Law, § 92, vi. 2286.
- Insurance Law, § 107, subd. (b), cl. 6, vi. 532.
- Laws 1892, c. 690, as amended by Laws 1897, c. 218, vi. 2263.
- Laws 1892, c. 690, § 24, as amended by Laws 1906, c. 326, § 7, vi. 576.
- Laws 1892, c. 690, § 55, vi. 77, 577.
- Laws 1892, c. 690, § 137, as amended by Laws 1894, c. 611, § 1, vi. 1446.
- Laws 1892, c. 690, § 209, vi. 696.
- Laws 1892, c. 690, § 267, vi. 938.
- Laws 1892, c. 690, § 2680, amended by Laws 1897, c. 29, vi. 946.

STATUTES CONSTRUED—Continued,

Laws 1896, c. 672, § 22, vi. 1094.

Laws 1913, c. 155, § 2, vi. 529.

North Carolina,

Revisal, § 4646, vi. 2185.

Rev. 1905, § 4808, vi. 2156.

Rev. Code 1905, § 6064, vii. 3239.

Rev. 1908, § 4773a, vi. 576.

North Dakota,

Civ. Code, §§ 1862, 1863, vi. 1043.

Rev. St. 1905, § 4775, vi. 1011.

Comp. Laws 1913, § 6466, vi. 181.

Comp. Laws 1913, § 6501, vi. 1990.

Comp. Laws 1913, § 8719, vii. 3726.

Ohio,

Gen. Code, § 9577, vi. 560.

5 Stat. § 3686, vi. 945.

Rev. St. § 2636, vii. 2755.

Rev. St. § 3623, vi. 678.

Rev. St. 1906, § 3643, vii. 3098.

Rev. St. 1908, § 289, as amended by Act April 9, 1908, vi. 576.

Oklahoma,

Comp. Laws 1899, p. 176, art. 1, § 5, vi. 574.

Comp. Laws 1909, § 3784, vi. 1985, 1992.

Oregon,

L. O. L. §§ 4666, 4668, as amended by Laws 1911, p. 279, vii. 2609.

Pennsylvania,

Act May 11, 1881, vi. 683, 693, 1934.

Act June 23, 1885, § 1, vi. 1990.

Act April 6, 1893, vi. 798.

Rhode Island,

Gen. Laws 1896, c. 182, § 17, vi. 577.

South Carolina,

Civ. Code 1902, §§ 1787, 1790, vi. 592.

Civ. Code 1902, § 1810, vii. 2493.

Civ. Code 1902, §§ 1825, 1826, vii. 2755.

Civ. Code 1912, § 2719, vi. 1410, 1448.

South Dakota,

Civ. Code, § 712, vi. 806.

Civ. Code, § 731, vi. 452, 2124.

Civ. Code, § 1796, vi. 509.

Civ. Code, §§ 1802, 1809, vi. 204.

Civ. Code, § 1849, vi. 490.

Laws 1905, c. 126, § 2, as amended by Laws 1907, c. 170, § 1, vi. 529.

Laws 1909, c. 164, vi. 529.

Laws 1915, c. 126, vi. 1779, 1783.

Tennessee,

Acts 1907, cc. 441, 457, vi. 678.

Texas,

Rev. St. 1895, art. 3096aa, vi. 2156.

Rev. St. 1895, art. 3096aa, as added to by Gen. Laws 1903, p. 94, vi. 1190, 1410.

Rev. St. 1895, art. 3096aa, as added to by Laws 1903, c. 69, vi. 1828, 1856.

STATUTES CONSTRUED—Continued,

Rev. St. 1911, arts. 4741, 4954, vi. 998.

Rev. St. 1911, art. 4834, vi. 1953.

Rev. St. 1911, art. 4847, vii. 2493.

Rev. Civ. St. 1911, art. 4951, vi. 681.

Rev. St. 1911, art. 4954, vi. 1011.

Sayles' Ann. Civ. St. Supp. 1897-1904, art. 3096aa, vi. 1824.

Vernon's Sayles' Ann. Civ. St. 1914, art. 4742, vii. 3239, 3275.

-Vernon's Sayles' Ann. Civ. St. 1914, arts. 4874a, 4874b, vi. 1893.

Vernon's Sayles' Ann. Civ. St. 1914, art. 4948, vii. 2755.

Acts 1903, c. 69, vi. 1318.

Acts 33d Leg. c. 105, §§ 1-3, vi. 1457, 1502.

Virginia,

Code 1904, § 3252, vi. 532.

Pollard's Code Biennial 1908, p. 483, § 28, vi. 2156.

Washington,

3 Rem. & Bal. Code, § 6059-34, vi. 1439.

3 Rem. & Bal. Code, § 6059-36, vi. 439.

3 Rem. & Bal. Code, §§ 6141-6143, vi. 1011.

Laws 1903, c. 97, § 12, vii. 3093.

Laws 1911, p. 195, § 33, vi. 1011.

Laws 1911, p. 197, § 34, vi. 1779, 1812.

Laws 1911, c. 49, § 106, vi. 1893.

Laws 1915, p. 703, § 1, vi. 1443.

West Virginia,

Code 1906, c. 34, as amended by Acts 1907, c. 77, vi. 684.

Wisconsin,

Rev. St. 1898, § 1943a, vii. 3057.

Rev. St. 1898, § 1955o, vi. 1012.

Rev. St. 1898, § 1955c, as amended by Laws 1899, c. 101, vi. 805.

St. 1913, § 1960, subds. 1, 2, 9, vi. 532.

St. 1913, § 4202s, vii. 2758.

Rev. St. 1913, § 4202m, vi. 2439.

St. 1915, § 2347, vii. 3736, 3759.

STRIKE INSURANCE,

Estoppel to assert breach of conditions by retention of premium, vii. 2690.

Waiver of breach of conditions by delivery of policy, vii. 2621.

SUBROGATION,

In burglary insurance, vii. 3911.

In automobile insurance, vii. 3894, 3911.

In theft insurance, vii. 3893.

T

THEFT,

Insurance against robbery, risk and cause of loss, vii. 3033.

Insurance of automobile against, vii. 3033.

Subrogation in theft insurance, vii. 3893.

TITLE INSURANCE,

Construction of policy, vi. 634, 638.

Forfeiture, vi. 2454.

Return of premium on cancellation, vi. 1047.

Subjects of insurance, vi. 784.

7 SUPP.B.B.INS.—118

TORNADO INSURANCE,

Vacancy of premises, vi. 1656.

U

USE AND OCCUPANCY,

Of premises in burglary insurance, vi. 1628.

V

VACANCY,

Condition applicable to tornado insurance, vi. 1656.

In burglary insurance, vi. 1657.

VALIDITY OF CONTRACT,

Policies not conforming to standard form, vi. 529.

What law governs, automobile policy, vi. 560.

VALUE,

Overvaluation of automobile, vi. 1314.

W

WAR,

Validity of war rider, vi. 529.

WARRANTIES,

In automobile insurance, vi. 1791.

In burglary insurance, vi. 1285.

WATCHMAN,

Condition as to employment of, in burglary insurance, vi. 1207.

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